

1990 Meeting of Commonwealth Law Ministers

and Senior Officials

Auckland, New Zealand
19 April 1990

and Christchurch, New Zealand
23-27 April 1990

Memoranda Part 1



Commonwealth Secretariat

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PREFACE

Commonwealth Law Ministers from 41 jurisdictions met in Christchurch, New Zealand, from 23 to 27 April 1990. This volume contains most of the Memoranda prepared for and during that Meeting, along with the Meeting's Annotated Draft Agenda (which in fact became the Meeting's Agenda) and the Communique.

The Minutes of the Meeting and classified Memoranda are published separately, and these are available only to Member Governments.

The regular Meeting of Senior Officials of Law Ministries was held in Auckland on the eve of the Christchurch Meeting.

Commonwealth Law Ministers meet regularly at approximately three-yearly intervals. They are scheduled to meet next in Mauritius in 1993. Previous Meetings have been in London (1969 and 1973), Lagos (1975), Winnipeg (1977), Barbados (1980), Sri Lanka (1983) and Harare (1986).

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COMMUNIQUE

Introductory

1. The 1990 Meeting of Law Ministers of the Commonwealth was held at the Christchurch Town Hall, Christchurch, New Zealand from 23-27 April. The Meeting, attended by Law Ministers, Attorneys-General, other law officers and officials from 41 countries, was chaired by the Hon W P Jeffries MP, the Minister of Justice of New Zealand. The opening ceremony was addressed by H R H the Princess Royal, and the Rt Hon David Lange MP, the Attorney-General of New Zealand. Prior to the opening ceremony, delegates received a powhiri (formal welcome) from the local Maori people, the tangata whenua.

2. Delegates expressed their pleasure at being able to greet Pakistan on its return to the legal deliberations of the Commonwealth, and to welcome Namibia, attending its very first Commonwealth gathering after achieving its independence only the previous month.

3. On 25 April, the 75th Anniversary of the Gallipoli landing by ANZAC forces, a wreath was laid at the Dawn Service at the Christchurch Cenotaph on behalf of all delegations. The Meeting also stood in silence in memory of all those in the Commonwealth who had laid down their lives in the cause of freedom and justice.

4. The Meeting's agenda covered a range of matters of current interest, some calling for decisions by Ministers and others allowing for the sharing of views and experiences in ways which would assist them in developing appropriate domestic policies. Ministers viewed the law as a special feature of the Commonwealth association, embodying core values which their countries had long cherished. Thus there was a firm basis for the highest level of mutual assistance in legal matters, and particularly in criminal matters. They expressed satisfaction that their deliberations during the week had not only consolidated but would have the effect of extending both the level and the effectiveness of intra-Commonwealth legal co-operation to combat crime, especially trafficking in illicit drugs.

5. Ministers expressed their appreciation of the calibre of the papers prepared for the Meeting by governments and by a wide range of Commonwealth lawyers.

Consistency in Sentencing

6. Ministers expressed the view that public confidence in the judiciary could be undermined if the public perceived a marked lack of consistency on the part of sentencing tribunals.

7. They recognised that consistency in sentencing was greatly assisted where there was agreement on the objectives of sentencing policy, whether retribution, deterrence, rehabilitation, the protection of the public, or the vindication of community standards. At the same time it was important that the sentence be proportionate in its severity both to the seriousness of the crime and the blameworthiness of the offender.

8. The Meeting was informed of steps taken in a number of jurisdictions to help meet the need for consistency. These included judicial training (both for new appointees and by way of refresher courses), the publication of sentencing guidelines, the provision of information systems to keep judges aware of the sentences given by their brethren, and the giving of power to the Attorney-General to appeal against a sentence which was unduly

lenient and gave rise to public concern. However, Ministers recognised that the application of any explicit and pre-determined formula would mean that the sentencing process would cease to be judicial in nature and develop into an arbitrary or inflexible process which ignored variations in individual cases.

9. Ministers were also aware that while policy-makers were prudent to heed public opinion, they had to be particularly cautious in the criminal justice field. Public attitudes at times contained elements which were irreconcilable, with demands for longer custodial sentences and opposition to more public money being spent on building and operating new penal institutions. It was also recognised that some countries were handicapped by a lack of resources to achieve consistency in sentencing through training and other programmes, and that this could be exacerbated as lower courts were increasingly being given a wider jurisdiction.

Mutual Assistance in Criminal Matters

10. The Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth was one of the major achievements of the previous Meeting of Law Ministers in Harare in 1986. At Christchurch, Ministers noted with pleasure that, despite the relatively short time which had elapsed, considerable progress had been made towards the implementation of the Scheme. It was their firm hope that by the time of their next Meeting the legislative process would have been completed in many more Commonwealth countries, thus securing the broad geographical coverage important to the Scheme's success. Ministers invited the Commonwealth Secretariat to continue its work in monitoring progress and in facilitating the effective operation of the Scheme.

11. Ministers adopted a number of amendments to the Harare Scheme. In particular, they adopted substantial new provisions to strengthen and make more comprehensive the powers to trace, seize and confiscate the proceeds and instrumentalities of crime. They noted further that there were other proposals for amendments which required careful and early consideration by Senior Officials prior to the next Law Ministers' Meeting. They reviewed developing practice in this most important area. They agreed that ratifying and implementing the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances would make a valuable contribution and heard reports of progress to that end. They noted that the effective combatting of drug trafficking and other serious crime required that attention be given to the part played by some bank secrecy laws and to the need for effective forfeiture legislation. The constitutional difficulties to which forfeiture legislation could give rise in some jurisdictions were also emphasised.

12. Ministers recognised, from experience in their own countries, the great benefits which could be derived from international co-operation between criminal investigation and prosecution agencies. For example, they heard of the criminal investigation following the Lockerbie aircraft disaster which had proved to be the most complex international criminal investigation in modern times. In the course of this investigation, assistance has been sought from over fifty jurisdictions, many of them Commonwealth countries, and the assistance which Commonwealth countries had been able to give was acknowledged as having been particularly prompt and valuable.

13. Ministers identified the need for the extension of mutual assistance in the area of business regulation. The increasing internationalisation of financial markets required effective mutual assistance between national business regulatory agencies. Voluntary co-operation needed to be reinforced by legislative provisions to enable powers of compulsion to be exercised in the fulfilment of requests in appropriate cases. Ministers agreed to encourage their regulatory agencies to provide assistance to corresponding

agencies in other Commonwealth countries, and to develop inter-agency agreements to that end. They invited the Commonwealth Secretariat to report to their next Meeting on the progress that had been made throughout the Commonwealth to develop this additional form of mutual assistance.

Rendition of Fugitive Offenders

14. Ministers gave close consideration to a proposal for the amendment to the London Scheme for the Rendition of Fugitive Offenders within the Commonwealth. The Scheme requires that before a rendition order is made a court of the requested country should be satisfied, by evidence admissible under its own law, that a prima facie case has been established that the fugitive has committed the offence of which he is charged. The proposal would retain the prima facie case requirement in the Scheme while adding in an Annex a set of optional provisions which might be adopted under the existing power of any two or more Commonwealth countries to substitute different practices in rendition cases between themselves. Under these optional provisions, the court of the requested country considering whether the case against the fugitive was sufficient to warrant a trial of the charges against him, would receive and consider a record of the case, meeting prescribed conditions, whether or not the evidence disclosed in the record would be strictly admissible in evidence under the law of the requested country.

15. Most Ministers saw the proposal as not substantially affecting the safeguards afforded by the Scheme, but as enabling countries which wished to do so to agree to some relaxation of rules of evidence, which had proved unduly onerous in a rendition context. They considered that this relaxation should be permitted, on an optional basis, within the provisions of the Scheme itself in order to eliminate the need to make bilateral treaties in this regard. However, some Ministers raised objections to the proposal which they considered diluted the prima facie case requirement which they regarded as an important safeguard for the person being sought and a part of the shared legal tradition of the Commonwealth. Although they recognised that the existing Scheme did not prevent countries from making such a departure by bilateral arrangements outside the scope of the Scheme, they considered that the relaxation was of such a fundamental nature that it was inappropriate for incorporation in the Scheme, albeit on an optional basis.

16. The proposal was supported by most of the countries represented and was accordingly adopted. Countries which had serious reservations about the change in practice would be under no compulsion to depart from the present system. Ministers asked the Commonwealth Secretariat to monitor closely the use made of the optional Annex to enable Ministers at future Meetings to assess the practical effect of its provisions.

Transfer of Convicted Offenders

17. Ministers adopted an amendment of the Scheme for the Transfer of Convicted Offenders within the Commonwealth to provide a formal notification procedure when countries had the necessary legislation in place for the implementation of the Scheme.

Proposed Scheme for the Protection of the Cultural Heritage within the Commonwealth

18. The Meeting had before it the Report of a Working Group which had been appointed by the Commonwealth Secretary-General, as requested by Ministers when they last met. The Group had examined and revised the Proposed Scheme for the Protection of the Cultural Heritage within the Commonwealth in an effort to accommodate the views expressed by governments.

19. Ministers expressed their gratitude to the Working Group. They acknowledged that a number of them were not yet in a position to express a final view on the proposal as processes of consultation with other interested ministries were not yet concluded. The Meeting asked that once this process was complete, the proposal should come before Senior Officials when they next met, so that Law Ministers would be in a position to take a firm decision on the matter at their next Meeting.

Plain Language in Legal Drafting

20. Ministers reaffirmed their belief that legal documents and legislation should be as simple and as intelligible as their contents allowed. They noted that in several countries, lawyers and legislative draftsmen had been criticised with justification for using verbose, unintelligible or arcane language. Non-lawyer parliamentarians could also be handicapped in their law-making role by incomprehensible language. There were examples before the Meeting of how documents such as wills could be both reduced in length and made readily understandable without any apparent loss of legal precision. Ministers learned, too, how the need to translate legislation into another language could provide a stimulus for simplicity. Readability, and so intelligibility, could also be enhanced by improving the design and layout of the statute book.

21. The Meeting acknowledged that in some technical areas of the law, plain language might be unattainable. However in the areas of the law which touched directly upon people in their daily lives - whether statute law or legal documents - it was a challenge to governments and to the practising profession to render these meaningful to the lay person.

The Right of Silence and the Right Against Self-Incrimination

22. The "right of silence" and the privilege against self-incrimination of a suspect and an accused were the subject of a particularly interesting discussion. The Meeting acknowledged that these terms needed careful analysis. Properly understood, they lay at the heart of the accusatorial system. Ministers recognised that as a general rule the innocent were placed in peril if the burden of proof was put upon defendants and if defendants were compelled to speak in their own defence, but this did not necessarily preclude some rebuttable presumptions of fact or the drawing of inferences from silence.

23. Ministers agreed that the right of silence as understood in the common law world was never designed to have the consequence of frustrating the purpose of the criminal justice system. Increasingly countries were encountering terrorist activity, at times conducted by criminals trained to resist sustained but proper police interrogation, and complex money-laundering situations where an accused might be in sole possession of key material facts. As a consequence of this, the guilty could not be convicted and at times the criminal justice system was frustrated.

24. Ministers acknowledged the importance of considering carefully both necessity and reasonableness when creating statutory exceptions, because of the central place of the privilege against self-incrimination to the requirements of a fair trial. There was a continuing need to balance the rights of the individual with the interests of society as a whole. In this context Ministers noted the guidance afforded by international human rights norms including the principles enshrined in the International Covenant on Civil and Political Rights.

25. The development of new technology, for example in the field of DNA testing, now made it possible for evidence to be obtained from the accused which might be highly probative as to a fact in issue in the determination of either guilt or innocence, and which needed

to be accommodated within the criminal justice system and subjected to appropriate safeguards which respected the rights, privacy and integrity of the individual.

26. In view of its central importance to Commonwealth jurisdictions, Ministers considered that the whole subject required continuing thought and study. They stressed the importance of finding solutions which reflected changing circumstances, were moderated by pragmatism, but which also found an acceptable balance which prevented the conviction of innocent suspects, yet brought the guilty to justice.

Alternative Dispute Resolution

27. Ministers were conscious that the expectation of access to the courts had risen and was continuing to rise, placing considerable strain on their formal court systems. They were also aware that there were many more of their people who were denied access to the courts by cost or by physical remoteness, as it was difficult to extend the reach of the regular courts into remote rural areas.

28. The Meeting recognised that if people were unable readily to bring grievances to court, they would lose confidence in the system and resort to other and unacceptable means. It was of the view that a system which may have worked adequately in a less litigious past could not be expected by itself and without reform to deliver justice into the 21st century to a wider and better educated clientele. Nor was legal aid a complete answer, as even in developed countries able to fund extensive legal aid schemes it was too costly to extend these adequately to cover middle income earners.

29. Ministers learnt with interest of innovative approaches tried by some countries. These included an emphasis on mediation and conciliation; drawing on the strengths of traditional resolution procedures; using voluntary adjudicators to provide informal and free tribunals both unfettered by technical rules which excluded lawyers from representing parties in limited categories of cases; and extending to non-lawyers the right to represent parties in arbitrations. In some countries, family courts had achieved remarkable success. The Meeting heard of both successes and failures, and it was clear that there were no universal answers.

30. However, Ministers were firmly of the view that sooner or later it would become necessary for many of them to address the question in the context of their individual circumstances. They asked the Commonwealth Secretariat to keep the matter under review, and to advise them of developments both in Commonwealth jurisdictions and beyond.

Law and the Environment

31. Ministers shared their experiences to date on developing practical legal responses to the threat which industrialisation and the indiscriminate and unsustainable felling of rain forests were posing to the human habitat, and in particular to the atmosphere. The need for a balanced perspective and concerted international action to address these challenges had been emphasised by Commonwealth Heads of Government in their Langkawi Declaration on the Environment of 1989. Ministers recognised the special contribution which lawyers and the law would have to make in achieving these objectives, both domestically and internationally.

32. The Meeting heard from developing countries of their concern at the dumping of nuclear, toxic and other hazardous wastes in developing countries and the steps some of them have taken to try to prevent the practice within their own jurisdictions. They particularly commended the practice of developed countries who contained and disposed of

waste within their own borders. Ministers recognised that developing countries were in a particularly vulnerable position as they did not always have the appropriate expertise to identify particular forms of hazardous wastes.

International Arbitration

33. The Meeting noted comments that international arbitration could be both time-consuming and unduly expensive, and it was suggested that there was potential within the Commonwealth association for enhanced co-operation in this area, and also in mediation and conciliation. They agreed to invite the Commonwealth Secretary-General to explore this suggestion, and report when next they meet.

Integrity in Public Office

34. The Meeting recognised that no country was free from the risk of abuse of office and that responses had to be conditioned by the need to minimise as best their systems could the temptations to which people could succumb.

35. The debate demonstrated a variety of approaches around the Commonwealth. Some had "leadership codes" giving legal backing to the integrity of leaders; some had independent commissions; some required public or other forms of disclosure of personal interests; some relied on the more traditional approach based on the ordinary criminal law, and others had created special procedures in order to overcome difficulties of proof, and of disproof, inherent in conventional prosecutions.

36. Ministers recognised that as in other areas of human activity, there were limits to what the law by itself could achieve in assuring a high level of integrity from public officials. Their discussion would assist in the development of their own legal strategies in this area, but it was necessary for these to be accompanied by a strong and positive leadership culture of public service if these were to be as effective as the public was entitled to expect. In helping to build and reinforce this culture, Ministers looked forward to working with their colleagues both in their own jurisdictions and within the Commonwealth Parliamentary Association.

Legal Activities of the Commonwealth Secretariat

37. Ministers expressed indebtedness for the range and quality of the legal services they receive from the Commonwealth Secretariat. They expressed their particular appreciation for the Commonwealth Law Bulletin, which was a vital and vibrant feature of legal literature and of every day relevance and assistance to a wide range of government and other lawyers, and which was produced in a remarkably cost-effective fashion.

38. They recognised that the development of the Scheme for Mutual Assistance in Criminal Matters within the Commonwealth in particular was a landmark achievement which owed much to the Secretariat and to its distinguished consultant, and observed that this had been achieved within existing resources. They were conscious, too, that the development and servicing of these and other mutual assistance arrangements would inevitably place a continuing added burden on the Secretariat's already hard-pressed legal establishment. They expressed their concern to ensure that the Secretariat was provided with resources adequate to enable it to discharge its essential functions in the legal field on which a great many of them placed reliance, and in particular the Commonwealth Law Bulletin.

39. Ministers paid tribute too, to the assistance many of them had received from the CFTC and its Technical Assistance Group which had been of the highest professional standard. They were particularly appreciative of assistance with legislative drafting, including in particular the work of the drafting service for small states. Importance was also placed on the continuing provision of training courses for law drafters, and in this regard they endorsed the need for a distance learning programme which would facilitate the training of law drafters without requiring them to go abroad for considerable periods of time.

Human Rights

40. Ministers reaffirmed their commitment to human rights, which is a constant theme running through all Commonwealth legal issues. The enduring humanity of Commonwealth legal systems resulted from the recognised universality of fundamental human rights, and the observance of the rule of law provided a key buttress to those rights.

41. The Meeting noted that there were binding international human rights norms deriving both from international instruments and from international customary law. Legislation, and the judicial application of such norms, served to etch fundamental human rights indelibly into the social fabric of their societies and provided the means for their vindication.

Retiring Commonwealth Secretary-General

42. Ministers paid tribute to the outstanding career of Mr Shridath S Ramphal, the retiring Commonwealth Secretary-General. His stewardship had been a notable one spanning all facets of Commonwealth activity, and his contributions to Commonwealth law, and Commonwealth legal co-operation had been of special value to Ministers and the people they serve.

43. His tireless, vigorous upholding of the principles for which the Commonwealth stands were an inspiration to them all, and had left in particular an indelible mark on Commonwealth law.

Next Meeting

44. Ministers accepted with great pleasure the invitation of the Government of Mauritius to host their next Meeting, and looked forward to meeting in a setting in the Indian Ocean in three years' time.

Appreciation

45. Ministers expressed their profound gratitude to the Chairman who had guided their deliberations with great skill and good humour and as a generous host had attended to their every need. In congratulating the Chairman, they asked that he convey to the Government and people of New Zealand their deep appreciation for the warmth of their reception and the friendship they had received throughout their stay in Christchurch.

Christchurch
New Zealand

27 April 1990

PROVISIONAL ANNOTATED DRAFT AGENDA

BACKGROUND

The Annotated Draft Agenda has been drawn up after comments and proposals have been received from Governments in response to suggestions made by the Commonwealth Secretary-General.

AGENDA ITEM ONE

CONSISTENCY IN THE SENTENCING PROCESS

One of the challenges to the criminal law is to maintain a degree of consistency in the sentencing process whilst preserving the scope for judges to take account of personal circumstances and the facts of the individual cases. Public perceptions of a lack of consistency on the part of sentencing tribunals can give rise to calls for minimum and mandatory sentences which, while assuring the former, necessarily deny the latter. Ministers may wish to canvass recent developments in jurisdictions which have approached this problem in other ways, including sentencing conferences for judges, judicial training, the establishment of sentencing commissions and the development of sentencing guidelines. A paper will be before the Meeting prepared by the Society for the Reform of the Criminal Law, whose work has been actively supported by a number of Ministers.

AGENDA ITEM TWO

PLAIN LANGUAGE AND LEGAL DRAFTING

In their use of language, lawyers must strike a balance between accuracy from a technical viewpoint and the need for legal documents to be reasonably intelligible for the lay person, particularly with rising standards of education on the part of the general public coupled with escalating legal costs. Ministers may wish to discuss their own perceptions and experience against the background of moves in several Commonwealth jurisdictions to tackle this question on two fronts - the style of language used in legislation and that used in legal documents in ordinary use - which will be described in papers before the Meeting. They may also wish to discuss their own role in promoting a wider appreciation of the need for a simple language, as well as of its limits, both in government, in legal circles and in the wider public domain.

AGENDA ITEM THREE

MUTUAL ASSISTANCE IN CRIMINAL MATTERS

(a) The need for greatly enhanced arrangements for mutual international assistance in criminal matters has been at the forefront of legal activity in the Commonwealth. A Commonwealth Scheme providing for this was adopted at the 1986 Harare Meeting of Law

Ministers and since then regional workshops and a pan-Commonwealth meeting of senior officials from law ministries have been held to assist with the implementation of the Scheme by Commonwealth countries. In addition to the Harare Scheme there are also two other Commonwealth Schemes in the criminal area dealing with the rendition of fugitive offenders and the transfer of convicted offenders. Ministers may wish to take advantage of the Meeting to report the progress made to date with their own country's moves to implement in particular the Harare Scheme and follow this by a discussion of recommendations made by the Meeting of Senior Officials from Law Ministries held in London in June for amendments of a technical nature to the Harare Scheme. The Report of the June Meeting will be before Ministers.

(b) Senior Officials are also scheduled to meet in Auckland on the Thursday prior to the Law Ministers' Meeting to discuss a proposed amendment to the Scheme for the Rendition of Fugitive Offenders within the Commonwealth (the London Scheme) and their report will also be before Ministers.

(c) Central to the international attack on traffickers of illicit drugs is the forfeiture of the profits of convicted drugs traffickers and the enforcement of confiscation orders internationally. As well as being provided for in the Harare Scheme, this approach lies at the heart of the United Nations Convention on Drug Abuse and Illicit Trafficking (UNCDAIT), and a paper will be before the Meeting which illustrates how the mutual criminal legal assistance provisions in UNCDAIT harmonise with the Harare Scheme thus enabling necessary legislation to implement both measures simultaneously. A particular problem in the area of confiscation is when assets derived from drug trafficking are held by third persons claiming to have derived title innocently and for value, which will be the subject of a paper before the Meeting.

(d) The proceeds of drug trafficking are increasingly finding their way into the securities markets, both for the purposes of laundering the money and to manipulate these markets. This in turn requires enhanced degrees of co-operation between relevant regulatory bodies if illegal and damaging activity by criminal elements is to be held in check. A paper will be before the Meeting which discusses aspects of the problem.

(e) Proposed Scheme for the Protection of the Material Cultural Heritage within the Commonwealth. As the Report of the Working Group convened by the Commonwealth Secretary-General in response to a request from the Harare Meeting and which will be before the Meeting makes plain, unanimity on the proposed Scheme has not been achieved, although the Working Group made considerable progress at their meeting with the result that there is now a text before the Meeting which may be expected to attract wide if not universal support. Ministers will wish to consider whether they now wish formally to adopt the Scheme as amended by the Working Group as a package or whether, in view of the absence of total unanimity, they would prefer to defer further discussion of the proposal.

AGENDA ITEM FOUR

THE RIGHT AGAINST SELF-INCRIMINATION

The "right to silence" has long been regarded as an integral part of the adversarial system. However in recent times it has been argued with increasing frequency that the historical and sociological basis for this right no longer exists and that it has now become a positive obstacle in the context of a rising tide of organised criminal activity (with well-funded legal advice) and of terrorism. The "right to silence" is also linked to the "right to privacy", and at times confused with it, a link compounded by scientific advances such as DNA testing and the need for invasive body searching of suspected drug couriers. A paper will be before the Meeting discussing the origins and evolution of the right to silence and its applicability to present-day circumstances.

AGENDA ITEM FIVE

ENVIRONMENTAL LAW AND THE PROTECTION OF THE ATMOSPHERE: THE LEGAL IMPLICATIONS

When Commonwealth Heads of Government met recently in Kuala Lumpur they issued their Langkawi Declaration on the Environment. This Declaration has implications for the law and for lawyers, both directly and in the context of the international action required by the Declaration in order to develop the essential global response. A paper will address some of the key issues in the context of the protection of the atmosphere. In view of the recent experiences of developing countries a second paper will discuss the legal aspects of the disposal of toxic waste.

AGENDA ITEM SIX

INTEGRITY IN PUBLIC OFFICE

Commonwealth countries have approached the question of legal strategies to achieve integrity in public office in a variety of ways. Some have "leadership codes" giving constitutional backing to the integrity expected of their leaders, some have independent commissions, some require public or other forms of disclosure of personal interest, some rely on the more traditional approach based on the ordinary criminal law. The Commonwealth Secretariat, together with the Commonwealth Parliamentary Association, has embarked on a comparative study in this field, the results of which will be summarised in a paper before the Meeting. Ministers may wish to share their experience with their colleagues in the success or otherwise of the strategies their own countries have been following.

AGENDA ITEM SEVEN

ALTERNATIVE DISPUTE RESOLUTION

As the costs of legal services escalate, the ability of members of the public to obtain adequate legal help, particularly in civil disputes, is reduced and confidence in the legal system is eroded. Responding to this challenge, a number of countries have introduced alternatives to the traditional court as a means for resolving civil disputes by diverting litigation into non-formal and non-legal fora, whether by way of small claims courts, commercial dispute centres, mediation centres or dispute resolution centres. Ministers may wish to discuss the guiding philosophy behind such developments and the impact they can have both on making justice more readily available and in reducing the lengths of court lists.

AGENDA ITEM EIGHT

BANK SECRECY

Bank secrecy laws can be used as a shield for the laundering of criminal profits, especially those of drug traffickers, but are of central importance to a number of Commonwealth jurisdictions who offer off-shore banking facilities. They can also obstruct the operation of mutual legal assistance arrangements such as the Harare Scheme. Papers will be before the Meeting which will discuss the practical ramifications of these laws and ministers, both from the banking centres and those who from time to time seek assistance from them, may wish to share their respective perceptions of this problem.

AGENDA ITEM NINE

REVIEW OF THE LEGAL ACTIVITIES OF THE COMMONWEALTH SECRETARIAT

A paper will be before the Meeting describing the legal activities of the Commonwealth Secretariat since Ministers last met in Harare in mid-1986. This agenda item will provide an opportunity for Ministers to assess these activities and to provide the Secretariat with guidance as to the way ahead.

10. NEXT MEETING

11. CONSIDERATION OF COMMUNIQUE

12. CLOSE

CONSISTENCY IN THE SENTENCING PROCESS

CONSISTENCY IN SENTENCING

**A Paper prepared for the meeting of
Commonwealth Law Ministers at Christchurch,
New Zealand, in April 1990**

by

**Members of the Society for the Reform
Criminal Law**

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FOREWORD

The Society for the Reform of Criminal Law is an international non-governmental association of judges, legislators, lawyers, academics, and government officials, principally from common-law jurisdictions, who have come together to work actively on the improvement of the criminal law and the administration of criminal justice both in their own jurisdictions and internationally. The Society was founded in January 1988 following upon a conference, held in July 1987 at the Inns of Court in London, which was attended by over 200 leading judges, legislators, lawyers, academics and government officials in Australia, Canada, the United Kingdom, New Zealand, other Commonwealth countries, the United States, Europe and Israel.

In 1989 the Chairman of the Society, Mr Vincent Del Buono, was asked by the Commonwealth Secretariat whether members of the Society could prepare a major paper on consistency in sentencing for presentation to Commonwealth Law Ministers at their meeting in Christchurch, New Zealand, in April 1990. This invitation was readily accepted, and Sheriff Principal Gordon Nicholson, who was at that time a Commissioner with the Scottish Law Commission in Edinburgh, was asked to co-ordinate the preparation of the paper. He had been the Chairman of a major Society conference on sentencing, parole and early release which took place in Ottawa in August 1988, and he had subsequently established a network of Society members with a particular interest in the problems of sentencing and early release.

The paper which has now been prepared contains contributions from experienced judges and from distinguished academics all of whom have previously written extensively on the subject of sentencing and sentencing reform. Although the views expressed in the paper are those of the individual contributors, the overall aim has been to give a coherent and, it is hoped, helpful description and analysis of attempts to achieve consistency in sentencing around the world. By doing this, the paper attempts to focus discussion and debate, and to present a range of policy options for consideration.

Part 1 of the paper contains a general introduction and summary of the issues. Part 2 examines and analyses the concept of consistency, and asks whether consistency in sentencing is a policy objective which may require clarification and modification in certain cases. Part 3 of the paper contains a number of contributions which describe and comment on attempts which have been made, or are being made, to achieve greater consistency in some of the major jurisdictions of the world. Finally, the contribution in Part 4 seeks to bring all of this experience together; to discuss the advantages and

disadvantages of differing methods of trying to achieve consistency; and to present for consideration a range of possible ways in which future advances may be made.

Throughout the paper an attempt has been made to present information which is not only accurate but also as up-to-date as possible. However, sentencing practice and procedure can be affected very suddenly by decided cases, by the introduction of new legislation, by government pronouncements, and so on. The time required for the physical preparation, copying and distribution of this paper has meant that law and practice are stated as at December 1989.

Gordon Nicholson
Edinburgh.

January, 1990.

THE CONTRIBUTORS - A BIOGRAPHICAL NOTE

Professor Andrew J Ashworth is Edmund-Davies Professor of Criminal Law and Criminal Justice at King's College, University of London. He previously taught at Manchester University and then at Worcester College, Oxford and remains an Associate at the Centre for Criminological Research in the University of Oxford. He has been editor of the "Criminal Law Review" since 1975 and has published books and articles on criminal law, sentencing, evidence and the criminal process. He is Chairman of the Council of Europe's Select Committee of Experts on Sentencing. He is also a member of the Executive Committee of the Society for the Reform of Criminal Law.

Professor Jean-Paul Brodeur is a professor at the Ecole of Criminologie at the Universite de Montreal. He was Director of Research for two Commissions: the Canadian Sentencing Commission, 1984 to 1987, and the Commission d'enquete sur des operations policières en territoire quebécois, 1978 to 1981. He has a PhD in Philosophy from the University of Paris and a Masters degree in Criminology from the University of Montreal. He is the Director of the International Centre for Comparative Criminology and has published numerous works on the police and sentencing.

Professor Anthony N Doob is a professor of criminology and psychology at the University of Toronto. From 1979 to 1989 he was the Director of the Centre of Criminology there. He was a member of the Canadian Sentencing Commission from 1984 to 1987. He has carried out research on various topics in criminology including sentencing, public attitudes concerning sentencing and other aspects of the criminal justice system, fear of crime, tax evasion and the exercise of discretion in decisions concerning young offenders.

Professor Joshua Dressler is a professor of law at Wayne State University Law School. He is the author of the treatise, Understanding Criminal Law and many scholarly articles on substantive criminal law. He is an Associate Editor of Criminal Justice Ethics. He is a member of the American Law Institute, American Society for Political and Legal Philosophy, and American Society of Criminology.

Dr John W Ekstedt is full professor of criminology and Associate Dean of Arts at Simon Fraser University, British Columbia. From 1967 to 1972, he was Senior Supervisor of Correctional Education in British Columbia and developed education programs for the province of Manitoba. From 1973 to 1979, he was Executive Director of the Justice Development Commission, Deputy Minister of Corrections

and Senior Policy Advisor to the Attorney General in British Columbia. He is the co-author of the text Corrections in Canada: Policy and Practice. He holds an MA from the University of Chicago and a PhD from the University of California.

The Hon Mr Justice John S Henry has been a judge of the High Court of New Zealand since 1984. He was President of the Auckland Law Society from 1979 to 1980 and Vice President of the New Zealand Law Society from 1980 to 1981. He was a Member of the Contracts and Commercial Law Reform Committee from 1969 to 1985 and was appointed Queen's Counsel in 1980.

Professor Andrew von Hirsch is a professor at the School of Criminal Justice, Rutgers University. He is also a Research Fellow in Penal Law, Uppsala University, Sweden. He is author of The Sentencing Commission and its Guidelines (1987); Past or Future Crimes (1985); and Doing Justice. His degrees include an LLB from Harvard, 1960; and an DIur (Hon), Uppsala, 1988.

Dr Margaret A Jackson is currently an Associate Professor in the School of Criminology, Simon Fraser University, British Columbia, and Associate Director for the Institute for Studies in Criminal Justice Policy. Her research interests include judicial attitudes and sentencing behaviour, corrections, child abuse, psychiatric decision making, criminal justice administration, planning and policy, and the mentally-disturbed, female, native and elderly offenders.

The Hon Judge Jon O Newman is a US Circuit Judge, US Court of Appeals for the Second Circuit. From 1972 to 1979, he was a US District judge, District of Connecticut, and from 1964 to 1969, a US Attorney, District of Connecticut.

Sheriff Principal Gordon Nicholson, QC is Sheriff Principal of Lothian and Borders in Scotland. He practised at the Scottish Bar from 1961 to 1970. He was appointed Sheriff (judge) in Dumfries in 1970 and presided there until 1976 when he transferred to Edinburgh. From 1982 to 1989 he was a full-time commissioner with the Scottish Law Commission. He is the Honorary President of the Scottish Association for the Study of Delinquency, and the Honorary President of Victim Support, Scotland. He is also the author of The Law and Practice of Sentencing in Scotland (1981).

The Hon Mr Justice Frank Vincent, QC is a justice of the Supreme Court of Victoria. He is also Chairman, Victoria Adult Parole Board, and a part-time member of the Victorian Law Reform Commission.

PART 1

GENERAL INTRODUCTION AND SUMMARY OF ISSUES

by

Gordon Nicholson

General Introduction

It is a measure of the attention which is now being paid to the structure of sentencing around the world that, in 1990, the subject of "consistency in sentencing" should feature on the agenda of a meeting of Commonwealth Law Ministers. As recently as 20 years ago any informed discussion of such a topic would have been most unlikely, largely because there seemed to be very little concern until then about the ways in which sentences are determined, imposed, and carried out.

During the last 20 years, however, there has been an upsurge of interest in this topic, and reformed sentencing structures have been introduced, or are under consideration, in many countries both in the Commonwealth and elsewhere. Major sentencing reforms have already taken place in, for example, the United States, New Zealand, Finland and Sweden; substantial reforms are under consideration in, for example, Canada and Australia; and in some jurisdictions, such as England and Wales, Canada and New Zealand, appeal courts have recently been setting out their own sentencing guidelines without the need for any new statutory provision. Internationally, bodies like the Council of Europe have in recent times been concerning themselves with disparities and inconsistencies in sentencing; and the subject of sentencing is likely to feature in the deliberations of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. A preparatory report for that Congress was produced in Vienna in June 1988, and it recommends, *inter alia*, that:

"Member States should consider the following -

- (a) developing policies including explicit sentencing principles that provide guidance to sentencing judges, and that facilitate an understanding of sentencing by offenders, victims and the general public;
- (b) formulating the principles mentioned above in such a way that individual sentences can be assessed on the basis of those principles;
- (c) evaluating whether sentences are fulfilling the purposes ascribed to them within the context of the principles."

In this paper the topic of consistency is addressed in various ways by academic and practising lawyers from several different jurisdictions. In Part 2 the concept of consistency is itself analysed and discussed because, without a clear understanding of what may be involved, any remedies to remove perceived inconsistencies may be ineffective or misdirected. In Part 3 of the paper some of the major reform initiatives of recent years are described and commented on. Finally, in Part 4, Professor Ashworth has provided an objective assessment of the

advantages and disadvantages which present themselves in respect of the reform options which might be considered in those jurisdictions where reform has not yet taken place. The remainder of this Part of the paper seeks, for the convenience of Ministers, to summarise all that follows, and to set out a suggested list of topics for consideration.

Reasons for concern about sentencing, and anxiety about consistency

It is impossible to pinpoint any single explanation for the sentencing reform movement which has been taking place in recent years. Rather, it seems to have been brought about by an accumulation of factors, many of which interacted with each other to provoke a widespread desire for change. Most of those factors are referred to in the following contributions to the paper, and they may be summarised as follows -

- (a) disillusionment about rehabilitation as an aim of sentencing, and resultant uncertainty about what should be the aims of sentencing;
- (b) growing concern about inconsistency in the absence of general agreement about the aims of sentencing;
- (c) growing interest in clearer sentencing aims: many people argued in favour of just deserts and proportionality as being the only rational and just aims which sentencers should be pursuing; others, however, argued that prison at least should be reserved only for those who had, by their conduct, shown themselves to be a continuing danger to society;
- (d) growing concern about leaving the sentencing of offenders to the wholly unfettered discretion of judges without any effective form of legislative or other guidance or control;
- (e) greater consideration for the position of the victim as a proper object of a sentencer's attention;
- (f) anxiety about what was seen as the often excessive use of imprisonment for non-dangerous and non-violent offenders;
- (g) concern about the resource and cost implications of ever-growing prison populations;
- (h) growing anxiety, in at least some countries, that the general level of prison sentences was too high;
- (i) conversely, anxiety in some countries that those convicted of serious offences were not receiving sufficiently severe sentences;

- (j) dissatisfaction with apparently arbitrary parole arrangements which could result in consistent sentences being rendered inconsistent in their actual operation.

Other factors, too, came to be identified as leading to inconsistency. For example, an abundance of community-based resources in one district could lead to many more non-custodial sentences there than in another district where such resources were not to be found. There has also been in recent years a growing amount of evidence that in some countries ethnic and other minority groups are disproportionately represented in the criminal justice process. That, of course, raises questions not only for sentencers but also for police, prosecutors, social workers, probation officers and others.

A clear lesson from all of the foregoing appears to be that any attempt to achieve consistency in sentencing must take note of many important and contentious issues which go well beyond the simple proposition that like cases should be dealt with in a like manner and that unlike cases should be dealt with differently. Those issues will be examined in more detail later, but first it may be helpful to summarise the main approaches to sentencing reform which have either taken place or are under consideration around the world. As will be seen, they all appear to offer certain advantages and disadvantages.

Approaches to reform

Although each approach to reform is, to a greater or lesser extent, different from all others, there are nonetheless six major approaches which can be distinguished. These are -

- (1) **Presumptive sentencing.** In California, and some other States in the United States, statutes have been enacted which grade offences by seriousness, and then prescribe three possible sentences for each grade of offence - a normal sentence, an aggravated sentence, or a mitigated sentence. The court must choose one of those sentences, and in this way a great deal of consistency can be assured.
- (2) **Numerical guidance.** In US federal courts, and in several States such as Minnesota, sentencing commissions, acting under statutory authority, have prepared guideline tables for judges to follow. These are usually in the style of a grid with a number of offence levels down the side and an ascending series of numbers reflecting the offender's criminal history score along the top. Once the offence level and the criminal history score have been determined (taking account of aggravating or mitigating factors which may themselves be prescribed in the guidelines), the point on the grid where the two lines meet will disclose a guideline sentence, usually expressed as a

number of months imprisonment. Courts may depart from the guideline sentence, subject to appellate review.

- (3) **Presumed disposals.** One element in the proposals advanced by the Canadian Sentencing Commission is that offences should be divided into four categories of presumed sentence - "in" (custody), "out" (community sanction), "qualified in" (custody unless it is a minor instance of the offence and the offender has no relevant criminal record), and "qualified out" (community sanction unless it is a serious instance of the offence and the offender has a relevant criminal record).
- (4) **Hierarchy of principles and policies.** A new sentencing law in Sweden sets out the principles which courts should follow in calculating the seriousness of each crime and when choosing sentence, but contains no numerical guidelines. The law makes clear the aim of sentencing (proportionality), but also states the circumstances in which other aims such as deterrence or rehabilitation may play a part.
- (5) **Narrative judicial guidelines.** In recent years appeal courts in England, New Zealand and Canada have from time to time used the occasion of an appeal against sentence as an opportunity to lay down guideline sentences for particular types of offence. These guideline judgments are expressed in narrative form, like any other appeal court judgment, and usually set out a "starting point" sentence for the offence in question together with an indication of aggravating or mitigating factors which would justify a sentence above or below that starting point.
- (6) **Legislative guidance as to use of certain sentences.** Both the Criminal Justice Act 1985 in New Zealand and section 1(4A) of the Criminal Justice Act 1982 in England and Wales seek to offer some guidance as to the circumstances in which a court ought, or ought not, to consider the imposition of a custodial sentence in respect of certain categories of offence or certain categories of offender. These statutes do not enunciate general sentencing principles or aims; nor do they offer any numerical guidance as to the appropriate length of sentence where custody is chosen; nor do they offer any guidance as to the appropriate type of community sanction where a non-custodial sentence is chosen. However, they create a framework of legislative intention within which appeal courts may, if they are so minded, build up a body of constructive case law.

All of the foregoing approaches to reform present certain advantages and disadvantages. These are considered in detail in the contributions by Professor von Hirsch (p 122 et seq) and Professor Ashworth (p 137 et seq) later in this paper. Along with the various factors pointing to the desirability of reform (mentioned earlier), they also bring into focus the many important issues which require to be addressed if effective steps are to be taken to tackle problems of inconsistency and generally to reform the structure of the sentencing process. These issues are considered in some detail in Professor Ashworth's contribution below. In the remainder of this part of the paper the important issues are, for convenience, set out largely in the form of broad propositions and questions which might form a basis for discussion and decision.

Achieving consistency in sentencing: topics for consideration

1. Simply to change sentencing practices will not necessarily bring out about consistency. Attention must also be given to the role and functions of, for example, prosecutors, probation officers, and parole boards.
2. An important first step towards fostering consistency is to settle the aim or aims which are to be the basis for decision making since, if no clear aims are declared, there are likely to be divergent approaches and hence inconsistency. All of the contributors to this paper are in agreement on this point.
3. If sentencing is to have more than a single aim, it is important to state clearly the circumstances in which one aim is to be preferred to another.
4. A declaration of the overall aims of sentencing, though undoubtedly important, is unlikely to achieve consistency unless it is accompanied by clear statements on assessing offence seriousness, on factors personal to the accused (especially prior record), and on factors which should be irrelevant to sentencing.
5. In any overall determination of sentencing policy, what weight is to be given to -
 - (a) public protection;
 - (b) victim compensation;
 - (c) the sparing use of custodial sentences;
 - (d) control of public expenditure?
6. To what extent is it constitutionally acceptable to introduce legislation which, to a greater or lesser extent, fetters and controls judicial discretion in sentencing? Both the High Court of Australia and the Supreme Court of the United States have accepted that such legislation is constitutional, but there may be residual doubts in some countries.

7. At a more practical level, is there likely to be judicial resistance to legislative control of sentencing discretion? If so, how can that best be overcome?
8. Assuming that some legislative intervention is required and justifiable, what general form should it take? Some options are -
 - (a) guidelines within the legislation itself, possibly on the Californian model: this has the advantage that it is the result of a democratic process which might maximise public support, but on the other hand it can allow sentencing policy to be amended for short term political gains, and it is unlikely to be grounded in principled and well informed debate;
 - (b) delegation to a sentencing commission to prepare guidelines within a legislative framework: this should ensure that a coherent body of rules and principles is formulated by a specialist body with time, resources, and broad experience of criminal justice, and this is likely to enhance consistency: on the other hand, such a body is a constitutional novelty, and much may depend on the choice of individuals as commissioners;
 - (c) as a variant of (b) a sentencing commission could be given the task of preparing principled guidelines for subsequent inclusion in primary legislation: this produces greater accountability and ensures that the guidelines will have full parliamentary authority: on the other hand, any necessary adjustments to the guidelines in future will require legislative procedures which may be slow and cumbersome;
 - (d) judicial self-regulation: this is the traditional common law approach and requires no legislative intervention other, perhaps, than the setting of the outer limits to the courts' powers: under this system some courts have, as mentioned above, developed a practice of issuing guideline judgments: however, not all appeal courts have been prepared to offer general sentencing guidance, and may not do so in future: moreover, even where an attempt is made to offer some guidance, it may only relate to relatively few crimes, and there is unlikely to be overall consideration of aims, principles and policies.
9. Once the means of introducing guidance has been determined, it will be necessary to consider what form that guidance should take. Possible models are the six "approaches to reform" outlined on pages 9 to 11 above. They, of course, have to be considered subject to the comments on them by Professors von Hirsch and Ashworth.

10. Apart from all of the foregoing, there are some other ways of influencing sentencing practices, and perhaps achieving greater consistency, which do not involve legislative or other forms of direction and control. They are -

- (a) **Information systems.** There is a school of thought that sentencers would be more consistent if they were able to find out what other courts had done in similar cases. One way of furnishing such information is to build up a computerised index of all sentences passed since a certain date, suitably subdivided according to type of offence and offender, which would be available to judges through computer terminals. Information systems of this kind have been developed in Canada and in New South Wales where the system is now available to courts.
- (b) **Co-operative developments.** If sentencers agree to co-operate with other criminal justice professionals in the introduction and development of a new sentencing structure, this may give them a commitment to its success, and so bring about some measure of consistency. This is thought to be a major reason for the success of the Intermediate Treatment scheme in reducing the use of custody for juveniles in England and Wales during the 1980s.
- (c) **Judicial studies and training.** Study courses for sentencers may bring about greater consistency, but their impact is limited in the absence of clear aims, principles and policies (see 2, 3 and 4 above).
- (d) **The context of sentencing.** Since sentencing decisions can be affected by actions taken by others (see 1 above), there may be advantage in considering matters such as: the role of prosecutors in selecting charges and negotiating pleas; the possibility that prosecutors should be permitted to address the court in relation to sentence; the circumstances in which a court should be obliged to consider a pre-sentence report from a probation officer or other official before passing certain kinds of sentence; and, the ways in which sentencing decisions can in effect be altered by the decisions of parole boards and other administrative agencies.

Conclusion

What has been said above and, all the more so, the contents of this whole paper demonstrate clearly that the difficulties which are associated with the reform of sentencing, and in particular with the achievement of consistency, should not be underestimated. A great deal of research, discussion and careful

thought will be required if fair and effective changes are to be made to existing sentencing practices. While a completely unfettered and unprincipled discretion may be undesirable, a hasty and ill-considered reform would probably be worse than no reform at all. Moreover, while some of the fundamental problems associated with a wholly discretionary system are probably common to most jurisdictions, it does not follow that the solutions will, or should, be the same in all countries: different legal and court systems, and different social conditions, may well dictate different solutions. It is hoped, however, that, particularly for those countries which have not yet embarked on major reforms, this paper will provide a helpful starting point from which continuing discussion and debate can emerge.

PART 2

THE MEANING OF CONSISTENCY

ACCOUNTABILITY IN SENTENCING

by

Anthony N Doob and Jean-Paul Brodeur

Introduction

Individual sentences handed down in criminal cases are criticized frequently and publicly in many countries. In our country, Canada, sentences are most often criticized in terms of level of severity of the sentence. A majority of Canadians have been shown to have a generalized belief that sentences are too lenient.¹ A careful analysis of this generalized belief would suggest, however, that in Canada, as in some other countries, the generalized belief does not translate reliably to a view about individual sentences handed down in individual cases. The generalized beliefs are based in part on misinformation and misunderstanding. A more sensitive view of the Canadian public would suggest that they, like many within the criminal justice system, find Canada's sentencing structure more confusing than lenient.

In addition, judges are increasingly criticized for handing down sentences which are apparently inconsistent with other sentences. In other words, concern is expressed about disparity. We will largely be concerned in this paper with the problem of sentencing disparity. Why are we so concerned with disparity? First of all, it has often been claimed that the possibility of "unequal treatment" in law is incompatible with the notion of justice. Although we believe that this claim is justified, we would suggest in this paper that the more general concern is that punishments are being handed down in our society in an unprincipled way.

There is a natural tendency to explain away the problems of sentencing by asserting that they are due, to a considerable extent, to lack of knowledge. Hence it is sometimes argued that the problems of disparity could be lessened, if not entirely solved, by providing additional information to judges about court practice and the tariffs which are applied by their colleagues. In a similar fashion, it is argued that public criticism could be defused by better informing the general public about the role and responsibilities of courts and by disseminating accurate data on the level of severity of the sentences imposed by the judges.

Such an analysis, we suggest, is fundamentally wrong. The problems with sentencing - disparity in particular - can be seen to relate to problems of accountability. We argue that in many Commonwealth jurisdictions - in particular the one that we know best, Canada - the state, by way of its sentencing judges, simply is not accountable for sentencing decisions. This is a rather strong statement to make, in particular when referring to the process which is often described as the most serious intrusion of the state into the lives of its citizens. We say it, however, not merely as a challenge to those responsible for sentencing policy, but because we believe that unless true accountability is built into the sentencing process, sentences will, over time, no longer be seen as legitimate.

A definition of accountability

Concerns about "accountability" can probably be found in most countries with respect to most areas of the criminal justice system. There are concerns expressed from time to time about "police accountability" (usually with respect to apparently problematic interactions with ordinary citizens). There are concerns about the accountability of prosecutors on decisions they make to proceed with or to withdraw criminal charges. There are concerns about the power that prison authorities have over their prisoners. There are concerns about the "accountability" of parole authorities to both parole applicants and to the public for their decisions.

Interestingly enough, for the most part non-elected judges' decisions are typically not discussed in terms of the concept of accountability. Our guess is that if judges were asked to discuss their accountability they would do so in four ways. They might suggest that they are accountable "to the law". They might discuss the manner in which their decisions might be reviewed by higher courts (unless they were members of the highest court). They might discuss how they were "accountable" for their own behaviour and how some other body - a judicial council, for example - could make them account for any behaviour that might be seen as inappropriate for a judge. And, finally, judges might refer to the notion that they, as members of society, were, in some indirect way, accountable to the public. In this context, it might be suggested that "accountability" is achieved by way of the openness of our courts and the providing of explanations of decisions.

Indeed, accountability is often thought of as relating primarily to openness and legitimacy. If a person makes a decision that can be justified in some way, and the decision and the basis of it are open for public examination, and if deviations from legitimacy or openness can be corrected, then the decision maker is seen by many as being accountable. Borrowing from a recent book by Patricia Day and Rudolf Klein,² we suggest that such an analysis ignores two fundamental aspects of accountability. Day and Klein suggest that:

"... accountability is all about the construction of an agreed language or currency of discourse about conduct and performance, and the criteria that should be used in assessing them. (p 2)

"Accountability implies both a shared set of expectations and a common currency of justifications. There has to be agreement about the context, the reason why one actor owes explanation to another since it is precisely this sense of obligation which translates the giving of accounts into accountability. Equally there has to be agreement about the language of justification, what constitutes good reason for explaining conduct. ... In short, accountability, even at its simplest in the relationship between individuals,

presupposes agreement both about what constitutes an acceptable performance and about the language of justification to be used by actors in defending their conduct. Furthermore, it implies a definition of the relationship between actors. To talk about accountability is to define who can call for an account, and who owes a duty of explanation." (p 5)

This view of accountability is innovative in that it goes beyond the traditional notion of responsibility and stresses that giving an account of one's behaviour implies using a medium that can be shared and understood by the party for which it is intended. The conditions for mutual understanding are said to be a shared set of expectations and a common currency of justifications. We shall elaborate on these ideas later in this paper.

Are judges "accountable" for sentencing decisions?

What then, in the area of sentencing, might be "a shared set of expectations" or a "common currency of justifications"? Simply put, it would be a "theory" or a set of guiding principles on sentencing and an explanation of how the sentence followed from the guiding principles. But, one might ask, don't we have a theory of sentencing in most Commonwealth countries? Don't we say that sentences should denounce the crime, rehabilitate, deter (individually and generally) and, if appropriate, incapacitate the offender? Many courts have laid down such a basket of principles. The problem, of course, is that this does not constitute "an agreed upon language or currency ..." It constitutes many. More directly, such an unordered and unweighted set of principles does not provide criteria for assessing the "conduct and performance" - the sentence, in this case - of the judge.

A few years ago, one of us was asked in an informal conversation with one of Canada's more senior judges what the empirical evidence was for unwarranted disparity in sentencing in Canada. The judge patiently listened as the evidence was described. There was evidence of variation from one location to another that could only be described in terms of differences in local custom unrelated to any underlying differences in crime or socioeconomic conditions; there was evidence from "simulation" exercises where large numbers of judges had been asked to indicate what sentence they would hand down in a particular case; and there was evidence that, depending on which purposes of sentencing they saw as paramount, different judges would emphasize different evidence, weigh various concerns differently, and come to different decisions about the appropriate sentence for a case.

The judge was told that the evidence suggested not so much that there was "random" variation, but rather that two different judges, sentencing on identical cases could start with the same set of facts. Because their "theories of sentencing" were different, they would end up with dramatically different, but

equally "justifiable", sentences. In other words, we told the judge, our sentencing structure allowed two judges to look at the identical case, apply different principles, emphasize different factors and come up with two vastly different but "justifiable" sentences. We suggested that evidence such as this would suggest that the sentencing system was in need of some attention.

The judge's response was simple: "Maybe both judges were right." Our judge, of course, was correct. Both sentences were "right" as long as the meaning of "right" is that both sentences could be "justified". The sentences could be justified, but the judges were not accountable for their sentences.

Defining disparity as a sentence that cannot be justified is equivalent to defining disparity out of existence. What we actually have is a set of principles that sometimes flatly contradict one another and which, depending on the priority given to any subset of them, and depending on the exact manner of application, could be used to justify virtually any sentence within the legally permissible range for that offence. The point is made more forcefully by Nils Jareborg in a common on many European sentencing laws:

"... any jurisdiction which relies interchangeably upon two or more of these [standard purposes of sentencing] has an incoherent policy. In fact, it is normal that any of the mentioned types of policy is seen as sufficient for justifying a sentence. Like cases are then certainly treated differently but they are also treated alike - in relation to the disjunction of relevant policies. Disparity occurs only [under such incoherent policies] when the sentence depends on factors clearly irrelevant according to all the accepted sentencing policies ... (p 11)

"No one can with certainty answer the question as to whether disparity exists unless he knows what sentencing pattern is the right one and whether a certain sentence deviates from that pattern." (p 12)³

Other than being within legislatively prescribed limits, sentencing, we would suggest, is almost completely devoid of expectations that can be seen as "shared" among a set of sentencing judges, let alone between members of the public and the judge, or any other pairing of individuals or groups interested in the criminal process. Furthermore, it would be hard to argue that we have an agreed "language of justification" for justifying sentences. Finally, we argue that we do not even have clarity on who can (or should) be called upon for an explanation.

Sentencing is, in many countries, in trouble. And disparity is a symptom of that trouble.

What forms does disparity take?

The most common association to the term "disparity in sentencing" is the situation where there is unwarranted variation in the sentence being handed down in two "equivalent" cases. Data often demonstrate that different sentencing judges in the same jurisdiction hand down very different sentences in identical written "simulated" cases. This constitutes evidence of disparity that is relatively uncontroversial, since it is difficult to argue against the view that identical cases should be treated alike.

Not treating similar cases similarly is actually only one side of the coin. The reverse situation - treating cases that are significantly different from one another in a similar way - is also a form of disparity. For example, if it is agreed that a particular factor should affect sentences and if it can be shown that this factor is not being taken into account, then clearly we have a different form of the same problem of disparity. This latter form of disparity is less conspicuous.

These two types of disparity, which we have described in relation to a single offence category (similar or different cases of robbery, for example) also apply across offences. Although it is not often thought of in the context of disparity, variation in sentencing patterns across offences raises problems of disparity which may even be more serious than intra-offence disparity. Disparity then becomes a systematic part of the sentencing process. For instance, if there are sound reasons to believe that two kinds of offences should have similar patterns of sentences and they do not, we have a type of cross-offence disparity that is analogous to intra-offence disparity. Similarly, if there are two offences that do have similar patterns of sentences, but there is an accepted view that they should not, we, again, have a form of disparity analogous to intra-offence disparity.

Individualized sentencing

In many Commonwealth countries, we pride ourselves on our system of "individualized" sentences. That sentences should be determined by sentencing principles and by a concern for the specific facts of a case is a legitimate, indeed a necessary, requisite of sentencing. However, the individualization of sentences is more often used as a rhetorical device to disguise anarchy in sentencing as order and to market chaos as deliberation.

At its best, the individualizing of sentences would imply a process where the purpose and principles of sentencing were clearly laid out. For example, sentencing in one jurisdiction might be governed by the principle that a sentence was to be proportionate to the harm actually done. Some form of standard for sentences would be set for different levels of harm for a particular offence. The judge, in individualizing the sentence, would then evaluate the harm done by the offender and then assess the appropriate penalty according to the agreed-upon standard.

Alternatively, if the primary purpose of the sentence was to rehabilitate the offender, judges would be obliged to assess the underlying factors that led the offender to commit the offence. Judges would then have to assess the evidence concerning the effectiveness of various treatments in dealing with the underlying cause of the offence and would then order the treatment most likely to "rehabilitate" the offender. Neither of the sentencing tasks - under a proportionality model or a rehabilitation model - would be easy. And neither task could be carried out completely reliably. There would always be some variation.

But this is not what is typically meant by "individualized" sentencing. The supporters of individualized sentencing often begin with the truism that "no two cases are alike". Though technically true, this statement implies that there is no consensus on what factors should be considered by the sentencing judge and which should not. The broadest definition of "individualization" of sentences implies complete anarchy in sentencing: Anything goes as long as an intelligent person can come up with a post hoc justification. A bit less anarchistic than this is the view that the judge first decides what the major goal of the sentence should be and then applies principles to achieve this goal.

Very few people, however, take an extreme view of the individualization of sentences. Most people would accept the view that there are some principles of sentencing, even though they might be reluctant to state these in such a way that there could be a shared understanding of what would justify a sentence.

Disparity and the need for a theory of sentencing

To have true accountability in sentencing, there must be a meaningful theory of sentences. Theory need not be understood as "grand theorizing" in the context of sentencing. It might be characterized in three ways. First, in the simplest sense of the word, a theory is a set of assertions which describe a phenomenon accurately. Hence a theory of sentencing would first attempt to present in a truthful way the reality of the sentencing process and the constraints that characterize the process. For example, in the overwhelming majority of cases, a sentencing hearing cannot last more than 15 minutes because of the crushing volume of cases that the lower courts have to process. Judges must determine their sentence in a matter of minutes. Within such a context, the individualization of sentences can only be a noxious illusion, because the most basic conditions to achieve this goal are lacking. Typically, for example, there is no time for careful deliberation and weighing of the principles and facts. In other words, having an accurate depiction of the practice of sentencing is the starting point in trying to achieve the much vaunted ideal of "truth in sentencing".

Second, within the context of sentencing tradition, a theory of sentencing refers to a set of principles upon which to base sentencing decisions. A theory of sentencing must tell the decision maker what principles are most important, and, by implication, what should not be given weight in the sentencing decision. In addition to "truth" which applies mostly to factual theories, there is the requirement that a theory must have consistency. This requisite applies equally to a set of norms, whether or not they are conceived of as sentencing principles, sentencing purposes, or sentencing guidelines (of whatever form). Hence a sentencing theory in this sense means simply a consistent set of sentencing norms.

Finally, the result of having a sentencing theory can be described by using the words of Day and Klein that we quoted earlier in this paper. If we have a true perspective on the reality of sentencing, we also have a "shared set of expectations" about what it can achieve and how it can do so. Second, a consistent set of sentencing principles will afford us the "common currency of justifications" which is now completely lacking in the sentencing structures of many Commonwealth jurisdictions. We will now apply these concepts to the problems of sentencing.

In its strictest sense, the term "disparity" means simply variation. Variation in sentencing per se clearly is not seen as bad. We have variation in sentences handed down for different offences and variation in sentences handed down for different instances of the same offence. The issue, however, that needs to be addressed is how one evaluates this variation.

When we hear about sentencing variation (across cases, across districts, across types of offenders, etc) and say that "it makes sense" we are, in effect, saying that the variation that exists fits a set of principles (or a single principle) that we agree with. On the other hand, when we find systematic variation in sentencing that we cannot explain by any acceptable set of principles (eg, variation in sentencing due to the race of the offender or victim), we might refer to that variation as unwarranted disparity in sentencing. A theory of sentencing, then, implies not only what should determine sentences, but what should not.

Imagine a situation where there are two co-offenders who had identical roles in an offence and one of the offenders had no previous convictions and the other had numerous recent convictions for similar offences. Let us first consider the case where they get quite different sentences - the one with the long criminal record getting a harsher sentence. We might be inclined, in many countries, to say that the existence of the difference in the sentences was not evidence of unwarranted disparity, since the one with the record was treated more harshly. However, implicit in such an evaluation is the principle that sentence severity and criminal record should be correlated.

Similarly, if they were to get identical sentences, whether one felt the outcome was appropriate would depend on one's "theory" of sentencing.

Since, in reality, no two cases are completely identical, the lack of a theory of sentencing would, in theory, allow any sentence to be justified because, after all, it is the responsibility of the judge to "individualize" sentences.

Another anecdote illustrates the problem of complex unstated "incoherent" theories of individualized sentencing. In discussing the evidence for disparity with a group of judges one day, one of us noted that in one Canadian province, for some offences, there is a good deal of variation from judicial district to judicial district on the use of conditional discharges. A judge suggested that there might be important variation in these locations, such as the prevalence of the offence, the tolerance for it in the community, or other factors that would "explain" the variation. Of course, the judge might well be right. But two observations can be made: "justifying" such variation in this way implies that such factors should be part of sentencing policy. Furthermore the discussion appeared to begin from the premise that the variation is acceptable ("because it is there") and to proceed to search for a post hoc explanation for it.

There is one final point which should be borne in mind with respect to the nature of a sentencing theory. In our earlier example, we have assumed that there normally is a correlation between the severity of a sentence and an offender's previous criminal record. This need not necessarily be so. One can imagine a situation where an offender with a shorter criminal record might be given a more severe sentence than an offender committing a similar crime with a longer record. In the case of a minor offence against property, some judges indicate that they like to give younger first time offenders a "short sharp shock" on the (empirically unsupported) belief that such "treatment" will be an effective individual deterrent. The same judge might be more lenient toward a more experienced shoplifter believing that overpunishing minor offenders is a practice to be avoided. Our hypothetical judge might, in other cases (eg, violent offences against persons) treat the prior criminal record as an aggravating factor.

If applied consistently, this set of rules concerning the use of previous criminal convictions could still constitute part of a "theory" of sentencing. The point that we want to stress is that a sentencing theory is not necessarily a simple-minded book of ready-to-use recipes. It is a rather detailed statement which attempts to spell out what is the desirable course of action in a variety of cases. This statement may be very complex, just as cases themselves are complex. Whether simple or complex, however, a theory of sentencing must be explicit.

Can disparity be eliminated without the difficulty of agreeing on a theory?

The simple answer to this question is "yes". The United States (Federal) Sentencing Commission, in what is now probably its most highly quoted statement of non-policy, said that it could not choose between a sentencing model based primarily on offence severity and one based on utilitarian goals, noting that "adherents of these [two] points of view have urged the Commission to choose between them, to accord one primacy over the other. Such a choice would be profoundly difficult.... As a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result". A set of guidelines is then described. But where, especially in the absence of any overriding theory of sentencing, is the shared set of expectations governing the sentencing process and, more importantly, how could one possibly find a "common currency of justifications" for a particular recommended sentence where there was no initial agreement on how sentences should be determined?

More to the point, even if judges attempted to follow such guidelines religiously and even if the nature of the guidelines were so unambiguous that judges could reliably determine what the guideline was for individual cases - and there is every reason to believe that neither of these conditions hold - the problem of inter-offence disparity described earlier in this paper still may exist. And, of course, intra-offence variation in sentences could exist because judges would apply different sets of principles to set an actual sentence within or outside of the stated guideline.

As Nils Jareborg noted a few years ago, "In many countries, we find a penal system with an incoherent penal policy".⁴ The goal of sentencing policy should be to achieve a level of coherence such that sentences and the policies that govern them make sense to all involved.

Our criticism of the US Sentencing Commission's work, then, should be put in the context of the present state of sentencing in many countries. As the "Carlisle" Report on Parole in England and Wales noted in 1988, the British government has thus far been successful in avoiding having to "grasp the nettle of sentencing reform for England and Wales". Similarly in Canada, though the Report of the Canadian Sentencing Commission was released in early 1987, there has been no outward sign that the government will be moving soon toward this difficult goal. It is not a simple or uncontroversial job. And, it is probably seen in most countries to be unnecessary. There are, therefore, few votes to be gained from sentencing reform.

In many common law countries, then, the legislative arm of government has left the problem of disparity - and sentencing policy - to the courts. The courts have dealt primarily with one

form of disparity: ranges for a given offence that are too wide. Thus very severe and in some countries very mild sentences have been appealed and quite often "pulled in" toward the centre of the distribution. Explanations are usually given for changes in individual sentences. When a sentence is made less severe, courts will often say something like "Insufficient weight was given to the goal of rehabilitating the offender". If the sentence is too mild, the court will substitute "deterrence" or "the serious nature of the offence" for the words "rehabilitating the offender". In this way, courts, like legislatures, can avoid making policy but at the same time narrow the distribution of sentences somewhat.

From time to time, however, some courts in some jurisdictions have ventured timidly into the policy area. The result is what are sometimes called "guideline" judgements, where the court of appeal has indicated some form of "starting point" in sentencing offenders convicted of a particular kind of offence. As an approach to dealing with the problem of high levels of variation in sentences, this might seem to be an adequate solution to the problem of sentencing. Interestingly enough, however, it is clear that sometimes even the court that created a "guideline" can have difficulty in following it in subsequent cases.⁵ The reason for this is simple: without a theory, the court has no guidance in how to apply the rules to the next case they are faced with.

But such guideline judgements illustrate quite clearly a form of disparity we have already discussed: unexplained variation across offences. Without a theory - or an explicit set of principles - to guide sentencing, the public, offender, victim, and court have no way of deciding the relative severity of sentences across offences.

One of the terms of reference of the Canadian Sentencing Commission, on which we each served, was to recommend a new set of maximum sentences for all Criminal Code offences in Canada. Although some initial work was done on it in the early stages of the life of that Commission, some of the more difficult decisions were made after that Commission had agreed upon a set of principles to guide sentencing decisions. The Canadian Sentencing Commission recommended that the seriousness of the offence be the primary determinant of the sentence. Thus when the commissioners got to the point of deciding the maximum sentences for each offence the Commission had a framework to apply to each offence.

The theory of sentencing that the Commission had agreed upon gave "a common currency" on which to evaluate each offence. Without agreement about what should be considered, any disagreement could never have been resolved adequately. It is possible that two reasonable people might not agree on the relative seriousness of the most serious instances of an offence, but at least they would know that the ultimate decision should be guided by the "seriousness" of the two acts.

The handing down of a sentence for an individual case reflects the same problems. Without a true "theory" of sentencing, accountability is not possible.

A parting thought

We have insisted throughout this paper on the need for a sentencing theory. Our insistence upon this need may generate an imbalance that must be redressed. For the ancient philosophers, the human mind had two components - the intellect and the will. In stressing the importance of a sentencing theory for the creation of a framework for sentencing accountability, we might appear to favour the intellect over the will. This appearance is completely misleading for we believe that accountability cannot be promoted only by developing a set of sentencing principles, however thoughtful they may be. Doing justice and thinking about it are not the same thing. A theory of criminal justice does not implement itself by virtue of its profundity. Its application is dependent upon a political will to reform the sentencing process.

As we have noted before, few votes are to be gained by undertaking to reform criminal justice and fewer still will be obtained by lowering punishments for certain offences or for creating a coherent theory of sentencing. There are, in Canada, few signs that contradict the conclusion that the criminal justice system is generally the object of a benign neglect by the government. To be fair to our government, we are encouraged, from time to time, to see some small steps toward the creation of a process that might eventually lead to sentencing reform. It is not an easy process and not one that is likely to be done well if done quickly or in response to an apparent crisis. We look forward to seeing our own government (and others) make the difficult decisions which are necessary to move toward achieving accountability in sentencing.

Summary

We have suggested that the concepts of disparity and accountability are intimately related. Organizations and individuals are "accountable" when there is a "shared set of expectations" and a "common currency of justifications" for policy, decisions, or actions.

Although not often discussed in these terms, we have suggested that the major cause of disparity and general discontent in sentencing is that we do not have a set of principles to guide the development of sentencing policy and sentencing practice.

Efforts to deal with disparity without first addressing the issue of policy will not be doomed to complete failure, but will be severely limited in their effectiveness and ultimately will never be able to provide an adequate foundation for defining, understanding, and eliminating unwarranted disparity in sentencing.

FOOTNOTES

1. See A N Doob and J V Roberts "Public punitiveness and public knowledge of the facts: Some Canadian surveys". In Nigel Walker and Mike Hough, Public attitudes to sentencing: Surveys from five countries. Aldershot, England: Gower, 1988.
2. Accountabilities: Five public services. London: Tavistock, 1987.
3. Jareborg, Nils. "Introductory report" in "Disparities in sentencing: Causes and solutions". Reports presented to the 8th criminological colloquium (1987). Council of Europe: Collected Studies in Criminological Research. Volume XXVI. Strasbourg, 1989.
4. Council of Europe: Collected studies in criminological research, Volume XXVI, p 10.
5. See Alan Young, The Role of an Appellate Court in Developing Sentencing Guidelines, Research Reports of the Canadian Sentencing Commission. Department of Justice, Canada, 1988.

**CONSISTENCY IN SENTENCING, JUST DESERTS, AND MERCY:
SOME REFLECTIONS**

by

Joshua Dressler

Initial Comments

At first glance, perhaps even second, consistency in sentencing appears to be a desirable goal. "Inconsistency" implies "irrationality" and, worse, "injustice". Injustice is an evil. Inconsistent sentencing is even more evil if it is based on especially ignoble grounds, such as ethnic, religious, or racial bias.

Commonplaces, however, are not always true; at least, they are more complicated than they initially appear. I submit that the principle that like criminal cases should be treated alike, more specifically, that persons convicted of like criminal offenses, should be punished alike, is only correct if "like criminal offenses" is very carefully and sensitively defined by lawmakers, which legislators may not be able or willing to do. I further submit that even if such care is taken, absolute equality among like cases might still be undesirable in some circumstances.

What follows are some broad philosophical comments. I leave to others the discussion of specifics. My purpose is quite limited: to reflect at an early stage of the process on some very nebulous, but important, matters: the meaning of "justice", "moral desert", and the role of mercy in a progressive sentencing system.

What "Consistency in Sentencing" Ought to Mean: Providing "Just Deserts"

Persons are entitled to their "just deserts". In the context of criminal punishment this means that persons should be punished in proportion to the crime that they have committed, no more and no less. Generally speaking, a "crime" consists of the "social harm" or "wrongdoing" (actus reus) and "moral blameworthiness" components.

Few people disagree that a "crime" involves "wrongdoing", but it often seems to be the case that the second component - the culpability component - is given too little emphasis in many efforts to develop "consistency in sentencing". At least in regard to serious offenses, people are not punished for causing unwanted results unless they are morally to blame for causing them. People kill and injure other people, as well as impair other person's rights to property, but these acts, although they may constitute a basis for compensation of the victim by the wrongdoer, do not constitute a "crime" unless the actor caused the result in a manner that merits moral opprobrium.

True "consistency in sentencing", therefore, requires that the "crime" - both the harm component and the actor's blameworthiness for it - be carefully gauged, and that equality be judged in terms of both factors. A person does not receive his "just deserts", in other words, unless the sentencing system takes into consideration both factors.

Neither component of a criminal offense is easy to calibrate, but the "harm" component may raise somewhat fewer problems. It is not controversial that killing a person is worse than injuring him; theft of a million dollars is more harmful than theft of ten dollars.

But, even with the "harm" component some difficult questions arise. These questions are primarily normative, although some are empirical. I will speak to just two issues that any effort to create consistency in sentencing would have to consider. The point to be made here is that unless lawmakers are prepared to consider these types of issues they cannot provide true consistency.

First, various studies demonstrate that, at least insofar as public perceptions of crime seriousness are concerned, the nature of the victim may affect the "harm" analysis.² Some such distinctions are easy to understand: it is worse from society's perspective when a public official is killed or injured than when a private person is similarly harmed. In terms of harm, not all murders or assaults are alike.

On the other hand, some evidence exists that the rape of a "former spouse" is considered by the public less serious than the rape of a "stranger".³ Although that particular example doubtlessly is tied to some special, historical anomalies (indeed, irrationalities) related to the offense of rape, the point here is that the determination of what constitutes a "like crime"⁴ deserving "like punishment" is not always as easy as it appears.⁴ Are legislators prepared, in the name of justice, to take on the task? If not, then they cannot in fairness say that they seek genuine consistency in sentencing.

Second, some crimes involve intangible harm. Inchoate offenses, such as "attempt", and crimes that prohibit "immorality" primarily involve intangible harm. "Harm" in this sense can be defined as the "negation, endangering, or destruction of an individual,⁵ group, or state interest, which was deemed socially valuable".

Traditional crimes, as well, include intangible harm. Rape causes tangible physical harm to the female victim, but she is also apt to suffer psychological distress. Rape may also impair her family structure, which in turn is hard to calculate in any simple matter. Is a rape of a single woman really equal in harm as a rape of a woman who has a family? If not, the sentence given to the rapist, holding all other issues equal, will have to be different.

The point, again, is that, even putting aside a myriad of other factors, and considering for the moment only the harm component of a crime, it is evident that, all else being equal, not all "murders", "rapes", or "thefts" are alike. There are aggravated and mitigated natures of each. Although de minimis differences doubtlessly can be ignored, a sensible, just

sentencing system that seeks consistency cannot ignore the major disparities within specific offenses.

However, unless the criminal code is made unacceptably complicated, the definitions of crimes cannot adequately consider all the permutations that exist. The disparate versions of murders, rapes, and robberies, must be left to the sentencing process. In the United States, the federal government recently developed sentencing guidelines, one major purpose of which was to reduce "unjustifiably wide" sentencing disparity.⁶ A study of those guidelines will demonstrate that it has made a serious (although, perhaps incomplete) effort to categorize the various harm-related "adjustments" that a judge ought to consider.

Far more complicated - and perhaps fatal to any effort to provide genuine consistency in sentencing - is the process of measuring the wrongdoer's moral accountability for the harm he has caused. Again, I will focus on only a few matters.

First, is the actor's mens rea. This is the easiest aspect. Virtually all would agree that intentional wrongdoing is worse than accidental wrongdoing (the latter of which should not be criminal at all). The lines between intentional and accidental wrongdoing are also not hard to draw, even if it is difficult in the individual case to determine the actor's mens rea.

The American Law Institute's Model Penal Code draws four lines of culpability: "purposely", "knowingly", "recklessly" and "negligently". Although the terminology may differ in other nations, the general lines are fairly clear: the most culpable wrongdoer is one whose conscious object is to cause the harm in question ("purposely"); next is the person who does not wish the crime to occur but knows that it is virtually certain to arise if he continues on his intended path ("knowingly"); less culpable still are those who consciously take unjustified risks in their conduct ("recklessly"); and, finally, there are those who inadvertently take such risks ("negligently").

Second, a morally just sentencing system ought to consider the extent to which a person, even assuming that he has the requisite mens rea, deserves punishment in a much more general, but morally critical, manner. I would suggest the following important three principles:

Principle 1. "Desert" is based on the principle that a specific blameworthy act can be imputed to the person who is in court if, and only to the extent that, he had the capacity and fair opportunity to function in a uniquely human way, ie freely to choose whether to violate the moral/legal norms of society.

Principle 2. In this context, "free choice" exists if the actor has the substantial capacity and fair opportunity to: (1) understand the pertinent facts relating to his conduct; (2) appreciate that his conduct⁷ violates society's norms; and (3) conform his conduct to the law.

Principle 3. Even among persons who possess "free choice" as defined above - and thus deserve to be punished - morally significant differences exist between persons, based on the degree of free choice that each person possesses.

What this means is that not only should a criminal code recognize excuses, eg, insanity, involuntary intoxication, duress, but it should also formally permit partial excuses, eg provocation, diminished responsibility.

But, it is impractical to recognize partial excuses to all crimes, for this can only be done if lawmakers are prepared to create degrees of all crimes, an unacceptable complexity. Therefore, a system that has as its goal "consistency in sentencing" must allow for differential treatment of wrongdoers, based on the individual culpability of the actor, which in turn is based on the actor's degree of free choice (as defined above).

For example, it is morally unjust to punish a retarded criminal, even if that person has sufficient capacity to form the requisite mens rea of a crime, and even if that person is not so seriously disabled as to be completely excusable, at the same level that we would punish a person of ordinary intellectual capacities who commits the same offense. The "crime" of a retarded person is not similar to the "crime" of a non-retarded person, at least as long as "crime" includes (as it should) a blameworthiness, and not merely a harm, component.

Thus, "consistency in sentencing" in this context requires that most judgments about moral culpability be handled at the sentencing phase. But, how will this be done? Notice that what I said before is that "a system that purports to provide consistency in sentencing must allow for differential treatment of wrongdoers, based on the individual culpability of the actor". There is almost (but not quite) a contradiction in that statement: we are seeking consistency, and yet we obtain it by providing differential treatment of individual wrongdoers, based on their just deserts.

It would seem that to truly say that two crimes are alike - and thus to punish them equally - we must allow the sentencing authority, who has read the testimony and observed the defendant, to have sufficient discretion to make a judgment about the convicted defendant's capacity and opportunity to behave lawfully.

Perhaps this means that all that any sentencing system can do is to provide a set of factors that the judge must consider (or not consider) in determining the defendant's culpability. There will have to be enough flexibility in the guidelines to allow the judge to judge. But, this threatens inconsistency, because issues of culpability inevitably are subjective.

When "Consistency" is Undesirable

Let me complete my observations with a view that, at least in the United States, is not in vogue these days: Consistency in sentencing, even if it is devised in a sophisticated manner, is not always desirable. At least in some cases, "like" cases (in the normal sense of the phrase) should not be treated alike. Let me explain.

As a matter of justice persons should be punished no more than they deserve, taking into consideration the factors discussed above - harm and blameworthiness. That is what we mean when we speak of giving a person his "just deserts". But, I further submit that sometimes - not often, but sometimes - justice should give way, just a bit, to mercy.

The difference between "justice" and "mercy" is significant. An offender has a moral right to be treated justly. Any sentencing system that punishes a person more than he deserves has acted unjustly. In contrast, wrongdoers are not entitled to mercy. To show mercy is a permissible, but not obligatory, act of the punishing authority.

When a judge displays mercy, he punishes a person less than he deserves. And, in doing so, justice is undermined to some extent. Nonetheless, if the choice is between a system that strives for near-perfect distribution of sentencing justice and one that is "unjustified", in the sense that it results in inconsistency in sentencing because it invites judicial mercy, I favor the latter system. A system of strict, unbending, merciless justice is not my idea of the preferred system, and I think that it is not one that most people ultimately would prefer.⁸

I do not suggest that judges should have unbridled opportunities to act mercifully. What I do suggest is that some leeway ought to exist in any sentencing system that may be devised that allows judges to express their very personal sense of compassion for the individual wrongdoer, unrelated to the harm and culpability questions discussed above.

For example: Suppose that D, a person of exemplary character, loses his job. He continuously seeks a new job, but fails to find one. He grows depressed, as his self-esteem is reduced, and as he observes his family suffering. One day, he is treated rudely in a grocery store. In response, he purposely and inexcusably smashes windows in the store and marches out with a bag of groceries, without paying.

D is probably guilty of malicious damage of property and of theft. Further, under my definition of "free choice" described above, he has free choice: he knew what he was doing, knew it was wrong, and had the capacity to conform to the law. He deserves "full" punishment in any "just deserts" sentencing system.

But, as a matter of compassion, the judge may wish to show mercy. Why? It may come down to nothing more than that this was a person of good character who did a bad act, and we are more willing to be merciful to a good person who acts out of character than we are to a person of bad character whose conduct is in character.

But, of course, here I may be showing my own biases - where I might show compassion in sentencing if I were permitted the opportunity. Someone else might show compassion in a very different type of case (perhaps to someone whose upbringing was so awful that, despite his bad character, mercy will be shown). Another judge might not wish to be merciful in any case, which would be that judge's right, too.

And, of course, all of this will lead to genuine inconsistency in sentencing. But, that is precisely what I submit ought to be included in the sentencing system: what I have in mind here is some freedom - some limited flexibility in the system - for judges to act for reasons highly individualistic to the case, that do not require justification within the ordinary sentencing guidelines or to an appellate court.

This leeway might be abused, of course, as any system that allows for discretion by human beings can be. But, it is also apt to be a more humane system. The international charge toward consistency in sentencing, to determinate sentencing, should not become so strong that mercy loses a place in the outcome.

Conclusion

Lawmakers should consider developing a system of sentencing that reduces unjustifiable disparity in sentencing. However, lawmakers need to be sensitive to three problems lurking in any effort to devise a "rational" sentencing system.

First, the system should not ignore the need for subtle line-drawing regarding the "harm" and "moral culpability" components of a "crime". In particular, the system should not paper over, or ignore, the difficult moral questions that arise in the "culpability" area.

Second, sentencing too easily can devolve into a mere exercise in calculation, when it ought to remain an exercise in some substantial degree of judicial discretion. It is not possible for lawmakers, no matter how thoughtfully they act, to deal with every relevant factor that may arise in a given case, particularly in regards to the wrongdoer's culpability. Judges need to be given some leeway, even in an otherwise structured system, to graduate punishment in relation to the particular offender's culpability. That is essential to the concept of treating like cases alike.

Third, the effort to provide consistency too often means that unbending justice replaces mercy, when there is a place for both

goals in a penal system. Admittedly, the two goals conflict: to show mercy to an offender means that the wrongdoer receives less punishment than he deserves - an injustice, especially to the victim. But, a society that allows a little bit of injustice of this kind might be better than one that does not, if the injustice occurs because those who act in our behalf - here, the judges - are acting like persons, rather than like mindless computers.

FOOTNOTES

1. See Davis, Sentencing: Must Justice Be Even-Handed?, Law & Philosophy 1:77 (1982) (holding that justice in punishment need not forbid, although it does not require, disparities in punishment).
2. Eg, Rossi, Waite, Bose, and Berk, The Seriousness of Crimes: Normative Structure and Individual Differences, American Sociological Review 39:224 (1974); Dressler, Thompson & Wasserman, Effect of Legal Education Upon Perceptions of Crime Seriousness: A Response to Rummel v Estelle, Wayne Law Review 28:1247 (1982).
3. Rossi, Waite, Bose, and Berk, supra note 2.
4. Or consider the following: is it worse for a person to steal a million dollars from a bank than to steal ten dollars from a destitute individual? The nature of the victim may matter, for the issue is not merely that the wrongdoer has been unjustly enriched, but that someone else has been unjustly harmed by that enrichment.
5. Eser, The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Interests, Duquesne Law Review 4:345, 413 (1965).
6. See Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, Hofstra Law Review 17:1 (1988). Breyer was a member of the Commission that generated the federal guidelines. For the views, often critical, of another member of the Commission, see Robinson, A Sentencing System for the 21st Century?, Texas Law Review 66:1 (1987).
7. Dressler, Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code, Rutgers Law Journal 19:671, 701 (1988).
8. Not all thoughtful people agree that mercy is desirable in a sentencing system. For example, Professor Jeffrie Murphy has argued that judicial mercy constitutes "unjustified sentimentality". Judges, he has said, should "keep their sentimentality to themselves for use in their private lives with their families and pets". Murphy, Mercy and Legal Justice, Social Philosophy & Policy 4:1, 9 (1986).

Perhaps he is right, but I think much can be said for the view that the criminal justice system - and, more specifically, the judge in relation to the offender - ought to be (even though it is not now commonly) analogized to a family. After all, the paternalism that is so much an acceptable part of the family relationship "has its roots in our common humanity". Morris, A Paternalistic Theory of Punishment, Am Philos Q 18: 263 (1981). Punishment ought to communicate a similar message.

9. See Silets & Brenner, Commentary on the Preliminary Draft of the Sentencing Guidelines Issued by the United States Sentencing Commission in September, 1986, Journal of Criminal Law & Criminology 77: 1069, 1082 (1986).

PART 3

CONSISTENCY AROUND THE WORLD

CONSISTENCY IN AUSTRALIA

by

Frank Vincent

THE PRINCIPLE:

"Just as consistency in punishment - a reflection of the notion of equal justice - is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that avoidance and the elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community." [Lowe (1984) 58 ALJR 414 at 415 per Mason J.]

1. Legislative framework

The legislature has a central role in establishing the framework for sentencing decisions, not only in relation to the fixing of penalties appropriate for offences, but also with regard to the range and type of sentence to be available to the courts and the degree of discretion to be left to them in determining the appropriate level of response in a particular case. Properly performed, this function should result in the development of a coherent and integrated system with appropriate hierarchies that reflect the relative seriousness attributed to different offences and which permit the application of rational sentencing policies.

Unfortunately in the Australian context the reality has, up to the present time, been somewhat less satisfactory. The relevant legislation is scattered amongst a mosaic of State and Commonwealth Acts (with some 4,000 separate penalty provisions listed in the Victorian Statute Books alone), with duplications and inconsistencies not only from Act to Act, but often within the one piece of legislation. In Victoria, for example, there are more than 100 sections under which an accused can be ordered to pay compensation or make restoration to his victim; the correlation between fines and imprisonment, where the two are prescribed sanctions for the same offence, vary from statute to statute; the degree by which statutory penalties increase for second and subsequent offences show no consistent pattern; and generally speaking the legislature has only haphazardly differentiated between adult, juvenile and corporate offenders for the purpose of punishment.

Although the legislature does provide for maximum penalties in relation to specific offences, when a number of serious offences are compared it becomes apparent that there has been no consistent approach adopted. For example, in Victoria an offence of armed robbery carries with it a maximum penalty of imprisonment for 25 years, whilst manslaughter carries a maximum term of 15 years, and until recently the offence of conspiracy to murder was punishable by imprisonment for 10

years. If one includes as well the fact that the penalties in respect of offences under Commonwealth legislation are often significantly different to those applicable in relation to comparable State offences, the situation becomes even more absurd. More often than not the apparent seriousness with which particular conduct has been viewed, as reflected by the criminal sanction attached to it, has been more indicative of political sensitivity about the subject than it has been of any rational response to the conduct concerned. For many years persons who had been found guilty of an offence under section 86 of the Crimes Act (Cth) for conspiracy to evade tax were liable to imprisonment for a term of three years. As a consequence of the increased concern about this kind of behaviour, the maximum penalty has been increased twice within the last few years, first to five years imprisonment and then to 15 years.

Sometimes the legislature may specify factors which are to be taken into account when determining whether a particular sanction is appropriate (see Magistrates' Court Act (Vic) s 58(a); Crimes Act (Cth) s 19B(1)(c)) or may provide for a suggested ordering of priorities in the imposition of sentences (see Crimes Act (Cth) s 509, s 17A, Penalties and Sentences Act, (Vic) s 13B(1)) however such statements or guidance have been rare. Rather the tendency in drafting has been to provide for a broadly defined crime which carries a single but relatively high maximum (and sometimes, but not always, minimum) penalty, leaving the judiciary with an extensive, albeit not unfettered, discretion to select the sentence appropriate to the circumstances of the case.

Re-examination of legislative policy objectives in sentencing is under way at both State and Federal levels. One approach which appears to have found favour with the numerous bodies concerned with this area of reform is that instead of prescribing individual penalties for separate offences, there should be a classification corresponding to crimes of different levels of gravity. Such a scheme would provide an opportunity to rationalize statutory maxima and to maintain consistency between the gravity of an offence and its possible penalty. Some steps have already been taken in this direction. In May 1988, South Australia became the first state in Australia to fix maximum penalties by reference to penalty divisions which were contained in an Act of general application. A similar approach has been recommended in the interim report of the Sentencing Task Force on Maximum Penalties which was commissioned by the Victorian Attorney-General earlier this year, and has resulted in the laying before Parliament of a Bill which not only attempts to bring all sentencing provisions together in the one statute and place them in a hierarchy whereby offence seriousness is matched with sanction seriousness, so that like offences are subject to like maxima, but which also attempts to identify the mitigating and aggravating factors to be considered by those passing sentences, to state the purposes of different types of sanctions and the circumstance in which they are to be used, and to articulate generally the principal policy considerations to be taken into account when sentencing.

The difficulty of avoiding disparity between offenders and inconsistency in sentencing in the Australian setting is rendered more difficult by reason of the Federal system and the jurisdictional limits of different Courts within State systems themselves. For example, injustices can occur in situations where some offenders may be just young enough to fall within the jurisdiction of a Children's Court whilst co-offenders who are only a little older may be treated quite differently. With respect to this particular matter, changes have been effected to the Children's Court Act (Vic) which will enable the Children's Court to commit the younger children for trial in the County Court so as to avoid the likelihood of disparity arising.

Furthermore, the ability of State law to apply in Commonwealth places within the State and to Commonwealth controlled off-shore areas adjacent to the State ensures, at least, a measure of territorial consistency: Commonwealth Places (Application of Laws) Act (Cth), ie the state law becomes "federalized".

2. Judicial discretion

Judicial discretion in determining sentence occupies a central position in the Australian criminal justice system's arrangements for the handling of offenders. Where legislatures fear to tread, Judges and Magistrates tackle the task of sentencing convicted offenders, doing their best to discharge the responsibility which the law leaves to them. Where discretion exists both as to the degree and species of punishment, sentencers find themselves, in performing their function, required to attempt to achieve a number of often contradictory purposes, which themselves are reflections of communal uncertainty regarding the aims of the criminal law.

Major sources of disparity are often very divergent views among sentencers as to the relative seriousness of the type of offences, the relevance of various characteristics of offenders, and in relation to the proper use of different kinds of sentences. To some extent these difficulties reflect the lack of legislative guidance on how these measures fit into the scheme of sentencing.

Consistency has been sought through the generation of a jurisprudence of sentencing principles which the courts are expected to take into account in future cases. However it has been argued that the precise jurisprudential nature of these principles is unclear. There is a divergence of views as to whether they operate as binding legal fetters on other sentencers or whether they are merely guidelines which aid in the application of the discretion which the fixing of a sentence requires.

The proposed Penalties and Sentences Act (Vic) 1989, the Bill for which is currently before Parliament, however, makes provision for the handing down by the Court of Criminal Appeal of what are termed "guideline judgments", setting out guidelines

to be followed by judges and magistrates when sentencing offenders and which are to be binding unless the particular circumstances of the proceeding are so materially different as to require a departure from them. Such judgments may contain, inter alia, the criteria to be applied in selecting among the various sentencing alternatives, the purposes that should be pursued in sentencing offenders for a particular class of offence, the appropriate range of the various sentencing alternatives, the criteria by which the sentencing judge or magistrate is to determine the seriousness of a particular offence, the criteria which the sentencing judge or magistrate may use to reduce the sentence for a particular offence or the weighting to be given to relevant criteria. Furthermore, the Bill also provides its own general form of guidance for those exercising discretion in that it attempts, inter alia, to provide sentencing principles to be applied by courts in sentencing offenders and to set out the objectives of various sentencing options.

In relation to the sentencing of Commonwealth offenders, State courts are trying to obtain a greater uniformity when applying Commonwealth law by a modification of the doctrine of precedent. In R v Abbrederis (1981) 3 A Crim R 366, the New South Wales Criminal Court of Appeal took the view that where a Commonwealth statute has been construed by the ultimate Court of Appeal within any state or territory, that construction should, as a matter of ordinary practice, be accepted and applied by the courts of other states or territories so long as it is permitted to stand unchanged by either the court of origin or the High Court. Similar approaches have been adopted in other jurisdictions and whether or not such decisions satisfy any technical definition of a binding precedent, they do act as important points of reference in promoting uniformity within the jurisdictional system and between jurisdictional systems.

Although the overwhelming majority of sentences are handed down in the lower courts, the principle data on standards of judicial sentencing and principles of the same are derived from a very limited number of appellate decisions by the Full Supreme Courts in each State or territory. Furthermore these decisions are, themselves, sparsely reported. Sentencing decisions in the County Court are not reported at all. Some guidance and statistical data is provided in text books, digests and bulletins: for example, the Australian Sentencing Bulletin provides information in relation to criminal appeals from all States and a crude breakdown of classes of sentences is available for Magistrates' Courts in year books prepared by the Australian Bureau of Statistics. In New South Wales, a monthly newsletter is available to Magistrates and Judges with such relevant up-to-date data. It is worthy to note that in Victoria, a project is currently underway in the County Court, headed by Judge Mullaly, which is concerned with the production of a sentencing manual which would provide guidance to judges on factors to be taken into account and their weight in relation to a range of offences, both serious and relatively less so, that typically present difficulty for a sentencing judge. The aim of such

guidelines is to encourage consistency of approach by identifying significant factors in relation to severity of the offence, identifying mitigating factors which should be taken into account in mitigation, encouraging judges to articulate the policy or philosophical basis of a sentence, and by providing tariff information, sentencing options and remissions/merit-time and other corrections sentence-discount practices.

Furthermore, a Bill to establish a Judicial Studies Board and a Bureau of Crime Research and Statistics is currently before the Victorian Parliament. The function of these bodies are stated to include, inter alia, the conduct of seminars for judges or magistrates on sentencing matters, the conduct of research into sentencing matters, the preparation and circulation of sentencing guidelines to judges, magistrates and other interested bodies, the development and maintenance of a computerised statistical sentencing database for use by courts, the provision of sentencing statistics to judges, magistrates and other interested bodies, the monitoring of present trends and initiation of future developments in sentencing, and the provision of assistance to courts to give affect to the principles contained in, what is currently, the Bill for the introduction of the Penalties and Sentences Act 1989.

The Australian Institute of Judicial Administration also plays an important role in the dissemination of information, particularly with the educational courses and seminars it organizes for judges and magistrates. In September 1987, an inter-jurisdictional seminar and discussion on sentencing was conducted by this body in Melbourne, while sentencing seminars for individual jurisdictions were conducted in Western Australia, South Australia and Queensland soon after.

Nevertheless, there is, at this stage, no continuing monitoring of judicial sentencing practice sufficient to reveal the frequency with which each separate sentencing option under the various State and Commonwealth laws is utilised, the consideration which led to its use, or its practical efficacy.

3. Appellate review

In the sentencing of State offenders consistency is sought to be achieved largely through the unifying effect of an appellate review by a Full Court. Disparity of sentencing standards, not only between individuals but between jurisdictions, has been recognized by the Appellate Courts as a serious deficiency in the criminal justice system. A recurrent theme is that it is the task of the Court of Criminal Appeal to minimise sentencing disparity not only because it violates the principle of justice that like cases be treated alike, but also because it is "unfair in the absolute sense that the sentences which fall toward either end of the scale are simply and plainly wrong when they are measured against fairness and effectiveness"; R v Griffiths 1977 137 CLR 293 at 326 per Jacobs J.

However the use of appellate review as a means of evolving a "common law of sentencing" has been assailed not only as an excessively slow process, but also as one which may be unsuccessful in reducing disparity if it does no more than replace the discretion of the trial judge with that of the Appellate Court. In fact, uniformity can be undermined by many factors, including the imprecise and contradictory nature of the sentencing principles expounded, which appear to vary according to the composition of the court, and the inadequate system by which the communication of principles developed by appellate courts to the courts of first instance, is effected.

Frequently appeals against sentences are perceived as merely incidental to those against conviction, and appellate judgments frequently concentrate more on issues relating to the admissibility of evidence or the judge's charge to the jury than on sentencing policy. Even when these decisions do concern sentence, in many cases, particularly those which involve a confirmation of the original sentence, they do not state any explicit principle, but merely confirm the appropriateness of the sanction applied to the particular offence in question, or illustrate the balancing of principles, or give an example of how a particular sentencing problem should be approached.

Appeals against sentences imposed upon Commonwealth offenders within the State are also taken by the State court hierarchy. While this contributes to a common approach to the sentencing of both classes of offender within the State, it can also lead to a variation between States in the handling of persons facing identical Commonwealth charges, although, as has been earlier mentioned, principles are being developed to deal with this problem. While the ultimate Australian Court of Appeal in sentencing matters is the High Court, it has, until recently, been reluctant to grant leave to appeal in sentencing matters and has not provided a sufficiently close superintendence of the sentencing of Commonwealth offenders to guarantee that like cases will be dealt with alike throughout the Commonwealth. A new route for the review of Commonwealth sentences, in order to bring about a more uniform national approach to the punishment of Commonwealth crime, has been suggested by the Australian Law Reform Commission. In its Interim Report on Federal Sentencing, the Commission recommends that appeals against sentences in Commonwealth matters within a State be diverted from the superior courts in the separate States where they are now handled, to the Federal Court of Australia. This would serve as the first Court of Appeal in all Commonwealth sentencing matters throughout Australia, and, in theory, would provide, in the sentencing of Commonwealth offenders, a degree of national consistency as yet unrealized.

Finally, although Appellate Courts see their task as that of minimising disparities in sentencing standards, they also recognise that a fair margin of discretion must be left to the

sentencing judge. Accordingly they will only interfere with the sentence when the sentence is manifestly excessive or inadequate ie the principle upon which an Appellate Court will operate is when it is contended that there has been some miscarriage of discretion. Therefore, it is actually possible for a judge to secure himself or herself against interference by an Appellate Court by simply selecting a penalty close to the middle of the range of sentences imposed for that specific offence with which he is dealing, for it could hardly be said that such a disposition was either manifestly excessive or inadequate. Nevertheless, such a sentence, while not inconsistent on its face, may in reality not have been tied to the real issues at all, and accordingly operate, in a practical sense, in an inconsistent fashion.

**SENTENCING REFORM IN CANADA: PURPOSE, POLICY, AND
PRACTICE**

by

John W Ekstedt and Margaret A Jackson

Introduction

The purpose of this paper is to provide a summary discussion on the topic of sentencing practice in Canada. It will be organized around three perspectives: the history of sentencing initiatives; the principles, procedures, and practices which contribute to and/or serve to alleviate the problem of sentencing disparities; and the contemporary socio-political context. This work is being done to provide an appreciation of the elements of sentencing reforms as they have emerged in Canada historically and as they are being developed today.

Considerable attention has been given to the problems of sentencing practice in Canada in recent years. The creation of the Law Reform Commission of Canada in 1970 was a deliberate effort on the part of the Federal Government of Canada to begin a long term process of criminal law review which would include, as one of its parts, a review of sentences and dispositions. The Law Reform Commission has produced several research reports and working papers on the subject of sentencing. As well, other commissions and working groups, established since 1970, have explored particular aspects of sentencing in Canada.

The Law Reform Commission of Canada, especially in relation to its work on sentencing, had a number of historical predecessors which provided a broad base of review and recommendations for use by the Law Reform Commission and other study groups. These historical data include information on the emphases in sentencing practice which have occurred in the major socio-political areas of criminal law administration in Canada. It is the objective of the first section of this paper to briefly discuss this history.

Part I: The history of sentencing practice in Canada

It is generally conceded that sentencing practices, including the procedures established to serve the making of the sentence, tend to evolve from the constant requirement for compromise between contemporary community standards and the intentions reflected in legislation. The enigma of judicial decision-making is the requirement to interpret and apply legislation. This is particularly difficult as public attitudes change and when legislation does not provide options which satisfy public needs. Such was the case at the very beginning of Canada's experience with sentencing.

The historical roots of sentence administration in Canada are found in the penalty structure of England as it existed at the end of the 18th century. In 1791, Canada adopted the English Criminal Law. Since capital punishment was at the centre of the penalty structure in England, it also became the primary sentence imposed in Canada. (Sentencing Reform, p 22). Because this penalty structure seemed so disproportionate to many of the

offences which called for it, sentencing practices and procedures began to be modified to provide for alternative dispositions. It is arguable that the history of sentencing practice in Canada is a continuing response to the development of alternatives to capital punishment.

Banishment and transportation were the first sentencing options to capital punishment in Canada. These were provided for in the 1800 Statutes of Upper Canada and existed as the primary dispositions for serious offences until the establishment of the Kingston Penitentiary in 1835. At this time, incarceration became the preferred punishment for serious offences. Initially, there was some difficulty trying to determine equivalencies between time in incarceration and the time in which a person might have been banished or transported. By 1853 it had been decided that a sentence of seven years of transportation equalled a sentence of four years of incarceration (Sentencing Reform, p 24).

As patterns of sentencing (judicial decision-making) and systems of sentence administration (available dispositions, eg, prisons) were evolving, Canada was also developing politically. As Canada sought to establish itself as a federal State with divisions of power within it, there was a consequent effect on the way in which sentences were administered. In 1841 the provinces of Upper and Lower Canada were unified creating the United Provinces. In the same year a statute provided that provincial jails would be used for those persons serving prison terms up to a maximum of two years. A federal (penitentiary) sentence required a minimum of seven years in custody. Immediately it could be seen that this division of responsibility was awkward and presented extreme difficulties for a judge in determining sentence. Consequently, in the very next year (1842), amendments provided that a judge was not required to impose a maximum term of two years in a provincial facility or a minimum of seven years in a penitentiary. The minimum term for a penitentiary sentence was reduced to three years.

Concurrent with these developments was the determination in Canada of the location of power to make criminal law. By 1865, it had been generally established that the making of criminal law was the responsibility of the central government. This principle was embedded in the British North America Act of 1867 (now known as the Constitution Act). However, while the federal government's responsibility in the making of criminal law seemed clear, the responsibility of the provinces in the administration of justice was left less clear. This is in spite of the fact that the British North America Act locates the responsibility for the administration of justice with the provinces. Thus, in Canada, the federal government is responsible for the underlying philosophy of criminal justice as it is reflected in legislation, especially the Criminal Code of Canada. In most aspects of justice administration, the provinces bear the responsibility for procedures and practice. The constant collaboration and dialogue between the federal and provincial

governments on this division of responsibility remains the central issue in sentence administration in Canada to this day.

Following confederation, immediate attempts were made to rationalize sentencing in Canada. One of the important initiatives in this regard was the passing of the Consolidation Act of 1869 which attempted to rationalize the penalty structure in Canada on the basis of the English attempt to do so eight years earlier.

In 1868 the Penitentiary Act provided for the remission of sentences for good behaviour. Procedurally, the decision to allow for the adjustment of a sentence administratively continues as one of the most important and problematic aspects of sentence administration in Canada.

Finally, in 1892 the Criminal Code of Canada was enacted. It can be said that the enactment of the Criminal Code of Canada ended the era (1869 to 1892) during which the structure of Canadian criminal justice administration was initially rationalized. It also signalled the beginning of the modern era of criminal justice administration in Canada.

Sentence administration and the Criminal Code

The relationship between sentencing practice and sentence administration remains a matter of controversy and continuing discussion. The basic issue is whether dispositions emerge out of sentencing practice or sentencing practices emerge out of the availability of dispositions. There is no doubt that the era of the Canadian Criminal Code is one where the tension between sentencing practice and sentence administration is continually illustrated. The evolution of Canadian criminal justice since 1892 is found through a study of the history of amendments to the Criminal Code of Canada. While it is beyond the scope of this paper to discuss this history in much detail, it is worth noting that almost every period of major amendments to the Criminal Code of Canada have resulted from discrepancies between the decisions judges are required to make and the options available to them for disposition. The history of the Criminal Code is a history of adjustments to penalty structures as community attitudes about the seriousness of offences shifts and problems of sentence administration (primarily incarceration) increase.

During the first thirty years of the existence of the Criminal Code of Canada, the primary adjustments to it were with regard to the manipulation of the sentence of incarceration. However, beginning in the 1920s, the Criminal Code began to be amended to reflect new dispositions and new sanctions. These included probation (1921), suspended sentence (1927) and absolute discharge, conditional discharge and intermittent sentence (1972).

Not only has the Criminal Code of Canada been used to introduce substantial changes affecting sentencing practice in

the interpretation and application of law to criminal cases, but it has reflected the changes in ideology since 1892 which have influenced both sentencing practice and the practices of sentence administration. Probably the most profound of these ideological shifts occurred in the transition from a punishment ideology to a rehabilitation or welfare ideology. Because the system of criminal justice in Canada had been founded on such a severe set of punishment principles, the movement to modify these principles in practice evolved into an opposing ideology. In Canada, it is generally believed that this transition occurred in the 1930s and culminated in the 1938 report of the royal commission to investigate the penal system in Canada (the Archambault Report). This report triggered the age of rehabilitation in Canada and was followed in 1956 by an Inquiry into the Remission Service of Canada which resulted in the formation of the National Parole Board of Canada in 1958.

It is interesting that the development of a rehabilitation ideology in Canada proceeded with an anti-institutional bias. Very early in the evolution of reformatory or rehabilitative practices, it was determined that the use of a penitentiary or prison for this purpose was inappropriate. Consequently, the one type of sentence to an institution which would follow from a rehabilitation ideology was not popular or significantly used in Canada, ie, the indeterminate sentence. While there has been some limited use of the indeterminate sentence in Canada, (and, indeed, it has been resurrected in recent times for purposes of addressing a class of offender-the dangerous offender), it is normally used in Canada as an administrative device rather than a rehabilitative device. In other words, the indeterminate sentence tends to be used in Canada as a means of extending punishment when there is evident danger to persons and the outcome of a sentence on the offender and the public cannot be satisfactorily predicted. In these cases, the release of a prisoner from incarceration is regarded as best being determined administratively. It would be wrong to say that the indeterminate sentence in Canada has ever been effectively associated with the principles or practices of rehabilitation.

In Canada, rehabilitation was adopted as an underlying sentencing rationale for many years. However, there was and continues to be confusion about the way in which this sentencing rationale can be practically reflected in sentencing policy. This has never been resolved. In some ways, the problem with the indeterminate sentence reflects this. For instance, in 1947 a Criminal Code Amendment Act was passed which permitted the incarceration of habitual criminals for indeterminate periods. This use of indeterminate sentencing for this purpose was almost immediately criticized and remained a continuing irritation within the criminal justice system in Canada until it was abolished in 1977. However, the habitual offender legislation was replaced by the dangerous offender legislation which, in practice, simply continues the confusion about the rationale and purpose for this type of sentence.

Probably the most influential report addressing Canadian criminal justice in modern times is the Report of the Canadian Committee on Corrections (Ouimet, 1969). Ironically, this report reaffirmed many of the philosophical notions underlying rehabilitation with which Canada had been wrestling for a little over three decades. However, the general approach taken by the Ouimet Committee marked the end of the rehabilitation ideology in Canada; at least in the sense that it had been originally proposed. In important ways, this Committee signalled the beginning of what is now referred to as the reintegration/reparation era of sentence administration in Canada. This Committee reinforced the anti-institutional bias concerning the reformation of the offender which was articulated in the Archambault Report. As well, this Committee made numerous recommendations with regard to changes in sentencing purpose, the availability of alternative dispositions, and the review of the criminal law, in order to further rationalize criminal justice practice.

Numerous commissions and working groups followed on the heels of the Ouimet Committee. They investigated conditions in penitentiaries and prisons, researched the incidence of new "criminal case" social problems (such as the non-medical use of drugs), as well as reviewing the principles of sentencing and the availability of dispositions for sentencing. In 1974 the Law Reform Commission of Canada produced its document entitled, Sentences and Dispositions. This work led, finally, to the creation of the Canadian Sentencing Commission in 1983. Its report was tabled in the Parliament of Canada in 1987. Surrounding these initiatives has been a complete and thorough review of the Criminal Code of Canada (indeed, the entire criminal law of Canada) begun by the Department of Justice in 1978. This work is ongoing.

Part II: Addressing the problem of sentencing disparity

The previous section has established the general context for an examination of sentencing practice in Canada through a review of the various commissions' efforts and the legislative changes which determined the nature of available dispositions. We turn now to consider more specifically the structures and procedures which have influenced the evolution of sentencing practice in Canada.

This section will consider the procedural and administrative outcomes of actual sentencing practice in Canada. A variety of legal factors which mitigate in the direction of consistency (as well as inconsistency) will be examined (eg criminal law procedure, Criminal Code directives, prosecutorial powers, etc). In addition, extra legal factors which may mitigate against consistency (judicial bias, prosecutorial bias, policy bias, regional differences, public attitudes, etc) in the Canadian context will be considered.

It is first important to reemphasize that the present structure and procedure for sentencing in Canada were not created to apply to Canada's current social realities. They remain tied to the past; the English past.¹ Our current sentencing scheme was derived with little change from the English model in which every offence had to be dealt with by imprisonment. Our system of classifying offences and dividing them into categories of indictable and summary offences was also modeled on English penal practices. The Canadian Criminal Code was based with little alterations on Stephen's English Draft Code of 1878. The Canadian Colonies did not really separate from English tradition until 1892 when Sir John Thompson presented Canadian Parliament with its code of criminal law, which abolished common law in Canada (Jobson and Ferguson, 1987, p 9). It was at that time that the classification of offences was changed from the English felonies and misdemeanors to the Canadian indictable and summary offences. This categorization of offences is highly significant in areas of Canadian criminal procedure such as the mode of trial, appeal procedures and the actual sentencing outcome. It should be noted that the Criminal Code of 1892 set out specifically that an accused person who was charged with an indictable (as opposed to summary) offence should normally have the opportunity to be tried by a court comprised of a judge and jury. "Speedy" trials, however, could occur, if the accused elected to be tried by a county or district court (higher courts) judge sitting alone without a jury.

The fact that much of Canadian legal procedure is articulated in a national criminal code is also significant. First, the point made earlier about the division of legislative powers between the federal government and the provinces means that Canada cannot have an exhaustive national code. It is perhaps best therefore, to examine the Code's limitations before continuing on to discuss its importance for sentencing practice and administration. For example, the Code does not even contain all that might be considered federal criminal law. It is usually presented with related statutes, such as the Narcotic Control Act and the Food and Drugs Act, separately provided. The Code presumes the operation of an adversary system, although there is no specific reference made to such a system (Arbour and Taman, 1980, p 32). There is very little expression of basic principles which are established in case law, such as the presumption of innocence. Finally, there are no guidelines or factors provided in the code to indicate when imprisonment as opposed to a non-carceral sentence is appropriate; nor is there any guidance concerning the appropriate range of sentence to be handed down (Jobson and Ferguson, p 10).

Approximately one third of the Criminal Code is directed to procedural matters. But, upon closer examination, some of the fixed procedures in the code lend themselves to practices which may result in disparate sentencing. For example, mandatory sentences can affect the practices of the justice system from

the time of police arrest. If there is a choice, it is not unreasonable to think that the police would select a charge that has a mandatory sentence as opposed to a non-mandatory one. Such an articulated punishment also provides the prosecutor with plea negotiation powers as well. Given the psychology of a mandatory sentence that is perceived to be more harsh, judges and juries might consequently be more likely to acquit if the accused is charge with an offence that has a mandatory sentence attached. There are additional problems of cost to consider because the defence is more likely to expend time and effort in delay strategies with a charge that has a mandatory sentence resulting (Ibid, p 17).

Another relevant point arising from the Code's limitations is the fact that it is silent on the issue of the relative weight or priority to be assigned to various factors such as, age of offender, employment status, marital status, etc. These are left to the discretion of the trial judge. Offender characteristics (as opposed to offence characteristics) have often been thought to possess greater potential to introduce disparity into the judicial sentencing outcome. It has been argued that, in their attempts to take into consideration factors such as age, employment status, etc, or from stereotypic considerations of the accused (as in the case of women, aborigines, etc), Canadian judges may hand down inequitable sentences relative to other similar offence pattern cases. A study by Warner and Renner in the 1970s, for example, on the criminal sentencing process of the Halifax courts suggested that disparity was introduced into sentencing outcomes. A disproportionate number of accused were non-white and came from the low income district of the city.

The sentencing of minorities has proven more generally, as with the blacks in the States, to be a critical issue in the discussion of disparity in Canadian sentencing outcome. Native offenders are represented disproportionately in the federal and provincial institutions compared with their proportions in the general Canadian population (Daubney Report, 1988, p 211). This increases as one moves to the north and west. Thirty one percent of those incarcerated in the Prairies, for example, are of native origin. These individuals, once in the system, are less likely to become involved with correctional programming, less familiar with release procedures and thus have a lower probability of being released on parole than the general inmate population.

In several jurisdictions, since the mid 1970s, there have been initiatives directed toward assisting the native offender in the trial process; these are generally termed "native courtworker" programs and normally involve native staff who guide the individual native accused through the trial. Unfortunately, many of these have not been thought successful because of role confusion - is the courtworker to be an advocate or a social worker? - and financial cutbacks, which affect the quality of the programming.

Women represent another group of Canadian citizens that appear to be dealt with unfairly at sentencing - primarily because of what lies ahead of them after disposition. Facilities and resources are severely restricted for women offenders, since they are "too few to count" and therefore a disparity of a different sort emerges (Ibid, p 13). There is, at present, only one federal penitentiary for female offenders in Canada. Women housed there are discriminated against because of the singular location of the institution and the limited range of programming available, relative to the situation for male offenders. The location issue should be somewhat alleviated in the near future, however, with the construction of new facilities in the West.

The same disparity concern could be said to be true for sexual offenders in Canada, but for an opposite reason. There are currently more sex offenders in prisons than the various treatment programmes can handle; therefore one problem is that there are waiting lists for sexual offenders. But each of the available programmes uses different techniques and the facilities themselves vary greatly according to setting (Ibid, p 208). As a result, there is disparity in sentencing outcome amongst the same offence-type group, again because of differential treatment.

Dangerous offender legislation appears to create disparity of a different sort which, in the context of current sentencing practice, appears difficult to rationalize. Application for a dangerous offender hearing occurs after the conviction of an offender. If successful, it essentially places the offender on an indeterminate sentence subject to periodic review. This type of indeterminate sentence appears to conflict with the utilitarian "just deserts" approach now popular in Canada. It seems a "throw-back" to the earlier "rehabilitation" model; but, in reality, as described earlier, may only be an administrative tool.

The type of disparity more often highlighted, however, is of the first kind. That is, over-representation of minorities. Fairness and equity in sentencing are issues in regional disparity as well. What the break-and-enter offender receives by way of disposition in rural Yellowknife in the North may vary considerably from what the same type of offender (with similar offence characteristics) receives in urban Toronto. Variation of this nature emerges even within provinces. Social/political/economic/cultural (especially with native and other visible minorities) factors enter into the equation.

Legal Aid has been effective to some extent in reducing the disparity which can occur when an accused cannot afford a lawyer. However, another important finding from the Warner and Renner study was that a major proportion of the 1,033 cases examined did not have a lawyer representing the accused. For the poor, Legal Aid was generally only available for indictable (more serious) charges and here Legal Aid workers appeared overworked. More lenient dispositions were given to accused who could afford their own lawyer (p 82).

Another form of disparity which can arise in treating roughly similar cases in like fashion may occur when the range of dispositions available varies from jurisdiction to jurisdiction. If a prosperous urban community creates and supports a number of alternatives to incarceration programs, an offender may not receive a carceral sentence; this outcome may not occur for an offender in a small, rural, relatively poor community, which can not/does not support such corrective programming.

It is interesting to note that when the ultimate disposition is no longer available to the courts, as occurred in Canada in 1976 with the abolishment of capital punishment, disparity of a different sort can result - that is, **offence** (as opposed to offender) sentencing disparity. A "ceiling effect" is placed on the severity of sanctioning possible, which means no matter how onerous the criminal act, no one gets more than a life sentence. As well, the adjustment of the penalty structure in the absence of a death sentence appears to have resulted in a disproportionate severity in the application of the carceral sentence. Whereas prior to the abolishment, it could be argued that the judiciary attempted to avoid the death sentence, afterwards, two patterns in sentencing outcome were observed: a lengthening of the period of time before an offender was eligible for parole and the disproportionate use of the life sentence - both as a probable consequence of the judiciary's attempts to reassure the public through visible examples of severity that the absence of the death penalty did not cause more lenient treatment of the offender (Ekstedt and Griffiths, 1988, pp 402-403).

In light of these various "potentials" for sentencing disparity, the focus by government commissions and legislative reformers has been upon the enigma detailed in the first section. That is, the judicial requirement to interpret sentencing legislation and apply it equitably seemingly requires supporting provisions not present in the Criminal Code, ie, sentencing guidelines to reduce the potential for disparity. Judges may be in need of such guidance because they are in the institutionalized position of making sentences; they must, by legislated authority relate old law to current social conditions. Social conditions, however, are not consistent or constant nationally.

The committees discussed earlier, Ouimet, Archambault, the Law Reform Commission, and the Sentencing Commission, focused their recommendations upon judicial decision making, because of the almost mythological role of judges as neutral arbiters. This vision of judicial sentencing is highly symbolic. It represents the most visible aspect, the culminating activity, of the police and courts. Therefore, the perception of justice being done in the courts is critical. Any assistance available to the judiciary in arriving at equitable sentencing through guidelines and recommendations seems sensible. However, as discussed below, remedies might be more appropriately addressed at earlier stages in the process to focus on the means to the end, not just the end itself. But let us examine the judiciary first.

Given the importance placed upon judicial decision-making, it seems important to consider initially what rationale is used by judges in sentencing. What is the philosophy which underlies the sentencing rationale? There does seem to be a rather basic conflict and subsequent tension between the operation of the courts in sentencing and the programs/practices of corrections and sentence administration. One argument made to explain this philosophically is that the courts view man as rational; with free will. Thus judges are "just deserts"/utilitarian in their orientation. Corrections as an institution is thought to perceive man as being influenced by external forces in the environment. Therefore, it is rehabilitation/treatment oriented. On the other hand, as Hogarth determined in 1971 with Ontario court judges, these varying philosophies are distributed amongst individual judges as well-resulting in further confusion influencing the outcome of sentence. In fact, the Ontario judges presented such a range of philosophies and attitudes about the sentencing function, that this alone might account for disparities. A judge sentencing an offender for strict punishment purposes might understandably vary sentence "harshness" from a brother judge who sentences with rehabilitative concerns in mind.

Another disjuncture in philosophic outlooks is the public perception of what sentencing philosophy/rationale should be and what the judiciary perceive it to be. In many ways, the public is the body in society most affronted, most concerned about apparent disparity in sentencing - reflecting the need to "perceive" justice being done. In Canadian society, there has been a decline of public confidence in the criminal justice system in general and the sentencing and correctional processes in particular (Daubney, p 9).

Canadians recently polled about such matters as severity of sentencing and the use of incarceration, indicated beliefs which appeared to differ from those of the Canadian judiciary. The public believed that sentences were not severe enough; the exception being some individuals who felt that sentences for native Canadians and poor people were too harsh (Ibid, p 9). In pursuing this interest in Canadians' perceptions of sentencing, a study by Gebotys and Roberts found that the public favour a sentencing model which does not include offender characteristics being considered in the outcome. If these factors are employed, the authors argue that the resulting sentences will be perceived as inequitable by the public. Therefore, if the purpose a sentence is to serve (eg, "straight" punishment versus rehabilitation) is a determinant in sentence length and sentence length is a crude measure of sentence harshness, then it appears essential, in order to consider the disparity issue, to determine not only what the judiciary feels should be properly considered in weighing case information, but what the public (and offenders) believe as well. Further, what the prosecutor considers as important may be just as critical.

The extent to which the prosecutor may contribute to sentencing disparity has not been well considered. It is true that there have been discussions about the potential for abuse by Canadian prosecutors (Verdun-Jones and Cousineau, 1979). However, this potential and its reality, remain little studied in the context of concerns about sentencing disparity. But Canadian prosecutorial powers may have more potential for decision making that leads to disparate sentence outcome, than judicial powers. What the prosecutor considers as legitimate sentencing philosophy; what facts are weighed by the crown in the processing (or dropping) of a case; probably affects sentence outcome more definitively than what the judge does at final sentencing.

The powers of the prosecutor are many. The most obvious occurs at the time of laying or reviewing the charge. In Canada, the Crown, in addition to the mandatory sentence option described earlier, may also have the discretion to decide whether an offence is to be classified as a summary or indictable offence (in the case of certain offences termed "hybrid" offences). As mentioned earlier, the determination of whether the offence is summary or indictable has important implications for further processing of the case to disposition. And, such discretion is not normally reviewable.

The other point at which prosecutors may have significant influence on sentencing outcome is at the time of sentencing. According to Stenning, the law concerning the prosecutor's role at sentencing is in a state of flux at present (Stenning, 1986, p 261). The prosecutor appears to have a common law right to make representations at the sentencing hearing and this right seems to be generally accepted. What is not clear is the form Crown representations to sentence should take and what matters (eg, type, quantum of sentence, etc) may be addressed by the Crown. The possibility of joint submissions, that is by both Crown and defence at sentencing time, does not seem accepted as a practice. But there are varying views about the Crown's speaking to sentence at all. Some state that the practice ought not to be allowed, unless specifically requested by the judge. However, members of the Manitoba Court of Appeal (in *R versus Simoneau* (1978), 40 CCC (second) 307), took the following position: "it has been suggested that it is objectionable for counsel to mention a specific term or, as a variation of making a specific recommendation to suggest a range of sentence, ... however, I see nothing wrong in being specific when the circumstances call for it" (as cited in Stenning, 1988, p 260).

Therefore, we see throughout the process of bringing an accused forward to trial and sentencing, that the prosecutor has innumerable points of decision making and subsequent powers related to those decisions, which may affect sentence outcome. To briefly list others of these in Canada: the prosecutor has the power to initiate a criminal prosecution; to lay the charge against the accused; to prefer an indictment against the

accused; to recommend a stay of proceedings; to select mode of trial; to determine what evidence is released in discovery; to negotiate what charge is actually laid; to influence the appeal procedure; and, to withdraw charges. Even in matters such as having control over the calling of the prosecution's witnesses, the outcome of the trial itself may be affected.

On the basis of their findings in their Halifax court study, Warner and Renner argue forcefully that there was not an adversarial model being adhered to by either the Crown or defence counsel. Of the 203 cases in which Crown and defence could make recommendations, rarely was there conflict between the two lawyers in the recommendation. The judge, in turn, usually agreed with the lawyer recommendations, suggesting that judicial independence or the judicial role as neutral arbiter was hard to demonstrate (p 92). But the prosecutor basically has control - control primarily over the flow of information - whether to use, when to use, how to use - and information is critical to decisions made in conditions of uncertainty, as sentencing decisions must be.

Information, interestingly enough, with the potential for creating bias, has been increasingly available in the Canadian courts. One piece of legislative reform which resulted in the need for additional offender information was the Bail Reform Act of 1972, with amendments following in 1976. This Act effected a major change in relation to the "onus of proof" in bail hearings. The onus of proof shifted to the prosecutor to "show cause" why the accused should not be released from custody. This required an investigation in order to determine the offender's status with regard to residential stability, employment status, etc.

As well, reflective of the earlier rehabilitation model in sentencing practice, changes were made with regard to what information on individuals was acceptable in the trial itself. Information from "friends of the court" allowed the individualization of the sentencing outcome. Such information was available through the pre-court inquiry, through pre-sentence reports, through social work evidence, and psychiatric testimony. The pre-sentence report (PSR) was the primary mechanism which came to be used to assess whether an offender was suitable for probation. The PSR normally contained demographic information on the offender such as, age, marital status, employment history, educational level, reports on alcohol and drug dependency, as well as materials relating to the offender's current offence, prior record, previous probation and parole, etc. (Ibid, p 263), the very kind of information which appears to contribute to disparity in sentencing.

For example, knowledge about the marital or employment status of the offender may affect the judge or jury's perception of the individual and his or her worthiness or deservedness for punishment. It is ironic that in the attempt to become more aware of the offender's individual treatment/life skills needs (in the interest of fair and humane justice process) the courts may

have, as a consequence, become more disparate and unfair in sentencing for specific offenses. It undoubtedly is a fine balance to make between the consideration of individual circumstance in sentencing and proportionality in sentencing; placing the emphasis on the offender or the offense. The traditional legal model has always stressed the consideration of offense characteristics in sentencing decision-making - confusion has arisen with the increasing amount of offender information competing for consideration.

Therefore with this increased flow of complicating offender information in the trial process and the control over that information largely determined by the prosecutor's decision-making, it appears not unreasonable to suggest that the prosecutor's role ought to be examined more closely in relation to concerns about sentencing disparity. That, however, is a task for further research. Given the lack of empirical data to date concerning the impact of the prosecutor's role on sentence outcome in Canada, we are limited to a selected review of the initiatives which have been taken to assist the judiciary to reduce disparity in Canadian sentencing.

There have been many reforms suggested and some implemented for educating the Canadian judiciary on information usage. These include judicial training seminars on sentencing and computerized data bases, with sentence ranges for current case decisions available "on line" for judicial use. However, the mere provision of information is obviously not sufficient. There is clear evidence that disparity in sentencing can result even when information is made known, not just about offender characteristics, but about the community, the corrections institutions, and the offender programming available.

In an Ontario study of alternatives to imprisonment, for example, additional awareness of programmes available, such as Community Service Orders (CSOs), resulted in a "widening of the net" effect (Jackson, 1982). That is, offenders who normally would not have been given a sentence of incarceration received a CSO. In many cases, the effect of this was to place persons in formal programs of social control when the absence of such a program would result in no application of formal control. Similarly, when information of jail overcrowding is made known to the judiciary in a jurisdiction, it has been observed in the past that there can be increased numbers of shorter sentences or intermittent sentences resulting. As mentioned earlier, awareness of the local "culture" in Canada has also resulted in disparity in sentencing, especially as seen in the far north, but also regionally from East to West. Simply increasing information can result in disparity. The key is to assimilate information wisely without bias to form a knowledge base, not merely a "data" base subject to prejudicial interpretation. The manner by which this is achieved requires that attention be paid to basic principles: clarification of sentencing purpose; self-awareness of biasing attitudes and beliefs. It is of little value to advocate sentencing guidelines to achieve consistency and fairness, if there is not even agreement about the purpose of sentencing.

Finally, some mention should be made of the offender's perspective in sentencing. These observations are based on a survey of inmates conducted in 1984 for the Canadian Sentencing Commission. The appearance of justice being done remains significant not only for the general public, but for those of the public who are processed by the system. Whether sentencing disparities result from prosecutorial negotiation, prosecutorial or judicial discretion, or such factors as race, sex, and the socio-economic level of the offender, they are often perceived to be **unfair** disparities by the offenders themselves.

The issue of sentencing disparity generated considerable discussion in all the inmate groups surveyed for the report. There were two related matters on which all groups were in strong agreement. These were: the influence of socio-economic circumstances and judicial bias or prejudice. Examples were provided of disparity in sentencing arising between men and women offenders and between rural and urban court settings. It was generally believed that sentencing in rural areas is harsher than in urban areas and that men receive harsher sentences than women. There was strong general agreement across all groups that some form of sentencing guidelines should be provided. Most groups were very careful to qualify this response with the concern that the ability to consider individual circumstances be retained in the development of sentencing standards or guidelines; that disparity resulting from mitigating circumstances of the individual was just and fair, while disparity resulting from socio-economic, racial, or gender factors was unjust and unfair.

There was also general agreement that both prosecutorial plea bargaining and overcharging were very common occurrences. These behaviours seemed to be accepted by most interviewees as "part of the system". A common observation made was that if you are rich and hire a good lawyer you will receive a lighter sentence, regardless of what is deserved. Lawyers were thus often viewed as the "criminals" of the justice system.

A primary finding from the British Columbia survey suggested offenders desire certainty in sentencing whether it be through a "flat" sentence or a predictable parole release date. They equated certainty with justice. They supported sentencing guidelines and a general reduction in judicial discretion. Yet it is clear that the offenders wanted a balance to the guidelines which can only be achieved through a consideration of mitigating case circumstances and offender characteristics.

It is now an acknowledged tenet in judgment/decision-making theory that, in the face of insufficient information, judgements tend to be based on pre-existing biases and stereotypes. This tendency was attributed to judges' decisions and lawyers' judgements by the inmates surveyed. A recurring message emerging from this review appears to be the need for information for all participants; but information which is placed

in a "knowledgeable" context, based on an understanding of the function and purpose of the process. It is not thought, even by the inmates themselves, that discretion in court decision-making should be eliminated entirely, but that there be a wise consideration and balancing of circumstances, individual offender characteristics, and offense characteristics in each particular case.

PART III: The contemporary socio-political context

Since the second world war, most institutionalized forms and methods for social order or social control have been challenged. This was particularly true during the decade of the sixties when the combination of relative affluence and reduction in perceived external threats to safety created, in many western nations, an interest, particularly among the younger "baby boom" generation, in introspective re-examination of personal goals and the validity of social institutions to support those goals.

In criminal justice, as well, the interest in re-assessing "first principles" became practically an obsession beginning in the decade of the sixties and proceeding into the decade of the eighties. In the United States, Lyndon Johnson's "War On Poverty" and Richard Nixon's "President's Commission On Crime" - both undertaken during the decade of the sixties - stimulated a series of initiatives some of which continue to this day. The Law Enforcement Assistance Administration (LEAA) was established in the United States for the purpose of re-assessing fundamental principles and practices in American criminal justice. The programmes and studies flowing from LEAA have had a significant impact on both the American and Canadian criminal justice systems.

Previous sections to this paper have pointed out the historical evolution of sentencing practices from the perspective of each era's interest in sentencing reform. However, there is no doubt that the last twenty years have produced an accumulation of initiatives in this area far in excess of anything which occurred in any previous era. As is generally the case, Canada has, in some ways, been influenced by the activities in the United States with regard to its method and approach in addressing these issues. Many of the studies undertaken in the United States during the decade of the sixties and seventies were instrumental in the development of Canadian reviews on this subject. However, while Canada was caught in the general thrust of interest in the broad area of criminal justice review, its political and judicial systems are sufficiently different to have resulted in some genuinely original and important work.

Possibly the most important shift in the last twenty years related to the review of criminal justice matters has been the movement away from a concentration on problems in practice to a restatement of fundamental objectives. It has been generally conceded that in a decentralized federalist state like Canada, it is extremely difficult to implement consistent standards in

sentencing practice without a nationally recognized and clearly articulated sentencing purpose. While it is true that some official reviews in the criminal justice area were recommending attention to re-articulated statements of purpose as far back as the 1930s (Archambault, etc), the activity of actually establishing a nationally accepted statement of purpose in the area of sentencing did not begin until the early 1970s.

In the criminal justice area, the creation of the Law Reform Commission of Canada (1970) is usually regarded as the first formal effort to develop modern standards of criminal justice practice. Actually, other events preceded the formation of the Law Reform Commission of Canada which are significant and should be mentioned. The first of these was the passing by parliament of the Government Organization Act in 1966. This was an Act which created the Department of the Solicitor General for Canada and refocused the federal government's attention on problems of policing and corrections. The Minister for Justice at the time of this initiative was Pierre Elliot Trudeau, who, on becoming Prime Minister of Canada in 1968, became instrumental through his choice of Ministers and Deputy Ministers for Justice and Solicitor General, and because of his own constitutional interests, in the promotion and support of a continuing set of activities intended to revitalize Canadian federalism and address justice issues. There was a serious attempt in the late sixties and early seventies to restructure the dialogue between federal and provincial jurisdictions on a number of issues. It must be remembered that, in Canada, no national initiative can be successful without multilateral cooperation between these jurisdictions. Every task force and commission set up to review justice in Canada has used an approach intended to promote and increase dialogue between these jurisdictions on the issue under review.

It is probably fair to say that, over the last twenty years, Canada has been a leader in the production of quality studies and reports on matters related to criminal justice. The mechanisms established in Canada to proceed with these reviews have been quite successful and have maintained a reasonable standard of objectivity. However, it is also possible that the means by which this was accomplished became counterproductive to the implementation of proposed reforms.

Governments in western democratic societies are particularly sensitive about proposals for judicial reform. On the one hand, political intervention in judicial decision making is viewed as improper and contrary to principles of natural justice. On the other hand, the maintenance of the judiciary and the provision of a legal basis for judicial interpretation are legitimate responsibilities of governments. It is, therefore, important for the government to act to promote systems of justice which are compatible with the political objectives of society while not unduly interfering with the actual and immediate decision-making of judges in the consideration of specific cases. This line is sometimes fuzzy and there is general resistance among the

judiciary, in Canada, to any form of political review. As a result of this, it has been the practice of Canadian governments to place review commissions and task forces, particularly on this subject, at arm's length in order not to be immediately identified with any recommendations which may arise from them. The Law Reform Commission of Canada, for instance, was established with its own autonomous status reporting indirectly to the Department of Justice for Canada but provided with the freedom to act independent of the interests of the Department of Justice. However, this also works in reverse and legitimizes the Department of Justice, as well as cabinet and parliament, to act independently of any recommendations of the Law Reform Commission. The result of this has been that the Law Reform Commission of Canada has experienced continuing frustration with the government's policy response to their recommendations as well as the implementation of their recommendations through the government bureaucracy. This is interesting, since the freedom enjoyed by bodies like the Law Reform Commission of Canada gives them opportunity to actually make reformist recommendations while their position in relation to government makes it almost impossible for them to actively promote and implement those recommendations.

Another, more recent, change to the socio-political "ethos" of Canada has influenced the way in which the government and judiciary interact around matters of reform. This was the bringing into effect of the Charter of Rights and Freedoms on proclamation of the Constitution Act in 1982 (the end goal of Pierre Trudeau's constitutional reform efforts). The Charter gives the judiciary both the responsibility and the power to review the legislation of all governments in Canada to determine whether or not they stand in violation of the provisions of the Charter. Many argue that this has forced the judiciary into a social policy development role in Canada. While there is some indication that the higher courts have resisted assuming this role, decisions by the lower courts (where most Charter cases are heard) gives evidence to increasing involvement in policy disputes (eg the abortions issue). It is arguable that the result of all this is a judiciary with a growing sense of its own collective power and responsibility moving beyond the simple debate on the characteristics of judicial independence (where the issue rests on the relationship between government and the judiciary in case law matters) into the larger arena of the test between judicial supremacy and political or parliamentary supremacy in policy matters. This may be increasing the tension between the judiciary, the legislature, and the executive arm of government, further complicating any attempt by government to reform sentencing standards or sentencing practices.

Finally, it is worth noting that, in Canada, most of the contemporary initiatives to review sentencing practice and recommend sentencing reforms were established by the Liberal government and/or a bureaucracy with its roots in Liberal

policies. However, in 1984, the Progressive Conservative party defeated the Liberals and assumed the responsibility for the federal government in Canada. It is apparent that there exists some tension between the recommendations arising out of the task forces and commissions created by the Liberal government of Canada and the requirement of the Progressive Conservative government to respond to them. The recommendations of bodies like the Canadian Sentencing Commission may appear more "radical" than the current parliament and government executive are prepared to support.

It is arguable that all the major committees and task forces studying sentencing reform in Canada have been affected by these variables. Three of these bodies: the Law Reform Commission of Canada; the Canadian Sentencing Commission; and the Standing Committee on Justice and Solicitor General (Daubney Committee); give evidence to this in spite of the fact that they are very different types of committees. The Law Reform Commission of Canada is a continuing committee with appointed Chairs and regular staff. While it retains its independence from the bureaucracy of the government ministries involved in justice, it is clearly supported and its membership confirmed by those government agencies.

The Canadian Sentencing Commission was an adhoc committee established to respond to the work of the Law Reform Commission of Canada (and others) and produced a working document with recommendations for specific reforms. The structure of this commission allowed the specific recommendations to emerge out of a fairly "academic" and radical bent. The commissioners were appointed by order in council through recommendation of the bureaucracy of the Department of Justice with confirmation by the Minister for Justice. However, the commissioners were not instrumental in the direct activity of accomplishing the research or constructing the arguments resulting in the recommendations. Much of the research (perhaps the entirety of it) was accomplished by persons in Canada who had been identified with the Liberal goals of justice reform for many years. Many of the recommendations of the Canadian Sentencing Commission were recommendations which had been presented in various forms in Canada for twenty years or more.

The Daubney Committee represents yet another method employed in the Canadian context to pursue these reform issues in a politically acceptable way. The Daubney Committee was a committee of parliament created to respond to issues arising from the capital punishment debate in Canada as well as the recommendations of a variety of task force groups and commissions on justice matters. It was also an attempt to provide a particular Progressive Conservation "stamp" for any statements or recommendations about justice reform that emerged. The report which resulted from their work, "Taking Responsibility", has been well received in Canada, particularly

by the working bureaucracies of the justice system. It attempts to provide a balance between the obvious and generally agreed requirements for reform and the more radical and more extensive recommendations emerging from the work of other commissions and task force groups.

Regardless of the differences in the construction and formation of these various study groups, they all are affected by the conservative reflex resulting from the tension between political interests and broader social reform interests in Canada. While the more radical recommendations of the Canadian Sentencing Commission may not be implemented in the foreseeable future, the more conservative recommendations of the Daubney Committee may also not find implementation. The reason for this is that while the first may not receive the political support necessary to overcome judicial and bureaucratic reticence, the second may not stimulate reform because it provides the judiciary and the working bureaucracy with too many options for maintaining and expanding the status quo. (It is interesting to note that, as this paper is being written, the Canadian Criminal Justice Association is organizing a "lobby" to obtain a response from government to the recommendations of the Daubney Committee.)

The reform of the criminal law and criminal justice practice is necessarily a difficult and time consuming process. In societies where the promotion of individual liberties is held in equal regard with the desire for social order and collective well being, the ability of the state to intervene arbitrarily in law reform is blunted. Change occurs slowly and even as the creation of statute law follows belatedly on changes in social attitude, so the reform of practices occurs some distance away from the rhetoric which has preceded it.

FOOTNOTE

1. The example of Quebec's legal system is briefly highlighted to indicate one of the basic differences in the development of Canadian legal structures arising from the attempt to recognize the two founding cultures of modern Canada. Quebec has a mixed system of law: the public (criminal) law has developed from the English common law, while its private (civil) law is derived from its Romeo-German background. The development of Quebec civil law represented an attempt to preserve the province's French cultural identity from the growing influence of the Canadian national identity. On June 10th 1857, a bill entitled "An Act to Provide for Codification of the Law of Lower Canada Relative to Civil Matters and Procedure" was adopted. It essentially codified the provisions relating to civil matters and were based upon the French civil code (Gall, 1983, p 136).

Thus it could be said that this effort represented an attempt to reduce potential for disparity in legal matters; by having the familial, social, and economic systems of the French minority maintained in private law, while adhering to the structures and rules of the English source of public law (Ibid, p 136).

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SENTENCING IN GREAT BRITAIN

by

Gordon Nicholson

Introduction

Before attempting to describe how sentencing operates in Great Britain, it should be made clear that Great Britain consists of two entirely separate legal jurisdictions, namely that of England and Wales and that of Scotland. Although similar in many respects, the two jurisdictions have separate systems of law, separate court structures, separate prosecution services, separate prison services, and separate, though not wholly dissimilar, arrangements for parole. A brief description of the two systems may be helpful.

The criminal justice system in England and Wales

In England and Wales the majority of criminal law is in statutory form. Thus, most crimes have a maximum sentence prescribed by statute. In a few cases that is life imprisonment, but in most cases it is a determinate sentence of a number of years of imprisonment. There are two courts which have criminal jurisdiction in England and Wales - the Crown Court and the magistrates' court. The Crown Court is presided over by a High Court judge or, more commonly, a circuit judge, and deals with all cases on indictment (that is to say, before a jury). The magistrates' court is presided over by stipendiary or, more commonly, lay magistrates, and deals mainly with summary cases (that is to say, without a jury). The sentencing powers of the Crown Court are limited only by the maximum sentences provided for specific offences. The magistrates' court cannot generally impose a sentence of more than six months imprisonment or a fine of £2,000.

Apart from sentences of imprisonment and fines, courts in England and Wales also have available to them a wide range of alternative disposals. These include suspended and part suspended sentences of imprisonment; community service orders; compensation orders; and probation orders (with or without special conditions).

The prosecution of crime of England and Wales is now the responsibility of the Crown Prosecution Service. Prisons in England and Wales are the responsibility of the Home Office and, although parole was introduced throughout Great Britain by the same statute, the Criminal Justice Act 1967, there is a separate Parole Board for England and Wales, and the early release procedures operated by that Board are in some respects different from those which operate in Scotland.

The criminal justice system in Scotland

In Scotland the majority of criminal law is not in statutory form, and is to be found in the common law. That is the case in relation to, for example, murder, rape, robbery, assault, fraud, theft, and many other common crimes. As a result none of those crimes has a statutory maximum sentence: in all cases the maximum is a sentence of life imprisonment.

There are three courts which have criminal jurisdiction in Scotland - the High Court, the sheriff court, and the district court. The High Court has universal jurisdiction throughout the whole of Scotland, and its sentencing powers are unlimited. It deals only with cases on indictment, and in practice only the more serious cases are prosecuted before it. The sheriff court is a local court and is presided over by a sheriff, who is a professional judge. The sheriff court hears cases on indictment and summarily. When dealing with a case on indictment the sheriff may impose up to three years imprisonment: when dealing with a summary prosecution his sentencing powers are broadly similar to those of the English magistrates' court. The district court is the only lay court in Scotland. It deals with minor crimes which are prosecuted summarily, and its sentencing powers are restricted to a maximum of 60 days imprisonment or a fine not exceeding £1,000.

Like courts in England and Wales, Scottish courts have available the disposals of community service orders; compensation orders; and probation orders. However, suspended and part suspended sentences of imprisonment are not available in Scotland.

The prosecution of crime in Scotland is undertaken by a public prosecution service under the direction of the Lord Advocate for Scotland. Prosecutors in Scotland have a virtually absolute discretion as to whether crimes will be prosecuted summarily or on indictment, and as to the court in which a prosecution will be conducted. Since, in Scotland, maximum sentences are, as described above, greatly influenced both by the mode of prosecution and by the court in which the prosecution takes place, this means that prosecutors can exercise a considerable influence on the likely, or at least possible, sentence in a given case.

Prisons in Scotland are the responsibility of the Scottish Office and, as noted above, there is a separate parole board for Scotland.

Consistency in sentencing

Despite the significant differences which exist between the criminal justice systems of England and Wales and Scotland, the two jurisdictions share one thing in common - a virtual absence of any statutory guidance on sentencing. Over recent years there has been, both north and south of the border, a considerable amount of legislation relating to sentencing. However, the purpose of this legislation has been either to introduce new non-custodial disposals, such as community service orders, or to create procedural barriers which must be overcome before a prison sentence, and in particular a first prison sentence, can be imposed on an offender. There has been almost no legislation which seeks to define the aims and objectives of sentencing, or which offers guidance on the choice or quantum of particular sentences. One limited exception to that is to be found in certain statutory provisions, applying only to England

and Wales, which relate to the imposition of custodial sentences on young offenders. Section 1(4) and (4A) of the Criminal Justice Act 1982 (as amended by the Criminal Justice Act 1988) offers some guidance as to the circumstances in which a custodial sentence may be considered in such cases. (Section 1(4) and (4A) of the 1982 Act are reproduced as an appendix to this part of the paper.)

The general absence of legislative guidance in Great Britain springs no doubt from a reluctance on the part of Parliament to fetter, or to appear to be fettering, the independence of the judiciary. In the result, however, the intentions of Parliament are far from clear. What is reasonably clear (though it is never explicit in the legislation) is that for several years Parliament has been seeking to reduce the use that is made of imprisonment. Consequently, new non-custodial disposals have been created and, as noted above, reports exploring the possibility of using some of those disposals may have to be obtained and considered before a prison sentence can be imposed. What the legislation does not do, however, (apart from the one exception noted above) is to state the considerations which should guide the choice between a custodial or a non-custodial disposal; nor does the legislation give any indication of the kind of offender who, in the opinion of Parliament, ought not to receive a prison sentence.

Some indication of the present Government's views on such matters has been given in a recent Green Paper,¹ *Punishment Custody and The Community*, which was published in July 1988. That Paper contains provisional proposals for introducing, in England and Wales, a new kind of non-custodial order which could contain elements of community service and compensation coupled with intensive supervision and, possibly, some curtailment of liberty in the form of a night curfew or electronic monitoring. In presenting those proposals it is said to be the Government's view that "custody should be reserved as punishment for very serious offences, especially when the offender is violent and a continuing risk to the public".² However, those words represent the views of the present Government, not Parliament, and it remains to be seen whether or not effect will be given to them in future legislation. A White Paper, containing proposals relating to those, and other, matters is expected to be published early in 1990.

While the present absence of legislative guidance may be regretted (and is regretted by many) it does not mean that judges in Great Britain are left entirely rudderless when it comes to selecting and imposing a sentence. There are other ways in which some guidance is offered, though the ways in which that is done are somewhat different in England and Wales and in Scotland.

Sentencing guidance in England and Wales

There are at present three main ways by which some consistency in sentencing may be achieved in England and Wales.

These are: guideline judgments by the Court of Appeal; the activities of the Judicial Studies Board; and local and national agreements and guidelines among judges or magistrates sitting in the same court or district.

Guideline judgments. For some years now the Court of Appeal (Criminal Division) has adopted the practice of using an appeal against sentence as an opportunity to express a view on the appropriate sentence levels for different manifestations of a particular offence. Such "guideline judgments", as they are known, are given approximately twice or three times³ a year, and well known examples have concerned drug offences,⁴ causing death by reckless driving,⁵ and rape.⁶ In such cases the court will normally specify what ought, in its view, to be the sentence, or sentence range, for offences of varying degrees of gravity, and may also identify aggravating and mitigating factors which would entitle a sentencer to select a sentence above or below the guideline levels.

On one view the giving of guidance in this way is no more than a natural extension of the normal functions of an appeal court, and as such it may be more acceptable to other judges than guidance imposed by an outside body such as Parliament. On the other hand, guideline judgments have been criticised on a number of grounds. First, it is said that guideline sentences may be unrealistically high since they have been determined by a court which is accustomed to dealing only with sentences which are appealed: the court has no experience of the general run of sentences for those same offences which may be much lower, and which are never the subject of appeal. Second, it is said that, since guideline judgments are only given occasionally and in relation to a small number of offences, it is not possible to construct any coherent sentencing policy out of them. (In fairness, the Court of Appeal has never claimed that it is trying to formulate a general sentencing policy by means of guideline judgments.) Third, and this is perhaps a more significant consequence of the foregoing criticism, it is said that, since guideline judgments are only delivered in relation to the most serious offences, they offer no guidance in relation to the mass of less serious offences which are dealt with daily in the Crown Courts and the magistrates' courts.

Judicial Studies Board. For many years judges in England and Wales have met together from time to time to discuss matters of common interest, including sentencing. Some years ago, however, it was decided to coordinate such activities, and to support them, by the creation of the Judicial Studies Board. This Board is presided over by a High Court judge, and it arranges meetings, seminars and conferences at which, among other things, judges are kept informed about a range of topics concerning sentencing, at which judges can discuss among themselves their approach to particular sentencing problems, and at which, from time to time, judges take part in sentencing exercises. Additionally, the Judicial Studies Board prepares, and sends to all judges, a regular supply of information about

matters such as new or impending legislation, and recently decided cases of importance.

Local agreements. It has been common for some years, particularly in magistrates' courts, for local benches to adopt agreed "starting points" for sentencing. Since the fine is the most common penalty in such courts, the starting point in relation to a given offence will normally be expressed as a fine of a certain amount on the assumption that the offence is an average one of its kind, that the offender is a first offender, and that he is earning average wages. The actual penalty in any case may then be fixed above or below that starting point depending on the aggravating or mitigating factors which are present. This sort of approach goes a considerable way towards achieving some consistency in sentencing, but of course it may do so only on a very localised basis. The starting points selected by the magistrates in town A may be quite different from those selected by their counterparts in town B, and so any consistency that is achieved may only be of a very limited kind.

To meet this problem the Magistrates' Association has very recently (September 1989) published a provisional Sentencing Guide for Criminal Offences (other than Road Traffic).⁸ Although the use of this Guide is not mandatory, it is hoped that all magistrates will use it as a basis for their sentencing decisions. The Guide lists all the common offences which are tried in magistrates' courts and, in each case, sets out a guideline penalty (usually a fine) together with various plus or minus "seriousness indicators". Although the aim of the Guide is to bring about greater consistency in sentencing, it is stressed that "the guideline is the point from which it is hoped magistrates will start, not where they will finish". The Guide is a bold step in relation to achieving consistency for less serious offences, and its effectiveness will no doubt be watched with interest.

Other means of achieving consistency in England and Wales

Although the foregoing represent the main ways by which some attempt is made to achieve consistency, there are others which might go some way to realising that result. One is the right which was recently given to the Attorney General to refer to the Court of Appeal sentences which are thought to be unduly lenient. It seems to be fairly clear that this new power was introduced, not so much for the purpose of trying to achieve consistency in sentencing, but rather as a response to a series of well publicised cases where the sentences were perceived as being excessively lenient. Nonetheless, it is possible that the achievement of greater consistency might be a consequence of this new procedure, provided of course that it were to be utilised with some frequency. For the time being it is too early to say whether or not that will be the case.

Finally, it should not be overlooked that, at least in courts where several judges sit regularly, a degree of consistency in

sentencing may be achieved simply by virtue of the fact that those judges are likely to be aware of each other's views and sentencing practices, and may as a consequence adopt some measure of uniformity of approach. However, that consequence cannot be guaranteed, and any consistency which does flow from working proximity alone may of course be very local in character.

Sentencing guidance in Scotland

In Scotland a limited amount of guidance on appropriate levels of sentence is to be found in the decisions of the Court of Criminal Appeal, sitting within the High Court. However, that Court has never sought to offer explicit guidance of the kind that has been favoured in recent years by the Court of Appeal in England. Normally the Court confines its attention to the circumstances of the particular case before it, and only very rarely does it make pronouncements which have a wider effect. The result is that, although it is never expressly stated, a kind of tariff can in fact be discerned from the Court's judgments, though that is so only in relation to a small number of very serious offences such as, for example, rape or armed robbery. So far as less serious cases are concerned, there is no obvious pattern which might be followed by judges sitting alone.

Unlike the position in England and Wales, there is in Scotland no equivalent to the Judicial Studies Board, nor has any attempt been made so far to produce a guide for sentencers similar to that recently prepared by the Magistrates' Association. It is also the position for the present that, in Scotland, the Crown has no right of appeal against sentences which are thought to be too low: the recent statutory innovation referred to above applies only in England and Wales. Newly appointed sheriffs, and justices in the district court, do attend introductory training courses at which some attention is given to sentencing; but as a rule such courses are concerned with the general approach to sentencing and with its attendant procedures, and they do not aim to offer guidance on sentencing choice and sentencing levels. In the result Scottish judges at all levels are currently offered much less guidance on sentencing than are their colleagues in England and Wales.

Other moves towards achieving consistency

(a) Unitary fines

Both in Scotland and in England and Wales some thought is currently being given to the possible introduction of a unitary or day fine system similar to that already in use in countries like Sweden and West Germany. Under such a system a unit would be calculated for each offender on the basis of the amount which he could reasonably be expected to pay towards a fine on a daily, or possibly a weekly, basis, and the fine would then be expressed in terms of a number of such units. The number of

units would be determined having regard to such considerations as the seriousness of the offence, the offender's record, and so on. An experimental unitary fine system has now been operating for more than a year at four magistrates' courts in England and Wales.

The main perceived advantage of a unitary fine system is that it will produce greater equivalence of impact between offenders of different financial means. It does not, however, guarantee overall consistency in sentencing since the determination of the number of units for a given offence will remain within the discretion of the sentencing court. In the experiment referred to above the courts have had their existing guidelines converted to show numbers of units rather than amounts of money; but, as noted earlier, such guidelines are to be found as a rule only in magistrates' courts, and any consistency which they achieve might not be reflected were unitary fines to be used in all courts.

(b) Parole and early release

Although the main emphasis in any discussion about consistency tends to be on the sentence selected by a sentencing court, it is as well to remember that any attempts to achieve consistency at that stage can be undermined at a later stage by virtue of administrative decisions concerning parole or other early forms of release. In this regard it is important to note that in Great Britain, as in some other jurisdictions, there may be a tension between the punitive aims of a sentencing court and the aims of a parole board which may be largely measured in terms of rehabilitation and continuing dangerousness.

The present position in Great Britain (ignoring for present purposes some minor qualifications) is that offenders sentenced to determinate periods of imprisonment are entitled to a one-third remission of sentence for good behaviour. Moreover, such offenders may be considered for discretionary release on parole after they have served one-third or one year (in England and Wales six months) of their sentence, whichever period is the greater. Since the grant of parole is a discretionary matter, similar and consistent sentences of imprisonment may in fact turn out to be dissimilar and inconsistent in their actual operation with offenders being released on different dates notwithstanding that they had all received identical terms of imprisonment. Conversely, a judge in England, applying rational and consistent principles, might discriminate in sentencing three co-defendants by sentencing one to nine months imprisonment, one to 15 months imprisonment, and one to 18 months imprisonment. In practice, because of the operation of remission and parole, all three might be released from prison on the same day after serving six months of sentence. Needless to say, it is just as inconsistent for different cases to be dealt with in the same way as it is for similar cases to be dealt with in different ways.

In response to criticisms of the present parole system two committees of inquiry were established, in 1987 and 1988 respectively, to examine the operation of parole in England and Wales and in Scotland. The English committee, under the chairmanship of Lord Carlisle reported at the end of 1988, and the Scottish committee, under the chairmanship of Lord Kincaid, did so early in 1989.⁸ Although the recommendations of the two committees differ on some points of detail, both express one of their main aims as being to restore some certainty in sentencing. To that end they propose that parole, with its discretionary system of release, should be reserved only for those serving long, determinate sentences. In the case of all other determinate sentences it is recommended that there should be automatic conditional release at the half-way point in a sentence with a liability to recall for the balance of the sentence in the event of re-offending within the unexpired balance. These reports are presently being considered by Government, and it remains to be seen whether any implementing legislation will follow.

CRIMINAL JUSTICE ACT 1982
(as amended)

- s.1(4)** A court may not--
- (a) pass a sentence of detention in a young offender institution; or
 - (b) pass a sentence of custody for life under section 8(2) below,
- unless it is satisfied--
- (i) that the circumstances, including the nature and the gravity of the offence, are such that if the offender were aged 21 or over the court would pass a sentence of imprisonment; and
 - (ii) that he qualifies for a custodial sentence.
- s.1(4A)** An offender qualifies for a custodial sentence if--
- (a) he has a history of failure to respond to non-custodial penalties and is unable or unwilling to respond to them; or
 - (b) only a custodial sentence would be adequate to protect the public from serious harm from him; or
 - (c) the offence of which he has been convicted or found guilty was so serious that a non-custodial sentence for it cannot be justified.

FOOTNOTES

1. Cm 424.
2. Ibid, para 1.8.
3. R v Aramah (1982) 4 Cr App R (S) 407.
4. R v Boswell [1984] 1 WLR 1047.
5. R v Billam [1986] 1 All ER 985.
6. For some years now the Magistrates' Association has published, for the use of magistrates, a table of suggested penalties for road traffic offences.
7. Criminal Justice Act 1988, ss 35, 36.
8. The Parole System in England and Wales - Report of the Review Committee, 1988, HMSO, Cm 532; Parole and Related Issues in Scotland - Report of the Review Committee, 1989, HMSO, Cm 598.
9. Carlisle Report: over four years; Kincaig Report: over five years.

SENTENCING IN NEW ZEALAND

by

John Henry

Court structure

There are two courts of original jurisdiction, the District Court and the High Court. The District Court deals with summary offences and indictable offences triable summarily. It has limited jurisdiction to conduct jury trials. The High Court is concerned with what could be described as the more serious indictable offences. An appeal lies to the High Court sitting as a single Judge and from the High Court to the Court of Appeal, which sits with a minimum of three Judges.

Sentencing provisions

The statutory provision creating an offence (all offences are statutorily based) also provides the maximum penalty which that offence can attract. In some instances a minimum penalty is also provided, but in general those are confined to offences of a regulatory nature or relate to the removal of a privilege such as disqualification from holding a licence to drive a motor vehicle. There are also examples of mandatory penalties, the most notable being murder for which a sentence of life imprisonment must be imposed. Subject to those somewhat rare exceptions, the particular statute will leave the Court with a wide discretion so as to enable the particular circumstances of the offences and of the offender to be assessed. The exercise of this discretion is controlled primarily from two different sources.

The first is a general statute, namely the Criminal Justice Act 1985, which inter alia provides the Court with a variety of sentencing options and also contains guidelines in some instances which the Court must apply. (Some extracts from the 1985 Act are reproduced as an appendix to this part of the paper.) The purpose of the Act is to bring sentencing practices and principles up to date in the light of social changes. Main objectives include the protection of the community from violent offenders, the creation of a cost-effective system with an increased emphasis on community participation and a recognition of the effects of crime on victims. Imprisonment for property and minor offences is discouraged. The statutory options which are in theory available wherever a sentence of imprisonment may be imposed include:

- .. discharge without conviction
- .. convict and discharge
- .. come up for sentence if called upon
- .. imposition of a fine
- .. reparation
- .. imposition of a community-based sentence involving the carrying out of some form of community service

- .. periodic detention
(weekend residential work programmes)
- .. supervision (probation)
- .. corrective training
(a three months full-time custodial sentence for young offenders only)
- .. preventive detention
(indefinite imprisonment, used primarily for persistent sex offenders).

The guidelines contained in the Act lay down certain matters of policy for the Courts to follow. For example:

violent offenders are to be imprisoned in the absence of special circumstances (s 5)

offences against property punishable by 7 years imprisonment or less are not to carry imprisonment in the absence of special circumstances (s 6)

any sentence of imprisonment to be as short as possible (s 7)

an offender under 16 years of age is not to be imprisoned for an offence that is not purely indictable (ie not triable summarily in the District Court and therefore necessarily of a serious nature)

imprisonment is not to be imposed unless the offender has received (or refused to accept) legal representation (s 10)

time spent in custody awaiting trial or sentence must be taken into account (s 81)

eligibility for parole is in general not a relevant factor. The Court is not empowered to order a non-parole period of imprisonment.

In practice these guidelines have generally been found to be of assistance in sentencing in that they help to define broad parameters and to clarify the social policies determined by government. It is believed they have contributed to meeting the problem of consistency, and probably also have had a favourable effect on the number of persons imprisoned.

Court of Appeal

The second source of control is the Court of Appeal which tends to set patterns of a general nature in its overall appellate consideration of sentences brought before it by either the offender or the Crown. Of recent years the Crown's right of appeal against inadequacy of sentences has been used and this

RAPE
R v Puru [1984] 1 NZLR 248
R v Te Pou [1985] 2 NZLR 508
R v Clark [1987] 1 NZLR 380

SEXUAL ABUSE OF CHILDREN
(cases as yet unreported)

AGGRAVATED ROBBERY
R v Moananui [1983] NZLR 537

DRUG OFFENCES
R v Smith [1980] 1 NZLR 412
R v Urlich [1981] 1 NZLR 310
R v Latta [1985] 2 NZLR 504

(a) A committee is presently considering the establishment of a sentencing information system which would be available on computer retrieval to demonstrate the range of sentences imposed for similar types of offending. No firm proposal has yet been formulated but the committee has indicated its initial preference for a statistics base similar to that operating in Canada, a variation of which is also understood to be used in New South Wales.

(b) A Ministerial inquiry into the prisons system recently reported to the Minister of Justice. The inquiry covered wide-ranging topics relevant to all aspects of the system, including the philosophy of imprisonment as being an answer to crime. The effectiveness of imprisonment as a means of achieving its stated aims is questioned by the report, particularly in the light of a high prison population, the undue proportion of prisoners being of Maori origin, and the extent of recidivism. For the purposes of this paper, the relevant recommendations centre on a system of habilitation centres, described as a range of therapeutic centres in which offenders are contained in custody. Whether or not such a system would require a consequential change in the assessment of the length of custodial sentences will need consideration by the Courts in due course. The report suggests a general change of approach which may well have an effect on the appropriateness of present sentencing principles.

CRIMINAL JUSTICE ACT 1985 (AS AMENDED)

SOME RELEVANT PROVISIONS

5. Violent offenders to be imprisoned except in special circumstances

(1) Where--

- (a)** An offender is convicted of an offence punishable by imprisonment for a term of 2 years or more; and
- (b)** The court is satisfied that, in the course of committing the offence, the offender used serious violence against, or caused serious danger to the safety of, any other person,--

the court shall impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, the offender should not be so sentenced.

(2) Where--

- (a)** An offender is convicted of an offence punishable by imprisonment for a term of 2 years or more; and
- (b)** The offender has previously been convicted on at least 1 occasion within the preceding 2 years of such an offence; and
- (c)** The court is satisfied that, in the course of committing the offence, and in the course of committing the previous offence, the offender used violence against, or caused danger to the safety of, any other person,--

the court shall impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, the offender should not be so sentenced.

(3) In determining the length of any sentence of imprisonment to be imposed in any case to which subsection (1) or subsection (2) of this section applies, the court shall have regard, among other matters, to the need to protect the public.

(4) This section shall be read subject to section 8 of this Act.

5A. Violent offending while on bail, etc.

(1) Where--

- (a) An offender is convicted of an offence punishable by imprisonment for a term of 2 years or more; and
- (b) The offender was, at the time of committing the offence, on bail or remanded at large in respect of any other offence involving violence against, or danger to the safety of, any such person; and
- (c) The court is satisfied that, in the course of committing the offences, the offender used violence against, or caused danger to the safety of, any other person,--

the court shall impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, the offender should not be so sentenced.

(2) In determining the length of any sentence of imprisonment to be imposed in any case to which subsection (1) of this section applies, the court shall have regard, among other matters, to the need to protect the public.

(3) Any sentence of imprisonment imposed by the Court shall be cumulative upon any sentence of imprisonment to which the offender is then subject for the offence for which the offender had been on bail or remanded at large, unless the court is satisfied that, because of the special circumstances of the offence or of the offender, the sentence should be concurrent with the earlier sentence.

(4) This section shall be read subject to section 8 of this Act.

6. Offenders against property not to be detained except in special circumstances--

Where an offender is convicted of an offence against property punishable by imprisonment for a term of 7 years or less, the court shall not impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, any other sentence that it could lawfully impose would be clearly inadequate or inappropriate.

7. General limitation on imprisonment--

(1) Where an offender is convicted of an offence punishable by imprisonment, the court shall, in considering the sentence it should impose, have regard to the desirability of keeping offenders in the community so far as that is practicable and consonant with promoting the safety of the community.

(2) Where the court considers that it should impose a sentence of imprisonment, the term of the sentence shall be as short as is, in the opinion of the court, consonant with promoting the safety of the community.

(3) This section shall be read subject to section 5 of this Act.

8. Limitation on imprisonment of persons under 16 years--

(1) No court shall impose a sentence of imprisonment on a person who at the time of conviction is under the age of 16 years except for a purely indictable offence.

(2) In subsection (1) of this section, a "purely indictable offence" means any indictable offence within the meaning of section 2 of the Summary Proceedings Act 1957, other than an offence for which, by virtue of section 6 of that Act, proceedings may be taken in a summary way in accordance with that Act.

9. Corrective training or imprisonment may be imposed where offender unlikely to comply with other sentences--

Nothing in section 6 or section 7(1) of this Act shall limit the discretion of the court to impose a full-time custodial sentence on an offender where the court is satisfied on reasonable grounds that the offender is unlikely to comply with any other sentence that it could lawfully impose and that would otherwise be appropriate.

11. Reparation to be considered in all appropriate cases--

In every case where an offender is convicted of an offence for which a sentence to make reparation may be imposed, the court shall impose such a sentence (whether by itself or in conjunction with any other sentence or order) unless it is satisfied that it would be inappropriate to do so.

12. Court may take into account offer to make amends--

(1) In imposing a sentence in any case, a court may take into account any offer of compensation made by or on behalf of the offender to the victim.

(2) In deciding whether and to what extent any such offer of compensation should be taken into account, a court may have regard to whether or not the offer has been accepted by the victim as expiating or mitigating the wrong.

(3) Without limiting any other powers of a court to adjourn, in any case contemplated by this section a court may adjourn any question of sentence pending the payment of compensation.

12A. Court not to take into account alcohol or drugs, etc., in certain cases--

(1) Subject to subsection (2) of this section, where--

(a) An offender is convicted of an offence; and

(b) The court is satisfied that, in the course of committing the offence, the offender used violence against, or caused danger to, any other person,--

the court, in imposing a sentence, shall not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by alcohol or any drug or other substance, unless the court is satisfied that the offender did not consume or use the alcohol, drug, or other substance voluntarily.

(2) Nothing in subsection (1) of this section shall limit the power of the court to impose any sentence or to make any order or to give any direction intended to promote the rehabilitation of the offender.

**FEDERAL SENTENCING GUIDELINES IN THE UNITED STATES
OF AMERICA**

by

Jon O Newman

Background

In the United States, the effort to lessen disparity in sentencing has produced significant developments, whose ultimate worth remains to be determined. The most comprehensive approach was adopted by the federal government. All sentences of those committing federal crimes after November 1, 1987, are now imposed by federal judges in accordance with an elaborate system of "sentencing guidelines".

Though the great majority of crimes in the United States are prosecuted in state courts and most ordinary "street" crimes such as murder, assault, rape, and robbery are not within the authority of the federal courts, federal crimes include a wide variety of criminal conduct, ranging from special offenses such as federal tax evasion to more ordinary offenses involving drugs, gambling, bank robbery, and a wide variety of frauds. Many crimes may be prosecuted in both federal and state courts. Drug offenses are a prime example. In fiscal year 1988, the federal courts concluded cases involving 56,441 defendants. The volume and range of federal criminal jurisdiction is therefore sufficiently broad to warrant examination of the origin, operation, and merits of the federal sentencing guideline system.

Three developments contributed to the evolution of the sentencing guidelines, two involving policy and one involving technique. During the 1960s and 1970s, the amount of reported crime in the United States increased, and crime became a political issue. Sentiment for more effective law enforcement was frequently expressed, often accompanied by demands for more severe punishment. Conservative proponents of this point of view sought not only longer prison sentences but also changes in the parole system to prevent the early release of sentenced prisoners.

During this same period, liberals approaching criminal law issues from quite a different perspective also found much to criticize in sentencing patterns. Concerned about fairness, they criticized disparities in sentencing and pointed out that even where somewhat similar sentences were imposed, the parole system contributed to disparities because of seemingly unjustified variations in the times served before parole release. Liberals who had at one time championed rehabilitation as a core concept in sentencing became disillusioned, some doubting that rehabilitation occurred during incarceration and most agreeing that parole authorities lacked the ability to determine when sufficient rehabilitation had occurred to warrant parole release.

The technical development occurred in 1973 when the United States Parole Board (now called Commission) began to use guidelines for making parole release decisions. Recognizing the disparities in its own decision-making, the Board analyzed thousands of its decisions and attempted to determine the average time served for various combinations of offenses and

offender characteristics. The Board produced a table or grid with several columns for different degrees of severity of the offense and several rows for different point scores that reflect adverse aspects about the offender, primarily the extent of his prior record. At the intersection of each row and column was a different range of months, with the high figure of each range no more than four months greater than the low figure. The Board made its parole release decisions according to the range appropriate for the prisoner as indicated in the table in about 85% of all cases, departing about equally above and below the indicated release ranges in the remaining 15%.

The Sentencing Reform Act 1984

The political interest in punishment that was both more severe and more fair coupled with the use of a mechanism for structuring penal decisions combined to produce a climate favorable to sentencing guidelines. In 1984 an unusual coalition of conservatives and liberals joined forces in the United States Congress to enact the Sentencing Reform Act 1984. This law created a Sentencing Commission and assigned it the task of devising sentencing guidelines. The statute requires federal judges to use the guideline system for all sentences. Previously a judge had discretion to select a sentence anywhere from probation up to the maximum penalty specified for a particular crime, except in those few instances where the law defining the offense also specified a minimum sentence. The 1984 law provides that the sentence must be selected from within the range of permissible sentences set by the sentencing guidelines, except in those situations where the judge determines that the case at hand presents "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines".

In 1986, the Commission, which includes three federal judges, issued its first set of guidelines, applicable to offenses occurring after November 1, 1987. The guidelines were used infrequently at first, both because of the time for post-November 1 crimes to reach the sentencing stage and because about half the federal judges ruled that the guideline system violated the United States Constitution. In 1989, the United States Supreme Court ruled that the guidelines were constitutional, and they are now used for an increasing percentage of federal crimes as offenses occurring after the effective date of the guidelines reach the federal courts.

The sentencing guidelines

The guidelines are extraordinarily comprehensive and detailed, filling a book of more than 200 pages. They apply to all federal crimes. They work as follows: For each type of offense, for example, drugs, robbery, or fraud, a "base offense level" is set forth. Specific numerical values are specified that increase the base offense level because of aggravating factors, for example,

the extent of injury inflicted or the amount of money taken. Further adjustments are specified, again with numerical values, depending on characteristics of the victim and the offender's role in the offense. These adjustments are added to the base offense level to yield a final offense level. Points are assigned to reflect the seriousness of the offender's prior criminal history.

The various offense levels and criminal history scores are arranged in a sentencing table, resembling the parole guidelines in format. (That table is reproduced for reference as an appendix to this part of the paper. The version shown in that appendix is the original one: it has subsequently been modified very slightly.) The sentencing table contains 43 rows, one for each of the offense levels, and six columns for different criminal history point totals. At the intersection of each row and column is a sentencing range that sets the minimum and maximum sentences for an offender with the appropriate offense level and criminal history. The range between the minimum and the maximum of each range is usually six months at the less severe levels of punishment and as much as 80 months at the most severe levels. The judge selects a sentence from within the specified range, but has limited discretion to "depart" and select a sentence either above or below the guideline range.

As an example, in a robbery case, the judge would start with the base offense level for robbery, which is 18. The judge would then add 3 levels because the amount of money taken was between \$50,000 and \$250,000, then add 3 more levels because a weapon was used, then add 2 more levels because injury (but not serious injury) occurred, then add 2 more levels because one of the bank tellers was tied up, then subtract 2 levels because the offender played a minor role in the offense, such as driving the getaway car, and then subtract 2 more levels because the offender acknowledged responsibility for the crime. The final offense level is therefore 24. The judge then calculates the criminal history score, assigning 2 points for a prior conviction for which the offender was sentenced to six months and 1 point for a prior conviction for which the offender was sentenced to 30 days. The total of 3 points places the offender in criminal history category II. The judge then consults the sentencing table and sees that for offense level 24 and criminal history category II, the sentence range is 57 to 71 months. The judge then selects a sentence within this range, unless the cause presents special circumstances justifying a departure above or below this range.

Parole and right of appeal

The Sentencing Reform Act also made two important changes in federal sentencing practices, in addition to requiring use of sentencing guidelines. First, the Act abolished parole. Whatever sentence is imposed under the guideline system, whether within the guideline range or, where permitted, as a departure from the range, is served without the possibility of reduction by

parole release. The sentence can be shortened by about one-seventh since the prisoner may earn 54 days a year for good behavior.

Second, the Act authorizes appellate review of sentences. Previously federal appellate courts had no authority to entertain appeals challenging the severity of the sentence, except in the extremely rare situation where the sentence was so extraordinary as to violate the constitutional ban against cruel and unusual punishments. Under the new Act, every sentence may be appealed. Sentences imposed within the applicable guideline range may be challenged on the ground that the sentencing judge selected an incorrect guideline; sentences imposed outside the applicable guidelines range may be challenged on the ground that the departure was unreasonable.

Assessment of sentencing guidelines

Since the number of cases involving offenses after the effective date of the sentencing guidelines is still fairly small (though increasing rapidly), it is too early to draw firm conclusions about them. Initially, nearly all of the federal judges were opposed to the guidelines, finding them too complicated and too restrictive of their discretion. With the guidelines now in use, that attitude is beginning to change, though most federal judges would still prefer to return to the era before guidelines. There is reason to believe that sentences have become more severe, especially for drug offenses, but that increase is attributable to new federal laws that require high mandatory minimum sentences, with the guidelines merely reflecting these new statutory requirements.

Whether disparities are being reduced has not yet been assessed. Some prosecutors have reported a reduction in the percent of defendants pleading guilty, presumably because defendants do not receive nearly as great a reduction in sentence for forgoing a trial under the guidelines as they did previously. However, data on the incidence of guilty pleas has not been systematically assembled. The appellate courts are seeing a number of appeals, but thus far the total is not overwhelming. As had been hoped, the appellate courts, in deciding guideline cases, are beginning to fashion sentencing "law", something that was virtually absent from federal criminal jurisprudence. Ultimate assessment of the guideline experience will have to await at least another year of the new system.

In a few of the state jurisdictions in the United States, limited guideline systems are in use. These systems are neither as comprehensive nor as complicated as the federal guideline system. Most apply only to selected categories of offenses and focus primarily on the decision whether or not to incarcerate, rather than on sentence length.

The United States experience with sentencing guidelines, especially at the federal level, is a bold experiment in structuring the discretion of sentencing judges. It will warrant careful examination in the coming years.

United States Sentencing Commission

SENTENCING TABLE

Guideline Range in Months of Imprisonment

Offense Level	<u>Criminal History Category</u>					
	I (0)	II (1 or 2)	III (3 or 4)	IV (5 or 6)	V (7 or 8)	VI (9 or more)
1	0 - 1	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6
2	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6	1 - 7
3	0 - 3	0 - 4	0 - 5	0 - 6	2 - 8	3 - 9
4	0 - 4	0 - 5	0 - 6	2 - 8	4 - 10	6 - 12
5	0 - 5	0 - 6	1 - 7	4 - 10	6 - 12	9 - 15
6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15	12 - 18
7	1 - 7	2 - 8	4 - 10	8 - 14	12 - 18	15 - 21
8	2 - 8	4 - 10	6 - 12	10 - 16	15 - 21	18 - 24
9	4 - 10	6 - 12	8 - 14	12 - 18	18 - 24	21 - 27
10	6 - 12	8 - 14	10 - 16	15 - 21	21 - 27	24 - 30
11	8 - 14	10 - 16	12 - 18	18 - 24	24 - 30	27 - 33
12	10 - 16	12 - 18	15 - 21	21 - 27	27 - 33	30 - 37
13	12 - 18	15 - 21	18 - 24	24 - 30	30 - 37	33 - 41
14	15 - 21	18 - 24	21 - 27	27 - 33	33 - 41	37 - 46
15	18 - 24	21 - 27	24 - 30	30 - 37	37 - 46	41 - 51
16	21 - 27	24 - 30	27 - 33	33 - 41	41 - 51	46 - 57
17	24 - 30	27 - 33	30 - 37	37 - 46	46 - 57	51 - 63
18	27 - 33	30 - 37	33 - 41	41 - 51	51 - 63	57 - 71
19	30 - 37	33 - 41	37 - 46	46 - 57	57 - 71	63 - 78
20	33 - 41	37 - 46	41 - 51	51 - 63	63 - 78	70 - 87
21	37 - 46	41 - 51	46 - 57	57 - 71	70 - 87	77 - 96
22	41 - 51	46 - 57	51 - 63	63 - 78	77 - 96	84 - 105
23	46 - 57	51 - 63	57 - 71	70 - 87	84 - 105	92 - 115
24	51 - 63	57 - 71	63 - 78	77 - 96	92 - 115	100 - 125
25	57 - 71	63 - 78	70 - 87	84 - 105	100 - 125	110 - 137
26	63 - 78	70 - 87	78 - 97	92 - 115	110 - 127	120 - 150
27	70 - 87	78 - 97	87 - 108	100 - 125	120 - 150	130 - 162
28	78 - 97	87 - 108	97 - 121	110 - 137	130 - 162	140 - 175
29	87 - 108	97 - 121	108 - 135	121 - 151	140 - 175	151 - 188
30	97 - 121	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210
31	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235
32	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262
33	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293
34	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327
35	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365
36	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405
37	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405	360 - life
38	235 - 293	262 - 327	292 - 365	324 - 405	360 - life	360 - life
39	262 - 327	292 - 365	324 - 405	360 - life	360 - life	360 - life
40	292 - 365	324 - 405	360 - life	360 - life	360 - life	360 - life
41	324 - 405	360 - life	360 - life	360 - life	360 - life	360 - life
42	360 - life	360 - life	360 - life	360 - life	360 - life	360 - life
43	life	life	life	life	life	life

**STRUCTURING SENTENCING DISCRETION: A COMPARISON OF
TECHNIQUES**

by

Andrew von Hirsch

This paper attempts to compare, briefly, different techniques for structuring sentencing discretion that have recently been tried or proposed in several jurisdictions, including the United States, Canada, England and Sweden.

I SENTENCING COMMISSION GUIDELINES

Several jurisdictions, mostly in the United States, have tried a variety of approaches to guiding sentencing discretion: mandatory minimum sentences, statutory presumptive sentences, and guidelines for parole release.¹ One technique, however, has attracted particular notice and I shall focus on it: sentencing commission guidelines.²

1. The elements of sentencing commission guidelines

Sentencing commission guidelines are now in effect in Minnesota, Washington State, Pennsylvania and the US federal judicial system. Several more States are considering their use.³ A government-appointed study commission has recently proposed sentencing guidelines for Canada.⁴

The guideline device constitutes an amalgam of three elements. The first element is **presumptive sentencing ranges**. Ranges are set forth as the ordinarily applicable penalties. Usually, these ranges are arrayed in tabular form on a grid, and depend on the gravity of the current crime and the extent of the criminal record. The sentencing judge is expected ordinarily to impose sentence within the prescribed ranges. However, the judge may depart from the ranges on account of circumstances of aggravation and mitigation, and the guidelines usually provide a non-exclusive list of qualifying aggravating or mitigating circumstances. When judges depart from the guidelines, they are required to state their reasons, and such departures, and their grounds, are appealable. The idea is to provide courts with consistent starting points when they sentence, while still allowing flexibility for the out-of-the-ordinary cases.

Because guidelines are often expressed in numbers on a grid, they appear to impose narrow limits on judicial discretion. The actual degree of constraint, however, depends on the width of the presumptive ranges and on the standard for departures. Wide presumptive ranges and easy departure criteria may give judges nearly as much leeway as they have under traditional sentencing law. Narrow ranges and strict departure standards will constrain discretion significantly. Different US jurisdictions differ significantly in this respect: Minnesota, for example, has considerably more tightly-drawn standards on the use of imprisonment than Pennsylvania.

Appellate review is the second major element. Traditionally, US sentencing law did not provide for judicial review. In States in which sentencing guidelines are established, the enabling statute also provides for judicial review. Since the standards are not

self-executing, judicial review is essential to insure that sentencing courts apply the guidelines correctly. Review is also necessary in order to develop a case law interpreting the grounds for departure from the presumptive ranges.

A rule-making commission is the third element. The authority to write the guidelines is delegated by the legislature to an independent rule-making commission. A commission is supposed to have more time for developing the standards than a legislature, to have greater opportunity to develop specialized expertise, and to be better insulated from political pressures (particularly, pressures to inflate sentences to unrealistic levels, in order to demonstrate "toughness" to the electorate). In some jurisdictions - eg, Minnesota and the US federal system - the enabling statute provides that the guidelines, after their issuance by the commission, are to take effect unless the legislature interposes its veto by enacting a resolution of disapproval. In other jurisdictions - eg, Washington State - the commission's proposed guidelines must be affirmatively approved by the legislature.⁵

The foregoing three elements are, in theory, separable. A jurisdiction might enact presumptive sentence ranges through legislation, without use of a sentencing commission. (Indeed, statutory presumptive-sentence schemes take very much this approach.) In the United States, however, direct legislative involvement in writing the standards has proven problematical, because of the pressures of "law and order" politics.

2. The variety of guideline approaches

To suggest the variety of sentencing guidelines, let me mention the salient features of three schemes. The **Minnesota** guidelines took effect in 1980.⁶ The guidelines purport to reflect a desert rationale, albeit in a modified form that gives somewhat more emphasis to the prior criminal record than a pure desert rationale would. The guidelines are designed to limit the use of imprisonment primarily to more serious offenses - principally, those against the person. The ranges in the grid cells prescribing imprisonment are fairly narrow, and departures are supposed to be invoked sparingly. The guidelines, as originally written, were designed not to increase the aggregate use of imprisonment. A major limitation, however, is that the guidelines do not purport to regulate non-prison sanctions - thus leaving the choice between jail and non-custodial penalties, and the choice among non-custodial penalties, substantially unregulated.

The **US Sentencing Commission's** guidelines,⁷ applicable only to federal crimes, took effect in November 1987. The guidelines do not opt for any particular rationale - indeed, expressly abjure such a choice. The standards are quite severe, with probation permitted only for relatively modest thefts and similar offenses. Lower-middle level offenses are to be dealt with by community confinement, and other more serious ones by imprisonment. The Commission estimates that the standards will lead to a doubling

of the federal prison population, but offers no suggestions about how the federal corrections system should absorb such an increase. However, the guidelines offer broad authority for departure from the guideline ranges. Thus it is uncertain to what extent the guidelines will actually foster greater consistency in sentencing practice.

The **proposed Canadian guidelines system**⁸ would involve the creation of a permanent sentencing commission charged with writing guidelines applicable throughout Canada. According to the proposal, an explicit rationale would be provided, emphasizing desert. The availability of correctional resources would be systematically considered when the guidelines are written. Imprisonment would be invoked considerably more sparingly than under the US federal system.

Two innovations of the Canadian Commission are worth noting. First, the proposal would provide for a less abrupt transition from imprisonment to lesser sanctions than is found in the Minnesota and Washington guidelines. Each offense category would be assigned one of four presumptions. Offenses most serious would receive an unqualified presumption of incarceration, those least serious an unqualified presumption of non-custody. Between these would lie two additional, qualified presumptions, applicable to offenses in the middle range of gravity. Under these qualified presumptions, the decision to incarcerate would depend upon whether the act was a more (or less) serious instance of that category of offense, and also on the extent of the criminal record. Second, the permanent sentencing commission would be called upon to include, in its standards, guidelines governing the choice among non-custodial penalties. This would be a marked improvement over Minnesota's standards, where that choice is left to discretion without explicit guidance.

3. Factors affecting the quality of guidelines

The quality of a sentencing commission's guidelines depends upon the commission's willingness to undertake certain tasks.

(a) An explicit rationale. A sentencing commission, in writing its guidelines, needs to formulate an explicit rationale. Should the system emphasize punishing offenders in proportion with the gravity of crimes or, instead, rely more heavily on aims of deterrence or predicted risk? The choice of rationale is critical because the different penal aims are in potential conflict: whereas desert focuses chiefly on the gravity of the current crime, individual risk depends chiefly on early criminal record and social factors. In the absence of an explicit rationale, the system may not serve any purpose: it may, for example, fail to punish proportionately while still failing to predict risk. Indeed, a chief defect of discretionary sentencing systems is the lack of a coherent rationale or policy. A sentencing commission is well suited to the task of choosing a rationale, because it can make its choice in an informed fashion.

An explicit rationale has value for the guidelines in two respects. The first is the formulation of the guidelines themselves.¹⁰ Minnesota, for example, faced the choice of continuing to give the primary emphasis to the prior record (as the state's courts tended to do before the guidelines), or shifting toward substantially greater emphasis on the gravity of the current crime. Its choice of a rationale (the Commission opted for a modified form of desert rationale) helped decide this question in favor of the latter emphasis. A rationale is likewise useful in deciding what kind of factors should be listed as aggravating or mitigating - those that reflect increased or reduced harm and culpability, or those that reflect such other conceptions as risk or supposed need for treatment.

The other usefulness of a rationale is in providing guidance for the courts. Most sentencing guidelines provide a non-exclusive list of aggravating or mitigating factors, leaving the courts the power to add other kinds of factors. An explicit rationale helps provide the courts with guidance in choosing which additional factors are acceptable.

Two of the existing guideline systems - Minnesota's and Washington's - explicitly adopt a rationale emphasizing desert, as does Canada's proposed scheme. The Pennsylvania and US federal commissions make no such explicit choice, and it is not clear what rationale their guidelines reflect, if any. This is a major weakness. In particular, the courts will have great difficulty interpreting the rather open-textured departure rules of the federal guidelines without a coherent set of aims.¹¹

Choosing a rationale does not mean the commission must choose one penal rationale to the exclusion of all others. But if a hybrid rationale is adopted, it is essential to make explicit the relationship among the various aims, and comparative weight to be accorded them. In the sentencing literature, several such hybrid models have been proposed.¹²

(b) Impact analysis. A sentencing commission needs to take prison capacity into account in writing its guidelines. If the guidelines fail to do so and would overtax available penal resources, they will have to be disregarded or circumvented in actual sentencing decisions.

Impact analysis leaves the commission still free to alter comparative severities to fit its chosen rationale. Minnesota, while attempting to keep aggregate use of imprisonment unchanged, shifted comparative severities markedly to fit its desert-oriented rationale, so as to give crimes against the person more punishment and property crimes less. Thus impact analysis is quite different from the "historical" approach to guidelines that some US jurisdictions have used: of basing sentences for particular crime categories on previous averages of time served.¹³

The Minnesota and Washington commissions set, as their aggregate population target under the guidelines, the existing capacity of the state's prisons. However, a commission could set a population target that was slightly lower than existing capacity - or slightly higher, provided that target was realistic. However, severe guidelines create strong incentives for avoidance.

II THE ENGLISH APPROACH: GUIDANCE BY CASE LAW ALONE

Sentencing guidelines provide numerical standards to guide the choice of sentence. The rule-maker (namely, the sentencing commission) prescribes the normally-recommended ranges of sentence, and the principal grounds for departure. The appellate courts' role is merely to enforce those standards, and to develop case law that interprets the guidelines' standards concerning the grounds for departure.

A quite different approach, in use in England, is to rely wholly on the appellate courts to supply the requisite guidance. The English statutes furnish virtually no principles on choice of sentence, and no sentencing guidelines exist. However, the Court of Appeal, Criminal Division, issues opinions when it reviews sentences from the lower courts. Recently, these opinions include so-called "guideline judgments", indicating normally-appropriate dispositions for selected types of crimes (eg, a "starting point" of five years' imprisonment for rape).¹⁴

One English writer, David Thomas, contends that the Court of Appeal's judgments,¹⁵ considered together, supply a substantial degree of guidance. Other English observers, however, are less sanguine: they question the extent to which a discernable pattern emerges from the Court's decisions, and also question whether the lower courts, in the majority of cases that are not appealed, give much weight to the Court's sentencing judgments.¹⁶ Moreover, the Court's decisions themselves are often less than satisfactory: claims about deterrence or treatment are made with little regard for the availability of supporting evidence; concerns about proportionality are not well articulated.¹⁷

Other jurisdictions that have relied only on the appellate courts have not even achieved what the English courts have. Despite ample appellate-review powers, the Swedish courts - before the recent legislation, to be discussed next - did not develop any comprehensive case-law jurisprudence of sentencing, and have not emulated the English Court's practice of issuing guideline judgments.¹⁸ Canadian appellate courts have shown a similar reluctance.¹⁸ Left to their own devices, without explicit principles on choice of sentence stated in statute, appeal courts in most jurisdictions are likely to be unwilling to take the active policy-making role that the English scheme presupposes.

III PRINCIPLES FOR CHOICE OF SENTENCE: SWEDEN'S NEW STATUTE

A middle way between numerical sentencing guidelines and the English approach is Sweden's new technique: statutory principles governing the choice of sentence. Here, the rule-maker (in Sweden's case, the parliament) sets forth a rationale, and general principles governing choice of sentence. The courts are then expected to apply these principles to develop the tariff. Sweden's technique differs from sentencing guidelines in that no numbers are supplied, and the ranges recommended for specific offenses are supposed to be decided by the courts. It differs from the English approach, however, in that the courts will not be working in a vacuum when they develop the tariff: they receive guidance from the statute regarding the rationale to follow, the offense and offender characteristics that ordinarily should receive most weight, and the main kinds of situations in which prison sentences would be appropriate.

Sweden's legislation derives from, and elaborates upon, a Finnish sentencing-principles statute adopted in 1976.¹⁹ The legislation was recommended by a government-appointed study commission, the Committee on Imprisonment, that issued its report in 1986.²⁰ With modest alterations, it was enacted by the Swedish Parliament in June 1988.²¹

The legislation²² makes the choice of sentence depend chiefly on the "penal value" (ie, seriousness) of the offense of conviction. Penal value, under the statute, is determined by the degree of harmfulness of the conduct, and the offender's culpability in committing it. Aggravating and mitigating circumstances are listed in the statute, and these generally refer to situations of specially heightened or reduced harmfulness or culpability. Imprisonment is to be invoked chiefly in two situations: when the penal value (seriousness) of the conduct is high; and when the penal value is in the upper-middle range, and the offender has a significant criminal record.

This sentencing-principles approach has two important prerequisites. One concerns the rule-maker. Drafting sentencing principles is as exacting work as devising numerical standards. While one need not undertake the time-consuming task of filling numbers in a grid, this makes it all the more important to state the principles and criteria with some precision - and with the requisite understanding of the empirical and normative issues involved. The drafting body thus needs time and expertise. The Swedish standards are in statutory form, but the process of drafting was not unlike that which a sentencing commission would undertake. The work was done over a period of several years by a study commission aided by a working group of penologists, who were familiar with the sentencing literature and with reforms in other jurisdictions. More routine methods of drafting - for example, a bill written in a ministry - would have yielded less satisfactory results.

The second prerequisite is a supportive judiciary. There must be appellate courts willing to take the stated principles seriously, and to apply them in generating a tariff of normally-recommended dispositions; and there need to be cooperative lower courts. Sweden may well have such a judiciary. Swedish courts tend to give legislative declarations of purpose considerable weight, and to review committee reports and other legislative history in applying them. Appellate review of sentencing has long existed. Lower courts tend to be "legalistic" - that is, sensitive to appellate court guidance. In other jurisdictions, the judicial traditions may be otherwise. There, numerical guidance may provide more authoritative guidance: the trial judge is given to understand that he or she must sentence within the applicable range on the grid or else come forward with permitted reasons for departure, or else face reversal.

Were this sentencing-principles approach adopted in other jurisdictions, it might be supplemented by an advisory sentencing commission. The commission could both help formulate the standards for legislative approval, and provide courts²³ with advice on applying the standards and generating the tariff.

IV CONCLUDING THOUGHTS: COMPARING APPROACHES

What are the comparative merits of the various methods of structuring sentencing discretion, discussed in this paper?

Numerical sentencing guidelines offer more definitiveness: the tariff of normally-recommended dispositions is part of the guidelines themselves, and the courts have the less onerous task of enforcing the standards and developing a case law on departures. In jurisdictions where prison overcrowding is a serious potential problem, moreover, the standards can be written with estimates of available prison capacity in mind.

The potential drawback of numerical sentencing guidelines is that the numbers may take on a life of their own. Even though a sentencing commission is better insulated from political pressures than the legislature itself, it still must produce a table of numbers that meet legislative approval or at least avoid legislative repudiation. The search for acceptable-looking numbers can eclipse principled solutions. Even in Minnesota, the commission felt compelled, in order to make the standards more "saleable," to give more weight to the offender's criminal record²⁴ than its own purported rationale would have indicated. Sentencing guidelines, moreover, are likely to be accepted chiefly in jurisdictions already having a tradition of courts' applying and interpreting administrative rules.

Statutory sentencing principles, Swedish style, avoid the problem just mentioned, because the rule-maker is writing general principles, not specific numbers. It should be easier to gain assent, say, to the general principle that lesser felons (even with long records) ought not be imprisoned than to defend a

grid where a car thief convicted for the eighth time receives probation. With the principle established in law, it may be easier for the courts to apply it in most cases, and resort to imprisonment of such felons only in quite unusual situations. The approach might also permit evolution of more differentiated standards than can be stated on a simple grid. The potential drawback is the scheme's dependence on active court assistance in developing the tariff pursuant to the stated principles. Reluctant courts will mean that no consistent pattern of dispositions will emerge.

There may be no single answer about which is the preferable approach. What is needed is principled guidance for sentencers. Whether that guidance can best be provided by numerical guidance, or by a body of stated principles, will depend on the character of the legal system in the particular jurisdiction.

FOOTNOTES

1. See Tonry, Sentencing Reform Impacts. Washington, DC, US Government Printing Office, 1987.
2. For a fuller analysis of the sentencing commission device, see von Hirsch, Knapp and Tonry, The Sentencing Commission and its Guidelines (Boston: Northeastern University Press, 1987).
3. Oregon has approved a system of sentencing guidelines, in the spring of 1989. Louisiana and the District of Columbia are in the process of writing guidelines.
4. Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach (Ottawa: Canadian Government Publishing Centre, 1987).
5. For an analysis of a sentencing commission's statutory powers, see von Hirsch, Knapp and Tonry, supra note 2, ch 4.
6. For fuller discussion of the structure and rationale of Minnesota's guidelines, see von Hirsch, Knapp and Tonry, ch 5.
7. For a fuller analysis and critique of the US federal guidelines, see von Hirsch, "Federal Sentencing Guidelines: The United States and Canadian Schemes Compared", Occasional Papers, Center for Research in Crime and Justice, New York University Law School, 1988, pp 2-12.
8. For further analysis of the proposed Canadian scheme, see von Hirsch, supra note 7, pp 12-17.
9. von Hirsch, Past or Future Crimes (New Brunswick, NJ: Rutgers University Press, 1985), ch 11.
10. See von Hirsch, Knapp and Tonry, supra note 2, ch 5.
11. For further discussion of this problem as it relates to the US federal guidelines, see von Hirsch, "Federal Sentencing Guidelines", supra note 7, pp 5, 18.

12. See Robinson, "Hybrid Principles for the Distribution of Criminal Sanctions", 82 Northwestern Law Review 19 (1987); von Hirsch, "Hybrid Principles for Allocating Sanctions: A Response to Professor Robinson", 82 Northwestern Law Review 64 (1987); Tonry, "Prediction and Classification: Legal and Ethical Issues", in Prediction and Classification: Criminal Justice Decision Making, DM Gottfredson & M Tonry eds. (Chicago: University of Chicago Press, 1987), 367-413.

13. von Hirsch, "Federal Sentencing Guidelines", supra note 7, pp 5-6.

14. R v Billam, [1986] 1 All ER 985.

15. Thomas, Principles of Sentencing. London, Heinemann, 1979.

16. For a critical analysis, see, eg, Ashworth, "Techniques of Guidance for Sentencing", [1984] Criminal Law Review 519.

17. See Harvey and Pease, "Guideline Judgments and Proportionality in Sentencing", [1987] Criminal Law Review 96.

18. Canadian Sentencing Commission, supra note 4, 78-86.

19. Penal Code of Finland, ch 6. The Finnish statute provides that the sentence should be in "just proportion" to the harm caused or risked by the offense, and the guilt (ie, culpability) of the offender as manifested in the offense. For fuller discussion of the Finnish statute, see von Hirsch, "Principles for Choosing Sanctions: Sweden's Proposed Sentencing Statute", 13 New England Journal on Criminal and Civil Confinement 171, 177-78 (1987).

20. Fangesestrafkomitten, Pafoljd for Brott, Stadens Offentliga Utredingar 1986: 13-15.

21. The statute's sentencing provisions become Chapters 29 and 30 of the Swedish Penal Code. For an English translation of these provisions, see von Hirsch and Jareborg, "Sweden's Sentencing Statute Enacted", [1989] Criminal Law Review 275.

22. For an analysis of the Swedish statutes see von Hirsch, "Principles for Choosing Sanctions", supra note 19, or von Hirsch "Guiding Principles for Sentencing: The Proposed Swedish Law" [1987] Criminal Law Review 746.
23. von Hirsch, "Principles for Choosing Sanctions", supra note 19, 189-90.
24. von Hirsch, Knapp and Tonry, supra note 2, ch 5.

PART 4

TOWARDS GREATER CONSISTENCY IN SENTENCING

by

Andrew Ashworth

This part of the paper seeks to draw together the various approaches to achieving consistency, and to point up their relative advantages and disadvantages. It is in two parts - first, what consistency involves; second, ways of promoting consistency. The second part appears to have the greater practical relevance, but experience suggests that it would be a mistake to debate "methods" without having devoted detailed consideration to what consistency involves and why it is thought desirable.

I WHAT CONSISTENCY INVOLVES

1. The paradox of consistency

The ideal of consistency is usually placed alongside fairness and justice in sentencing. Behind it lie the "rule of law" virtues of clear and open decisions regulated by standards formulated in advance. Whilst these virtues command widespread acceptance, their application to sentencing is not a straightforward matter. On the one hand, an attempt to foster consistency by requiring courts to impose uniform sentences for a certain type of offence might be criticised for producing inconsistency, in the sense that cases which should be treated differently are treated in the same way. The ideal of consistency is that like cases should be treated alike, and different cases differently. Consistency can therefore only be achieved if there is agreement on what cases are sufficiently "alike", ie on the factors which ought and ought not to affect the sentence of the court. This shows how the apparently simple concept of consistency becomes extremely complex in its operation in a sphere of decision-making like sentencing, to which so many different factors relating to offence and offender may be relevant. Another paradox is that the public expects to see consistency in sentencing, yet they often have a relatively crude concept of consistency and rarely learn all the relevant facts about a case. Thus sentences which fairly reflect differences between cases may be regarded as inconsistent by some members of the public.

2. Sentencing as one part of a system

There can be little doubt about the public importance of sentencing, as a symbol of the community's rejection of crime. The sentence of the court is a public declaration of how wrong a certain form of offending is. Yet sentencing may be seen as only one stage in a process, a process which involves several earlier and later decisions which inevitably exert some influence on the sentence. Thus the early decisions of prosecutors about whether to prosecute and what charge to bring have implications for the sentencing court. Cases which are not prosecuted do not come to court. Those cases which do come to court result from a particular charge laid by the prosecutor, which may constrain the court's actions in certain ways. Moreover, the prosecution and defence may reach an agreement which results in a plea of

guilty by the accused; in that case, the court's actions may be limited in their scope. Another influence at this stage is the pre-sentence report, which may be more or less influential according to its style and content. Then there are influences subsequent to the court's passing of the sentence. Probation officers play a key role here too, in their supervision of non-custodial sentences and their decisions whether or not to bring back to court those offenders who deviate from the requirements of the court order. Another obvious influence is parole: where there is a discretionary parole system, its operation can materially alter the practical effect of custodial sentences imposed by the courts.

Another reason for regarding sentencing as part of a system is that it is not the only way in which governments can seek to prevent lawbreaking and thereby protect the public. There is now a wide range of crime prevention techniques being used or being tried experimentally in different jurisdictions, ranging from educational initiatives, through situational crime prevention, to social crime prevention.¹ Approaches such as these may have a far greater potential for altering behaviour than the sentences of the courts. There is no ground for believing that sentencing and crime rates have a hydraulic relationship, so that when sentences go up the crime rate goes down, and vice versa.² Indeed court sentences are imposed on only a small minority of lawbreakers, since many crimes go unreported, many that are reported are not traced to anyone, and many that are traced are the work of youngsters, to whom normal sentencing policy is rarely applied.³

Implications:

— it is dangerous to assume that changing sentencing practice will change outcomes, unless care is taken to prevent "neutralising" practices by, eg prosecutors and parole boards;

-- it may be possible to bring about changes in sentencing practice by altering the practices of others, such as prosecutors, probation officers and parole boards.

-- it is wrong to regard sentencing as society's foremost defence against crime: other methods may be more effective in terms of public protection.

3. The aims of sentencing

Consistency in sentencing really means the consistent pursuit of certain aims, principles and policies in relation to sentencing. As Doob and Brodeur argue in their paper above, one cannot judge consistency without knowing what the aims are. Proposals for the reform of sentencing in recent years have recognised this, and most of the reports, after thorough reviews of the alternatives, have selected proportionality ("just deserts"⁴) as the leading aim. The Canadian Sentencing Commission⁵ took this approach, as did the Australian Law Reform Commission.⁶ Thus

the guiding principle is that sentences should be ranged in proportion to the relative seriousness of the crimes and the culpability of the offenders. This does not mean that all decisions about sentencing are rendered simple, as deductions from the overall aim of proportionality. Far from it - there are lively debates about the seriousness of offences, the significance of previous convictions, and the determinants of culpability.⁶ But it does mean that those who have to make the decisions - whether legislators, judges or others - have an overall aim to steer towards.

A more sophisticated approach is to declare an overall aim, but to allow it to be displaced by other aims in specified crimes or for specified types of offender. A good example of this is the newly-enacted Swedish sentencing statute, which declares proportionality as the leading aim but allows, for example, rehabilitative considerations to have priority in certain types of case.⁷ This recognises that different aims of sentencing may be justifiable for different types of case.

Much less sophisticated is the approach of "descriptive guidelines", ie devising sentencing standards which attempt merely to reproduce past practice. This was adopted by the United States Sentencing Commission as the basis for the federal sentencing guidelines (in force since 1987),⁸ and was once proposed in England. It may appear to be neutral as between aims of sentencing. In fact it is based on an unconsidered amalgam of aims, which gives no indication to the legislator or judge about the standards to be adopted in decision-making. It comes close to the "cafeteria" approach to sentencing aims, which announces a menu of various possible sentencing aims (eg proportionality, deterrence, rehabilitation, incapacitation) and leaves open the choice between them. This is a recipe for inconsistency.

Implications:

-- an important first step towards fostering consistency is to settle the aim or aims which are to be the basis for decision-making.

-- if no clear aims are declared, this is likely to result in divergent approaches and hence inconsistency.

4. Principles of sentencing

Even when the aims of sentencing are clearly formulated, there remain problems of a more detailed nature which must be tackled at the level of principle, and not left to be resolved by the court in each case. Three may be mentioned here - assessing the relative seriousness of offences, assessing culpability and other factors personal to the offender, and identifying factors which should not influence decisions.

(a) Offence seriousness: any sentencing system which relies on proportionality needs to have a rough scale of the relative gravity of offences. It has sometimes been said that this is an unnecessary and academic exercise, on a topic which causes a few practical problems. Yet in the 1980s there have been marked changes in views about the seriousness of certain offences: for example, rape, drunk driving and financial misdealings are among offences which have tended to be viewed more seriously. To be able to make sense of these changes we need some standards of seriousness. Steps have been taken in this direction by giving legislative authority to the general principle that violent offences should be regarded as more serious than property offences,¹⁰ and by seeking to reduce sentencing levels for offences which are "non-violent, non-sexual and non-frightening".¹¹ These are steps in the direction of consistency, whilst academic enquiry continues too.¹²

(b) Factors personal to the offender: there is also room for disagreement on the factors which should be taken into account as affecting the culpability of offenders, as Dressler points out above.¹³ Unless there is clear guidance about the relevance of such factors as intoxication, family responsibilities and good deeds in the past, sentencers may take divergent views. The most significant factor is, however, the effect of previous convictions on sentence. There is scope for considerable disagreement on the proper relationship between convictions and sentences in the past and the sentence for the present offence. For example, a clear policy in favour of custodial sentences for violent offenders and non-custodial sentences for property offenders could be rendered ineffective if sentencers regarded previous convictions as a significant aggravating factor, since many property offenders have previous convictions. Some sentencing systems seek to place a distinct limit on the amount by which prior record can increase a sentence.¹⁴ Those which do not are leaving considerable room for disparity.

(c) Irrelevant factors: studies of sentencing have shown that some factors influence sentencing decisions which ought not to do so. A society which is committed to racial and sexual equality will, for example, wish to ensure that no such bias enters into sentencing decisions. Differential sentencing based on employment status or marital status may also be regarded as improper. As Ekstedt and Jackson point out in their paper above, there is growing evidence of disparities in sentencing¹⁵ which relate to race, gender and employment status. Reforms of sentencing should recognise these dangers and should seek to eliminate them.

Implications:

-- a declaration of the overall aims of sentencing is unlikely to achieve consistency unless accompanied by clear statements on

assessing offence-seriousness, on factors personal to the offender (especially prior record), and on factors irrelevant to sentencing.

5. Criminal justice policies

The shape of the sentencing system depends on certain judgments about the ways in which the criminal justice system as a whole is to operate. Four possible policies deserve brief mention here - public protection, victim compensation, the use of imprisonment and the control of public expenditure.

(a) Public protection: there is no doubt that members of the public look to sentences as sources of protection of themselves and their families from criminals. There is equally no doubt that the sentencing system provides some protection: without police, courts and¹⁶ sentencing, there would surely be many more offences.¹⁷ But, as we saw above,¹⁷ there is substantial doubt about the idea that sentence levels have a hydraulic effect on crime rates, so that a government can reduce crime levels simply by increasing penalties for certain offences. Other approaches, such as crime prevention strategies, might be more effective. It is therefore necessary to be circumspect in claiming public protection as a major policy to be pursued through sentencing.¹⁸

(b) Victim compensation: a major feature of the 1980s was the increased understanding of victims' rights and needs. These go beyond sentencing to encompass other aspects of the criminal justice system and voluntary schemes for victim support. But it has come to be accepted widely that sentencing systems should pursue a policy of ensuring that offenders compensate their victims, so far as is possible.¹⁹ In this connection, consideration may be given to requiring courts to impose compensation orders unless they give reasons for not doing so, and giving priority to a compensation order over a fine if the offender's means are limited.²⁰ Whether there should be further provision for victims to submit a "victim impact statement" to the court,²¹ or to be legally represented, remain matters for debate.

(c) The use of imprisonment: one common feature of most new sentencing systems is a concern to reduce the use of custodial sentences. The conclusion that imprisonment is over-used - some offenders should never have gone there, and some of those who should are sent for unnecessarily long - has been reached in several committee reports (eg the May report in the United Kingdom, and the recent New Zealand report).²² Several reports on sentencing declare a policy of restraint (parsimony, frugality) in the use of custody, and seek to incorporate this policy into practical sentencing.²³ The main reasons behind this are that prison has more negative

than positive effects on offenders and has a high reconviction rate, so that non-custodial measures may be more constructive and may demand more of the offender.

(d) Control of public expenditure: one further reason sometimes given for reducing the use of imprisonment is that it is highly expensive when compared with other forms of sentence. This reason, however realistic from governments' point of view, may tend to produce adverse reactions from sentencers, who may harbour the suspicion that economic constraints are preventing them from doing what is right and just. Since there are sound penological reasons for reducing reliance on imprisonment, it is unnecessary to bring public expenditure into the argument.

Implications:

-- there are good reasons for ensuring that sentencing gives priority to victim compensation and uses custodial sentences with great restraint;

-- care must be taken in advocating public protection as a major policy behind sentencing, and public expenditure is best left out of the matter altogether.

II WAYS OF PROMOTING CONSISTENCY

6. Authority and Constitutionality

Before any discussion of the various methods of formulating sentencing guidance, it is necessary to deal with the underlying constitutional issues. Recent years have seen considerable debate about the proper functions of the judiciary and the legislature in matters of sentencing. We begin by raising this constitutional question, and then look at three of the possible ways of dividing responsibility between legislature and judiciary.

(a) The constitutional position: it might seem strange to question the propriety of legislation on sentencing - surely legislatures are free to make laws on whatever issue they like, subject to constitutional restraints in those countries with a written constitution? The question has been raised, however, because there are some who regard the principle of judicial independence - accepted by most constitutions - as reserving the function of sentencing offenders to the judiciary. Both the High Court of Australia²⁴ and the Supreme Court of the United States²⁵ have rejected this view and have upheld the liberty of the legislature to make laws on sentencing, including laws which require courts to impose a mandatory sentence and laws which delegate the rule-making function to a Sentencing Commission. These decisions are surely right: the principle of judicial independence means that courts should be free to pass sentence without fear or favour, and does not mean that courts should have an unbridled sentencing discretion.

(b) Direct legislative guidelines: although the sentencing discretion does not belong constitutionally to the judiciary, most systems have conceded a wide discretion to courts. However, this need not be so, and one approach is for the legislature to lay down sentencing guidelines in primary legislation. An example of this is the California Determinate Sentencing Act 1976, which contains detailed sentencing prescriptions for most types of offence and leaves little discretion to the courts.

Advantage: the legislative process is "democratic", and this might maximise public support for the sentencing system;

Disadvantages: it allows sentencing policy to be amended for short-term political gains; it is unlikely to be grounded in principled and well-informed debate.

(c) Legislative framework, Sentencing Commission, and residual judicial discretion: in recognition of the difficulties and disadvantages of direct legislation, some jurisdictions have created or proposed a Sentencing Commission or Council (eg Minnesota, United States federal jurisdiction, Canada).²⁶ The legislature retains overall control, since it lays down the Commission's powers and accountability. The Commission accomplishes the detailed rule-making, creating guidance and guidelines on sentencing for the courts. Its membership would typically include not only judges and magistrates but also others involved in criminal justice, thus recognizing the place of sentencing within the whole criminal justice system. The guidelines created by the Commission usually leave the courts with some discretion, to take account of the varying facts of individual cases, and there might also be a system of appellate review. There is usually provision for the Commission to remain in existence and to revise the guidance in the light of experience.

Advantages: it ensures that a specialist body, with time, resources, and broad experience of criminal justice, formulates a coherent body of rules and principles on sentencing; this is likely to enhance consistency;

Disadvantages: it is a constitutional novelty; too much will depend on the choice of individuals as Commissioners; there may be little accountability.

(d) Legislative framework, judicial self-regulation: this is the traditional common law approach and it has, as the paper by Sheriff Principal Nicholson (above) shows, been followed in Scotland as well as in England and Wales. The legislature sets the outer limits to the courts' powers, and perhaps creates a few mandatory penalties and other requirements, but sentencing is left predominantly to judicial discretion. Reliance is placed on the appellate courts to develop a jurisprudence of sentencing. Several

jurisdictions adopt this approach, and in some of them "guideline judgments" have been handed down by appeal courts for certain crimes.²⁷

Advantages: guidance prepared by judges for judges is more likely to be followed; the judiciary has long experience of sentencing; the judiciary is reasonably insulated from political pressure.

Disadvantages: such systems provide sentencing guidance on relatively few crimes, because appeal courts have limited time and resources; there is unlikely to be overall consideration of aims, principles and policies; the judiciary lacks the broad experience of criminal justice which is found among Sentencing Commission members.

7. Style of guidance

The next stage, after deciding on the authority which is to issue sentencing guidance, is to consider the most effective way of formulating the guidance so as to produce consistency. A whole range of possible approaches may be pursued, either singly or in combination, and six are selected here for brief discussion.

(i) **Presumptive sentencing:** the Californian system leaves the court with a choice among three sentences, once the court has decided the grade of the offence. The court may choose the normal sentence, the aggravated or the mitigated.²⁸

Advantage: high degree of consistency within each offence-category.

Disadvantages: leaves little room for courts to reflect facts of individual cases; gives considerable power to prosecutor in selecting the charge.

(ii) **Numerical calculations:** the United States federal system requires the court to calculate the sentence by starting from the "offence level" applicable to the crime, and then making various additions and subtractions to reflect any aggravating and mitigating factors in the case. The court then matches the offence level with the offender's "criminal history score", and this indicates the guideline sentence. Courts retain a discretion to depart from the guideline sentence, subject to appellate review.

Advantages: relatively sophisticated method of guidance, whilst retaining judicial discretion for individual cases;

Disadvantages: in the US system, courts have relative freedom to depart from the guidelines, and there is no stated aim or priority of aims of sentencing to assist the sentencer to exercise discretion.²⁹

(iii) **Presumed disposals:** part of the Canadian proposals is that offences should be divided into four categories of presumed sentence - "in (custody), out (community sanction), qualified in (custody unless it is a minor instance of the offence and the offender has no relevant criminal record), and qualified out (community sanction unless it is a serious instance of the offence and the offender has a relevant criminal record)."³⁰

Advantage: it gives a clear indication to the court of the desired policy for such offences;

Disadvantage: it is unlikely to be effective unless combined with guidelines for custodial sentences (as proposed in Canada) and guidance on the choice of non-custodial sentences.

(iv) **Hierarchy of principles and policies:** a major feature of the new Swedish sentencing law is that it sets out the principles which courts should follow when calculating the seriousness of each crime and when choosing sentence, but contains no numerical guidelines. The law makes clear the aim of sentencing (proportionality), but also states the circumstances in which other aims such as deterrence or rehabilitation may play a part.³¹

Advantages: the law gives a clear framework for the exercise of discretion both by trial courts and by the appellate court;

Disadvantage: the success of the law in achieving its declared aim of consistency depends on the way in which the abstract laws are interpreted.

(v) **Narrative judicial guidelines:** the higher judiciary in both England and New Zealand have used appellate judgments to lay down some sentencing guidelines.³² The result is much different from the mechanistic-looking guideline grids in the United States systems: in effect, the sentencing guidelines form part of ordinary, narrative judicial pronouncements. The court lays down sentencing levels or "starting points" for the particular type of crime, and indicates some factors which may aggravate or mitigate.

Advantages: their familiar form makes them more likely to influence judges, and to coincide with a judicial idea of "realistic" sentencing.

Disadvantages: if the guidelines are judge-made, they are likely to share the disadvantages of any system which relies heavily on the judiciary for sentencing guidance (see 6(c) above); but putting guidelines in a narrative rather than numerical form is a positive advantage.

(vi) **Legislation, reason-giving and appellate review:** before the advent of guideline judgments, the traditional common

law approach was to rely on appellate review and individual appeal court judgments. Such judgments may not achieve coherence and consistency if appellate courts do not look beyond each individual appeal (which is the main reason for the advent of guideline judgments), but the process may be assisted or shaped by legislation. One example of this is the Criminal Justice Act 1985 (New Zealand), sections 5 and 6. Another example, which has been particularly successful in shaping appellate and trial decisions, is section 1(4A) of the Criminal Justice Act 1982 (England and Wales), as amended in 1988. The Australian Law Reform Commission recommended that the common law approach of reason-giving and appellate review should be the mainstay of a reformed system.

Advantages: if there are specific requirements in the legislation, judicial interpretation of the law will help to concretise the legislature's principles and policies;

Disadvantages: in areas of sentencing where there is little legislative guidance, reliance on occasional appellate decisions (without guideline judgments) would mean that it may be many years before coherent guidance is developed.

8. Consistency without compulsion?

All the approaches considered above involve the use of legal authority to enforce certain sentencing practices. Legislation binds sentencers; sentencing commissions have delegated legislative authority, which also binds sentencers; and appellate courts have the doctrine of precedent to give authority to their judgments. In addition to these approaches, or possibly instead of them, it is worth outlining methods of improving consistency which involve no compulsion of sentencers.

(a) Information systems: there is a school of thought that sentencers would be more consistent if they were able to find out what other courts had done in similar cases. One way of furnishing this information is to build up a computerised index of all sentences passed since a certain date, suitably sub-divided according to type of offence and offender, which would be available to judges through computer terminals. Information systems of this kind have been developed in Canada³³ and in New South Wales,³⁴ where the system is now available to courts.

Advantage.: it reduces a judge's sense of isolation and, if judges desire consistency, it could be effective in producing it.

Disadvantage: much depends on the usefulness of the data assembled; it is a voluntary system – the horse is taken to water, but not made to drink.

(b) Co-operative developments: if sentencers agree to co-operate with other criminal justice professionals in the

introduction and development of a new sentencing structure, this may give them a commitment to its success. This is thought to be a major reason for the success of the Intermediate Treatment scheme in reducing the use of custody for juveniles in England and Wales during the 1980s - magistrates were members of the local administrative committees, along with social workers and others.

Advantage: involvement in this way gives sentencers first-hand knowledge of what such schemes can achieve;

Disadvantages: some professional judges may be reluctant to become involved; it is unclear how effective such co-operation would be unless some new sentence is being introduced.

(c) **Judicial studies and training:** study courses for sentencers may be one way of improving consistency, if sentencers could be persuaded in an extra-curial context to adopt consistent practices in court. However, such courses would be limited in their impact unless there were some clear aims, principles and policies which could be used as a basis for the educational process: see 3, 4 and 5 above.

Advantages: study courses focus attention on the sentencing system as a whole, whereas judges might not otherwise get this overall view; discussion with other sentencers might spread knowledge of others' practices (see 8(a), above) and thereby aid consistency.

Disadvantages: the success of study courses in terms of consistency depends on the coherence of the sentencing system itself.

(d) **Tackling the context of sentencing:** sentencing is one stage in a lengthy criminal process and, as suggested in 2 above, there are ways of bringing about changes in sentencing without the direct involvement of sentencers. Guidance and guidelines for prosecutors would regulate the flow of cases into the courts; if prosecutors are allowed to address the court³⁵ on sentence, that may influence sentencing decisions; if certain sentences may only be passed after the court has received a pre-sentence report, that gives some authority to another source of influence; and parole systems can be amended so as to affect sentencing to different degrees.

FOOTNOTES

1. R Clarke & D Cornish, Crime Control in Britain (Albany, 1983); M King, How to Make Social Crime Prevention Work (HMSO, London, 1988); J Delatte and P Dole, La Recomposition du Chaup Social et des Pratiques de Prevention (Ministere de la Justice, Paris, 1987).
2. For analysis of the limitations of deterrence as a practical policy, see F Zimring & G Hawkins, Deterrence: the Legal Threat in Crime Control (Chicago, 1973); D Beyleveld, A Bibliography on General Deterrence (Saxon House, 1980); and L Ross, Deterring the Drinking Driver: Legal Policy and Social Control (Lexington, 1982).
3. Canadian Sentencing Commission, Sentencing Reform: a Canadian Approach (1987), p 119.
4. Ibid, chs 5 and 6; see the paper by Andrew von Hirsch, above.
5. Australian Law Reform Commission, Sentencing (Report no 44, 1988).
6. For further discussion see A von Hirsch, Past or Future Crimes (New Brunswick and Manchester, 1985).
7. An English translation of the text may be found in A von Hirsch and N Jareborg, "Sweden's Sentencing Statute Enacted" [1989] Crim L R 275.
8. United States Sentencing Commission, Sentencing Guidelines (1988), discussed in the paper above by Andrew von Hirsch.
9. Advisory Council on the Penal System, Sentences of Imprisonment: a Review of Maximum Penalties (HMSO, 1978).
10. Criminal Justice Act 1985 (New Zealand), ss 5 and 6; see the paper by Judge Henry.
11. The words of Lord Lane, CJ, in the guideline judgment on sentencing for social security fraud: Stewart (1987) 85 Cr App R 66.

12. See A von Hirsch, Past or Future Crimes, ch 6.
13. "Consistency in Sentencing, Just Deserts and Mercy", above.
14. This is a feature of the Minnesota system: for discussion, see A von Hirsch, K Knapp and M Tonry, The Sentencing Commission and its Guidelines (North Eastern, 1987), ch 5 and passim.
15. Ekstedt and Jackson (above) quote the findings of the Daubney Report (below, note 18) at pp 208 and 211 in Canada. For Australia, see K M Hazlehurst (ed), Justice Programs for Aboriginal and Other Indigenous Peoples (Australian Institute of Criminology, Canberra, 1985); I Crow, Unemployment and Sentencing (1989). Many systems, including Minnesota and the proposed Canadian system, include a list of factors not to be considered in sentencing.
16. For references, see A Ashworth, "Criminal Justice and Deserved Sentences", [1989] Crim L R 340.
17. Section 2 of this paper.
18. This note of caution was sounded loudly by the Canadian Sentencing Commission, ch 6.3, but public protection reappears as a prominent element in the Daubney Report, Taking Responsibility (Report of the Standing Committee on Justice and Solicitor General, 1988, Ottawa), ch 5.
19. Australian Law Reform Commission, Sentencing, pp 191-195; for international declarations, see United Nations, Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power (1985).
20. Criminal Justice Acts 1982 and 1988 (UK); Daubney Report (above, n 18), ch 3.
21. Compare the Daubney Report, *ibid*, ch 3, with Australian Law Reform Commission, Sentencing, para 192.
22. Report of the Committee of Inquiry into the United Kingdom Prison Services (the May Report), Cmnd 7673 of 1989, HMSO, ch 3; report of the ministerial inquiry into the prisons system, Ministry of Justice, New Zealand.

23. Eg Canadian Sentencing Commission, p 113; Victorian Sentencing Committee Report (Melbourne, 1988), vol 1, para 3.15.
24. Palling v Corfield (1970) 123 CLR 52, especially per Barwick C J at p 65.
25. Mistretta v United States (1989) 109 Sup Ct 647, leading opinion by Blackmun J.
26. For Minnesota, see A von Hirsch, K Knapp and M Tonry, The Sentencing Commission and its Guidelines (1987); for the United States, see the paper by Andrew von Hirsch, above; for Canada, see Canadian Sentencing Commission (1987), ch 14, and the Daubney Report (1988), p 68 and Rec 11.11.
27. The English Court of Appeal has developed this technique in such judgments as Aramah (1982) 4 Cr App R (S) 407 on drugs and Billam (1986) 8 Cr App R (S) 48 on rape. There have also been guideline judgments in New Zealand, such as Puru [1984] 1 NZLR 248 on rape. For a general discussion of measures to reduce disparity in sentencing in Europe, see Council of Europe, Disparities in Sentencing: Causes and Solutions (Strasbourg, 1989).
28. For discussion, see D A Thomas, Equity in Sentencing (Pinkerton Lecture, 1977).
29. See the paper by Andrew von Hirsch, above.
30. Canadian Sentencing Commission, ch 11.5.2, supported by the Daubney Report, p 66 and Rec 11.5.
31. See note 7, above.
32. See note 27, above. Proposed legislation in Victoria, Australia, makes express provision for the Court of Criminal Appeal to lay down guideline judgments on sentencing; see the paper by Mr Justice Vincent, above.
33. A N Doob and N W Park, "Computerized sentencing information for judges: an aid to the sentencing process" (1987) Crim Law Q.

34. D Weatherburn et al, New South Wales Sentencing Information System Penalty Display and Sentencing Options Facilities (Judicial Commission of New South Wales, 1988).
35. See the paper by Ekstedt and Jackson, above. The roles of prosecutors vary among Commonwealth jurisdictions, and in some European countries prosecutors take a leading role in suggesting to the court the appropriate sentence: see D Downes, Contrasts in Tolerance (Oxford, 1988).

PLAIN ENGLISH DRAFTING

PLAIN ENGLISH LEGAL DRAFTING

A paper prepared for the Commonwealth Secretariat by Mark Adler, Solicitor,
of CLARITY, a movement for the simplification of legal English

The problem

The language used by lawyers is often wordy and difficult to understand. The disadvantages are:

- . the writer and his or her staff spend longer than necessary writing and amending;
- . the reader spends longer than necessary reading and deciphering the meaning and may give up in despair or boredom;
- . mistakes (by writer and reader) are more likely;
- . many lay people think us unapproachable.

Some technicalities are essential; everyday English does not have words for all legal concepts. But we should restrict our specialist vocabulary to those essentials (explaining them clearly to lay people) and otherwise use ordinary language.

What is plain English?

Robert Eagleson, Professor of English at the University of Sydney and a leading expert on legal language, says:

"Plain language" is the opposite of obscure, convoluted, entangled language. It's the opposite of language that takes a lot of effort and energy to understand and unravel. Plain language should not be equated with "simple" in the sense of simple minded ... (nor) in the sense of "childish" or "broken" language - a kind of pidgin. Nor should it be equated with "simple" in the sense of a reduced document that only gives part of the message.

Plain language, on the contrary, makes use of the full resources of the language. It's good, normal language that adults use everyday ... It lets the message come through with the greatest of ease.

Here is a typical clause from a commercial lease:

Not to use or permit or suffer to be used the demised premises or any part thereof or any buildings or erections at any time hereafter erected thereon or on any part thereof as and for all or any of the purposes of a brewery or a club (whether proprietary or members) or a public house or other licensed premises or otherwise for the preparation manufacture supply distribution or sale whether wholesale or retail and whether for consumption on or off the premises of all or any alcoholic liquors of any description and not without the previous consent in writing of the Landlord to carry on or permit upon the demised premises any trade business or occupation other than that of a retail shop for the sale of X

This could be rewritten:

Not to make or sell alcoholic drinks in the shop or (without the landlord's written consent) to use it except for the retail sale of X.

The irony is that the drafter must have started with something like the shorter version in mind. What did the client say he wanted? That the premises be used as a shop, with the landlord retaining a reasonable say in what was sold, with an absolute bar on strong drink. Why then did the solicitor so painstakingly construct that elaborate paragraph? It adds nothing and the tenant's solicitor - and those acting over the years for prospective purchasers - would have to translate it back to extract the meaning. So would the parties and their advisers if any query arose in future.

Why do lawyers write as they do? I suspect that it begins as role-playing and becomes a habit. Articled clerks and pupils want to sound like solicitors or barristers and copy (with their encouragement) the verbal mannerisms of their seniors; later, under the pressure of work, they write as they have become accustomed, uncritically repeating their usual phrases.

Here is an extract from a letter written by a solicitor to a client:

I have been looking into the situation relating to the term of the Lease in the light of indications given with regard to the X Housing Association's standard Form of Covenant. As you know, no Deed of Covenant was required from you at the time of your acquisition, but it appears that arrangements were in hand at one time for the term granted by the Lease which you have acquired to be extended to 999 years. At present you have a term in excess of 70 years remaining on the Lease which is perfectly satisfactory, and if you were to consider moving during the course of the next few years you would have no difficulty in disposing of the Lease. Ultimately, however, difficulties can arise and it may be to your advantage to consider taking a Variation to extend the term. I have now received confirmation that the X Housing Association will be willing to agree such an arrangement, but any such Variation will probably entail the introduction of the need for a Deed of Covenant to be provided by the Purchasers at the time of assignment of the Lease. Please give the matter some consideration and let me know your requirements. I anticipate that you will be expected to bear the costs of obtaining such a Variation.

I await hearing from you both with regard to the above and with your cheque as previously requested.

Most solicitors write like this. Amongst the faults:

The long paragraph is hard on the reader; it looks too boring to read, and many will start to skim before they reach the end.

There are many words and phrases which might not be understood by a lay reader.

The writer had not organised his or her thoughts; the text rambles from point to point and it is not always clear (even to another solicitor) what was intended.

The style is dull and repetitive, with many inappropriate capital letters.

It omits important information which the client would need to make the decision for which her solicitor is asking:

- how many years it will be before the value of the lease is affected;

- how much it will cost to put right;
- what commitments will be expected from a future purchaser;
- what sort of "requirements" the solicitor thought the client might have.

My interpretation of what the writer was trying say is:

Your lease has just over 70 years to run. At the moment that is long enough but in (an unspecified time) it will become difficult to sell.

The Housing Association is willing to extend the lease (to 999 years?) to solve this problem for you, but you will probably have to pay their (unspecified) costs and agree to (unspecified) terms.

Please tell me if you want to accept.

Current attitudes

England

Plain language has always had its champions but the campaign for its use by lawyers began only in the 1970s. The Plain English Campaign (founded in 1979 by non-lawyers) has had a considerable influence on the civil service but none on the profession. CLARITY - a lawyers' pressure group - was formed in 1983. Most of its 300 members are solicitors in private practice in England and Wales but it has also attracted barristers, academics, students, local government practitioners, civil servants and overseas lawyers. It has no members yet in Scotland (where there is significant room for improvement) or Northern Ireland.

Of these few reformers, some are restricted by pressure from unsympathetic superiors or others involved in the drafting process. Even eminent authors admit to toning down the reforms in their precedent books because the climate of opinion has not been right. The overall impact has so far been small. The rest of the profession, outnumbering us by about 150 to 1, has remained largely unaware of our views.

Reactions to plain English documents have been mixed: occasionally conservative colleagues say they dislike the style, though most accept without protest and many are enthusiastic. However, there is widespread fear of changing long-established forms for what they consider is experimental, although many do not mind if their opponent takes the risk: plain documents attract few amendments. Some corporate clients prefer their solicitors to use traditional language but most lay people are delighted to receive documents they can understand.

CLARITY is quite widely supported at The College of Law, through which many English solicitors must pass during training. Model documents supplied to the students have improved gradually through the 1980s and in the last couple of years short courses on plain English drafting have been well received by staff and students. Meanwhile, many commercial seminars have appeared to promote legal plain English.

The civil service and the minister responsible for it, encouraged by the Prime Minister, support the campaign, and since 1982 have made enormous improvements in the design and wording of forms and leaflets.

Some improvement has been made in the drafting of legislation but there is room for much more. The prevailing style is to squeeze as much detail as possible into one sentence or sub-section, with unnecessary repetition and inadequate "white space". The sense may be precise but can be difficult to extract. Considerable improvement is possible without risk to the meaning by breaking sentences into smaller parts, re-arranging the text to avoid repetition and adjusting the layout. A moderate example of these faults comes from the Protection from Eviction Act 1988:

27. - (1) This section applies if, at any time after 9th June 1988, a landlord (in this section referred to as "the landlord in default") or any person acting on behalf of the landlord in default unlawfully deprives the residential occupier of any premises of his occupation of the whole or part of the premises.

(2) This section also applies if, at any time after 9th June 1988, a landlord (in this section referred to as "the landlord in default") or any person acting on behalf of the landlord in default -

- (a) attempts unlawfully to deprive the residential occupier of any premises of his occupation of the whole or part of the premises, or
- (b) knowing or having reasonable cause to believe that the conduct is likely to cause the residential occupier of any premises -
 - (i) to give up his occupation of the premises or any part thereof, or
 - (ii) to refrain from exercising any right or pursuing any remedy in respect of the premises or any part thereof,

does acts likely to interfere with the peace or comfort of the residential occupier or members of his household, or persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence,

and, as a result, the residential occupier gives up his occupation of the premises as a residence.

One encouraging example is s.1 of the Torts (Interference with Goods) Act 1977, which says "Detinue is abolished." Perhaps this is the only Act whose main clause is shorter than its short title. Unfortunately, the style lapsed after this auspicious beginning, including a "hereby" in clause 12.

The regulations originally made by statutory instrument under the Enduring Powers of Attorney Act 1985 bound solicitors to follow the exact - and difficult - form of the draft provided, with the penalty that the document would otherwise be ineffective. Happily, that form has now been recast in plainer English, but for a time we were compelled to give our clients badly drafted documents which they couldn't understand.

In 1988 The Law Society began to take an interest and has since been collaborating with CLARITY. In the last few weeks this has taken a higher profile with the launch of the Society's national conveyancing protocol, whose documents have been drafted in plain English. This style, and CLARITY's role in the preparation, have been brought to the attention of the whole profession and will be stressed in the public campaign scheduled for March. For the first time, UK lawyers are being told that plain English drafting is not the whim of an eccentric fringe but a skill valued by the ruling body. Meanwhile, CLARITY is writing a drafting textbook for solicitors and is talking to The Law Society about publishing it under their auspices.

The Solicitors Complaints Bureau reports that most of the very many complaints it receives relate to a breakdown in communication between solicitor and client. It supports the use of plain English as one way of reducing the problem. However, the profession remains unaware of the 1983 decision in Socpen Trustees v Wood Nash & Winters, by which damages of £95,000 were awarded to a client who had not understood a letter of advice from his solicitors.

The European single market will encourage the use of plain English, as continental lawyers object to incomprehensible documents.

Other English-speaking jurisdictions

Some are well ahead of us and their experience should encourage us to follow. I have not had the time to carry out a comprehensive survey and I apologise for presenting a rather fragmented picture in the notes below.

Australia

The insurance industry (which has also been at the forefront in New Zealand and North America) produced plain English policies in 1976.

The Australian Government has adopted a plain language policy for official documents and has arranged for training in clear drafting.

The High Court of Australia severely censured legalise in a recent ruling about the Regulations under the Student Assistance Act 1973. Mr Justice Stephen commented:

Amended on more than 40 occasions in their 6 years of existence, these Regulations now represent an administrative scheme of great intricacy and much ambiguity. No applicant is likely to gain from them any clear impression of his entitlement to a benefit and this case suggests that even those who have to administer the scheme have great difficulty in understanding it ...

As a result of the judgement, the Regulations are being redrafted in plain English by a team consisting of policy, legal and language specialists.

The Law Reform Commission of Victoria has published several volumes on plain English. Its "simplified" version of the state Takeover Code, an exceptionally complex document, is little more than half the length of the original and "vastly more clear"; it has been enthusiastically received by lawyers and others involved in the industry.

The rewriting of summonses and court forms in plain English is saving an estimated \$600,000 a year in staff time.

New Zealand

The policy of the ruling Labour Party is to "simplify laws to make them as readily understandable as possible and to reduce the total number of statutes and regulations."

The Public Trust Office leads New Zealand with its plain language precedents and a number of statutory forms and business documents have been translated into plain English, to the general approval of those concerned. Some major law firms have hired plain language.

One of the functions of the Law Commission is to "advise on the ways in which the law can be made as understandable and accessible as it practicable". The Commission has made suggestions for improving the form and style of legislation but these were buried in an unrelated report and forgotten. It has also sponsored visits by Robert Eagleson to work with groups interested in using plain English.

The judges of the Court of Appeal have supported the development of plain English, although most judgments are still written in legal English.

Some years ago nearly 25% of the country's lawyers took part in seminars on clear drafting run by the Law Society. But this has not been followed up and despite the various initiatives described above there has been little change or interest in the use of clear language. Perhaps this will change with the welcome appointment of Geoffrey Palmer as Prime Minister.

Canada

Canada was slow to take up the use of plain language but is now making up for lost time.

Drafting conventions have been formulated to improve the language of statutes, although the attitude to plain English is not the same in all territories. One simple but useful development has been the adoption of the present tense. The regular revision of all statutes and annual meetings of senior legislative counsel have effected considerable improvements. The Yukon Territory has adopted plain English for its legislative drafting and reported on its experience to the Uniform Law Conference in 1988.

A Plain Language Centre has been set up by the Canadian Law Information Centre and has designed a major project to teach plain language legal drafting.

Private practice has lagged behind, although the Canadian Bar Association is now promoting the use of plain English throughout the profession. It has also undertaken a joint venture with the Canadian Bankers Association for the simplification of legal forms.

The United States

President Carter ruled in 1978 that "regulations be as simple and clear as possible" and in 1979 that government forms "should be as short as possible and should elicit information in a simple and straightforward fashion". This initiative lapsed under his successor, but nevertheless there has been a dramatic improvement in legal language over the last 10 years or so.

Statutes requiring the use of plain English in certain types of contract have been passed in a number of states; they have not been much used by litigants (persons because the remedy will often not be worth the risk and trouble of proceedings) but they have been widely obeyed and are therefore worthwhile. A number of the largest corporations report the success of their plain English policies. For instance, when Southern Californian Edison simplified their request for payments to a fund, contributions went up by 40%.

There are plenty of legal books promoting plain English drafting and the many seminars on the subject are over-subscribed. The law colleges are emphasising the need for clear drafting and are taking time to teach the mechanics. Practising lawyers and judges have adopted the style.

A couple of years ago the Board of Governors of the California Bar passed a resolution pressing the 117,000 lawyers under its jurisdiction to simplify their language. A 1987 survey conducted by the Los Angeles Times found that appellate judges preferred briefs written in plain English.

Jersey and the Cayman Islands

Isolated CLARITY members report no progress towards plain English in the profession.

Summary of proposals

1. The principles of good drafting should be taught to all law students and the use of "legalese" strongly discouraged. Seminars should be available for those already qualified.

The editing facilities of word-processors should be emphasised against the use of standard clauses, and text-editing computer programs should be better developed.

2. Parliament and the courts should encourage simple expression; in particular, if forms are prescribed a special effort should be made to write them in plain English.

3. The language and layout of legislation should be improved. The latter could usefully be investigated as a Commonwealth project.

4. The professional bodies should encourage the use of plain English. In particular, they might make rules of conduct imposing a duty on lawyers to express themselves intelligibly.

5. Specialists in each field should work with plain English draftsmen to recast standard forms and precedents.

Mark Adler, Chairman, CLARITY

with thanks for their contributions to Professor John Adams, Richard Castle, Professor Robert Eagleson, David East, David Elliott, Chris Elgey, Alexandra Marks, Darryl Myers, Justin Nelson and Professor Richard Wydick.

PLAIN LANGUAGE AND LEGAL DRAFTING

A paper by Mr Garth C Thornton, OBE, QC, MA, LLB

The language of the law is the subject of growing dissatisfaction in many Commonwealth jurisdictions. There is a demand that something be done to improve the quality of legal writing.

Two quotations illustrate the current critical view of the traditional language of legislation.

"The criticism of lawyers' language, running across the centuries to our day, boils down to essentially two: its style is strange, and it cannot be understood." ¹

"The traditional language of the law intimidates the people it is written to serve. Legal language is perceived as hindering, not helping the public gain access to information on their rights and responsibilities ... It is the style of legal writing more than the terms of art that confuse and intimidate." ²

An examination of the elements of this strange and intimidating style is called for. This is not an easy task for persons within the profession. The use of sentence patterns and particular vocabulary tends to be habitual and what is familiar tends to be comfortable.

Criticism of the language of the law has been directed at -

- A. word choice,
- B. sentence structures,
- C. organisation of material, and
- D. visual presentation.

Word choice is criticised particularly for fusty words (such as aforesaid and hereinbefore), for stilted formulas and for using numerous words when one will do. Sentence structures are criticised for length, complexity and awkwardness. Organisation of material is criticised as haphazard and unhelpful to the user and visual presentation is characterised as old-fashioned and odd stylistically.

Because current practices are deeply established, and in some cases have been judicially interpreted, and because complex concepts may require complex language to express them precisely, there is some resistance to change. Defences of current practice do not give sufficient weight to two factors.

First, much of the criticism relates to the quality of writing and there can be no defence of poor quality writing.

Secondly, the arguments against change ignore the interests of the ordinary person who has an interest in content but has no specialist legal knowledge.

A statute has a dual function. As well as establishing some area, great or small, of the law, it needs to communicate its content to the people who need to know of it and understand it. That is what makes the case for improvement of statute law overwhelming. The language of a law is satisfactory only if it is the best language to state the message

accurately and to communicate it effectively to as many people as possible. A strong commitment to plain language would improve greatly the intelligibility of legislation.

PLAIN LANGUAGE - WHAT IS IT AND DOES IT SOLVE COMMUNICATION PROBLEMS?

The essence of "plain language" is to write clearly for your audience.³ Plain language is user-friendly. It communicates the message as clearly and effectively as possible. It never loses sight of the interests of the user. It does not adapt or summarize the message but aims to deliver the full message with the least possible difficulty. The "plainness of a passage is defined in terms of the audience for that passage."⁴ Plain language uses the ordinary language used every day by the audience for the writing in issue. It is based on the established principles of clear writing as set out in the recognised texts such as the classic "The Elements of Style" by Strunk and White and Gower's "Complete Plain Words" (3rd edit).

Plain language is consistent with Einstein's dictum "to make things as simple as possible, but no simpler."

The international plain English movement has brought a vigour and a strength of purpose to the cause of clear writing and has significant achievements to point to. It has also successfully enlisted valuable political support. President Carter's order that "regulations should be as simple and clear as possible" is a landmark and in the United Kingdom Mrs Thatcher has been an enthusiastic supporter. She stated "It is no exaggeration to describe plain English as a fundamental tool of good government."⁵

The prophets of plain English aim high. For example - "Plain language marries content and format to create documents that can be understood by anybody."⁶

How realistic are statements of that kind, particularly as they apply to statute law?

The successful communication of the content of a statute depends on two variable factors in every case.

The first is the comprehension skills of the individual receiver of the message.

Many literate people do not read much and are readily intimidated by the serious written word. For example, recent research found that 73% of Australian adults could not identify the issues in a newspaper article about technology.⁷

Legislation affects also those who are illiterate and those who are literate in a language different from that of the statute.

The second variable factor is the intrinsic complexity and other characteristics of the subject matter of the message. Communication depends on an overlap of the linguistic experience of the sender and receiver of the message. There must be a shared context of both linguistic experience and social experience if ambiguities and other comprehension problems are to be avoided or resolved. To a substantial degree this shared context does not exist for many people when they are faced with a written law. There are so many elements of the context that are strange to them. The use of plain language removes some of the problems but much that is strange remains.

An additional factor inhibiting easy understanding of the effect of a statute is that no law stands alone. A statute is a strand in a complex web. Every statute reaches out and interacts with other statutes and also the common law. A comprehensive understanding will depend on interpretation legislation, criminal practice, the law of evidence, concepts such as natural justice and remedies such as certiorari.

In addition, much statute law amends textually other statute law and the amending statute may make little sense to a reader until it is included in a revised or consolidated text.

Plain language solves some of these problems and reduces the impact of others. Despite the use of plain language in statutes, there will remain a significant sector of the public who will continue to find statute law that effects them totally or partially incomprehensible. For such people, it is not enough that statutes be drafted in plain language. The need to communicate the message of much statute law remains. The fact that the law deems knowledge of the law does not absolve the Government from a double duty - to make and to communicate laws in a manner that is widely comprehended.

The use of plain language in statutes is a large step in the right direction, but no one should believe that its use solves all communication problems. It is very worthwhile because it extends the range of successful communication.

WHAT DOES DRAFTING IN PLAIN LANGUAGE REALLY MEAN?

There is a simple answer to this question.

LAWS SHOULD BE WRITTEN CLEARLY WITH THE USER IN MIND.

There are 4 elements at the core of clear writing.

- A. the use of language that is simple, direct, economic and familiar
- B. the omission of needless words
- C. the use of sentence structures that are evident and unambiguous
- D. the organisation and structure of the material in an orderly and logical way.

None of these points is either new or in dispute but, almost invariably, the drafter is faced with a bundle of factors that as the project proceeds combine to reduce the quality of the product. These are well known and include - inadequate, often ridiculously inadequate, drafting time, inadequate drafting instructions often not thought through properly, frequent variations in drafting instructions, insistence on detail, additional material and complex modifications instructed late in the drafting process or indeed while the Bill is in the throes of the legislative process. These are not excuses or defences but they do help to explain why much of our statute law is as it is. Such matters are the everyday experience of law drafters and they cannot be brushed aside as insignificant.⁸

Perhaps the balance of precision and intelligibility has too often not been adequate. A determination to get it right needs to be accompanied by equal determination to write clearly.

SUGGESTIONS TO SUPPLEMENT A COMMITMENT TO PLAIN LANGUAGE

If plain language is not a complete solution, what else can be done to assist in the communication of statute law?

Point 1 - Governments should vigorously promote an understanding that plain language and clear laws are the responsibility of all persons concerned with the legislative process - not just a technical matter for the drafter.

The achievement of laws in plainer language would be so much easier if the responsibility were shared equitably. It will not do for the drafter alone to be blamed for the state of statute book. Legislation is the responsibility of Governments and the Parliament. This point was stressed by the Renton Committee. "Parliaments cannot have it both ways. If they really want legislation to be simple and clear they must accept Bills shorn of unnecessary

detail and elaboration. We cannot emphasize too strongly that the Government and Parliament have clear responsibility for the state of the statute book."⁹

In addition to supportive words, Governments should show their commitment to the quality of the statute book by abandoning their practice of rushing a torrent of weighty legislation through Parliament in a short time. Drafting instructions should be required to be in plain language and legislative schemes, as well as the words in which they are expressed, should be designed so as to be capable of ready communication.

Year in and year out inadequately developed legislation is rushed to Parliaments in many jurisdictions. It is inevitably found wanting and must be amended. Time and money are wasted.

Real progress in improving the clarity of the statute book depends on a commitment to clear language on the part of all those concerned with legislation and the legislative process. Of course, the drafter has a central and vital role and is in a position to make innovative and progressive suggestions, but alone his or her steps will be small ones.

Point 2 - Governments should accept that a separate duty exists after the enactment of a statute requiring the communication of its content to those affected.

Such a duty is a necessary consequence of the reality that even if a law is drafted in plain language that is not sufficient to get its message across to a significant sector of the persons who have a concern with it.

The importance of the duty of post-enactment communication is so great that formal recognition of it is desirable. Unless there is a mechanism to monitor performance of the duty, it is likely to be performed spasmodically and inconsistently.

One possibility would be for Standing Orders of Parliament to require the Minister who has piloted a Bill through Parliament to inform Parliament within a fixed period of the steps taken to communicate the content of the law.

Alternatively, the duty of monitoring the Minister's performance might be imposed on some person outside Parliament but given the duty of reporting from time to time to Parliament. In New Zealand this duty might be given to the Law Commission which already has a statutory duty to propose ways of making legislation as understandable and accessible as practicable.

The duty might also extend to comment on the clarity of the law.

Point 3 - Law drafters should be enabled and encouraged to make use of modern technology.

The advantages of having current statute law on a computerized data base are huge. To be able to search the entire statute book in a few seconds is a powerful weapon in the struggle for consistency of style and language. The achievement of consistency and harmony in the statute book has traditionally been tantalisingly difficult. Similarly, the availability of search techniques is a marvellous aid to achieving consistency within a draft.

The manner of presentation of written material can assist or inhibit communication. This factor has generally been neglected in the publication of statutes. The style of the legislative page in many jurisdictions is archaic and would benefit greatly from the advice of an expert in graphic design.

In particular, print style should be modern and easy to read. There is enough discouragement in the content of many statutes and it does not need to be added to by forbidding print. Practice concerning capitalization, punctuation, headings and indentations should follow familiar usage, unless there is good reason for change.

Point 5 - Stylistic practices and precedents of commonly recurring provisions should be kept under continuing review and should be recorded and made available in a practice manual.

The nature of the legislative process and the ordinary usage of statutes require that legislation be structured and presented in accordance with established conventions. Numbering practice, for example, must be consistent within a jurisdiction to avoid total confusion. A programme of review should aim to develop and adopt practices that best facilitate easy communication.

A practice manual is a vital tool for a law drafting office. It promotes consistency, constitutes a valuable training resource and facilitates stylistic development and improvement.

Point 6 - Greater attention should be paid in legal training to the teaching of written communication skills.

Point 7 - A statute book must be kept up to date by an effective system of reprints or revision.

Most statutes amend other statutes textually. Until an amending statute is printed with the text integrated with that of the principal statute, the amending text makes little sense to a person not used to dealing with statutes. The problem arises whether or not the statutes are drafted in plain language. This is a problem of enormous proportions and one that is not being faced up to adequately in many jurisdictions. To solve it is not technically difficult, especially in these days of computer technology, but it is costly for a small jurisdiction and uses scarce and expensive expertise. Nevertheless, it has to be recognised that successful communication of a statute after amendment is very seriously inhibited until an integrated text is made available.

Point 8 - Existing statutes in consumer-oriented areas should be the subject of a programme of review and to the extent found necessary should be redrafted in plain language.

Such a programme should give priority to legislation on topics of concern to large sectors of society, particularly sectors that might be expected to face difficulties in dealing with statute law. Examples of suitable subjects are found in the fields of road traffic law, hire purchase, fair trading, credit, residential tenancies, door to door trading, family law, resolution of small disputes, equal opportunities and wills.

Footnotes

1. R W Benson, The End of Legalese: The Game is Over, (1986) 13 N Y U Rev L & Soc.Change 520.
2. G S Dykstra, Plain Language, Legal Documents and Forms: Background Information, A paper presented at the Canadian Institute for the Administration of Justice Seminar on Legislative Drafting and Interpretation, Ottawa, 1987. Published in the Loophole Vol 2 Part 2.
3. R Thomas, Plain English and the Law (1985) Stat. L R 139.
4. R D Eagleson, Efficiency in legal drafting, Essays on legislative drafting in honour of J Q Ewens, 14.
5. Foreword to Making it Plain, HMSO, 1988.
6. G S Dykstra, op cit, 4.
7. As reported in The West Australian, November 10, 1989.
8. See I I L Turnbull, Problems of Legislative Drafting, (1986) Stat. L R 68.
9. Cmnd 6053 (para.1.10).

PLAIN LANGUAGE AND LEGAL DRAFTING

Speech by Shri Dinesh Goswami,
Union Minister of Law and Justice, India

Mr Chairman:

I wish to express my appreciation to the Commonwealth Secretariat for bringing before us a subject which is important not only to the Commonwealth countries, but to the international community as a whole.

There cannot be two views on the need to write legal documents in plain language so as to make the law understandable to the man the street. This need is specially felt in developing countries where a vast majority of people are not familiar with legal language. Most of their laws were drafted in the colonial period. The language of these laws is legalistic and circumlocutious, requiring a special expertise in order to measure their meaning. The tortuous language used in drafting legal documents makes them incomprehensible even to those who are most familiar with the subject matter of legislation. The precious time of the courts, which are otherwise burdened with heavy a load of work, is also wasted in trying to explain the so-called legislative intent.

On several occasions the Supreme Court of India also commented adversely on the drafting of our statutes. Recently, while interpreting a provision in a statute, a Supreme Court judge observed that "the section has been drafted in a jaw-breaking fashion and its cumbersomeness could have been simplified had a different type of legislative drafting skill been brought to bear upon the subject". He then commented that the section reminds one of the old British jingle:

I'm the parliamentary draftsman
I compose the country's laws
And of half the litigation
I'm undoubtedly the cause.

The adoption of simple language in the drafting of our laws would contribute to a greater clarity and universal understanding. We may recall here what Lord Denning said:

"If you were seeking to see what different principles should be applied, the first would be to recommend simpler language and shorter sentences. The sentence which goes into ten lines is unnecessary. It could be split up into shorter ones anyway, and couched in simpler language. Simplicity and clarity of language are essential."

What is said of municipal enactments will apply with equal force to the legal documents adopted under the auspices of the United Nations and its related Specialised Agencies. Legislation enacted to give effect to such documents within the municipal sphere generally reproduce the English text of the international treaty.

Laws are intended to regulate human conduct and promote social welfare. In the present day world, there is not a single aspect of human life which is not regulated by some legislation or the other, whether principal or subordinate. What is more, in developing countries, a growing number of socio-economic enactments are being adopted with a view to promoting the interests of the weaker sections of the people and protecting them from social injustice and all forms of exploitation. A vast majority of people in any society generally consists of laymen, and they need to know law as much as any other section of

the society. If these laws are to have any relevance to them, they have to be drafted in plain language. They require adaptation to suit contemporary requirements of our social life. The common man wants to know his rights and obligations under the law.

Since any legal text has to satisfy the test of effectiveness in communication, if the language or style of such communication is deficient, it will, to that extent, fail to serve its purpose. Whether the language used for such communication is English or any other language, the function of the law can be said to be properly served only if consumers of the law understand its scope and reach.

The movement for the use of "plain English" in legislation, which has been gaining momentum in recent years in several Commonwealth countries, has not gone unnoticed in India. It is certainly a welcome development.

However, in the Indian context, the problem is not confined to the simplification of legal English. While English continues to be widely used in India in the legal field, the demand for increased use of the national language as also other local languages in the legal sphere has also been growing. The Authoritative Texts (Central Laws) Act, 1973, was enacted in India to provide that the translation of any Central Law or the subordinate legislation made thereunder in any of the fifteen Indian languages, specified in the Eighth Schedule to the Constitution of India shall be the "authoritative text" of that Central Law etc. in such language. It has brought about a qualitative change in the matter of language of the law in India and conferred on the Indian language texts the same authoritative status as was hitherto enjoyed by the English and Hindi texts of Acts of Parliament. The amendment has opened the door for the Indian languages to acquire the same status as English in respect of legislation and all other legal matters. The situation in India is thus somewhat different from that obtaining in other Commonwealth countries where, perhaps, the English texts of enactments alone need simplification.

The process of transition from English to the various national languages in India is not without its problems. It is not uncommon to find that many of the subtle legal concepts and expressions do not lend themselves easily to straightforward translation of English text into other languages. Very often, new expressions and phrases require to be coined to bring out the correct meaning of the original English text of a legislation or any other legal document. In finding a satisfactory answer to these problems, linguists and legal experts are sometimes forced to adopt words and phrases which are less intelligible than the English text itself.

While, in certain cases, it is only a question of finding suitable language to describe a well-understood concept, in others, it is a question of introducing the concept itself. For facilitating the switch over from English to the national languages, one of the important tasks initiated in India is the compilation of Legal Glossaries in various languages giving Indian language equivalents to English legal expressions and to standardise them, to the extent possible, for use in all Indian languages.

We are, at present, on the threshold of a new phase in the field of drafting Indian laws in various Indian languages. We are hopeful that our draftsmen will be able to avoid the pitfalls and shortcomings common to drafting in the English language, while drafting the laws in Indian languages.

Though the ideal is to bring the language of the law as close to the language of the common man as possible, it is often easier said than done. While we are aware of the difficulties involved in this regard, we need to make a beginning somewhere and let it be now rather than later. Towards this end, we welcome the proposals made by Mr Mark Adler in his paper. Thank you.

PLAIN LANGUAGE AND LEGAL DRAFTING: A NEW ZEALAND COMMENT

A paper by Sir Kenneth Keith*, Deputy President,
New Zealand Law Commission

In this paper I

- (1) illustrate the proposition that the plain drafting of legal documents is an idea whose time has come - again,
- (2) mention some of the steps already taken in New Zealand relevant to the drafting of legislation,
- (3) indicate further steps which I expect will be taken in New Zealand, and
- (4) emphasize what I think is the most important reason for the plain drafting of legislation.

* Deputy President, New Zealand Law Commission. Hardly a word in this paper is original. The influences are too extensive to allow adequate acknowledgement.

1. PLAIN DRAFTING OF LEGAL DOCUMENTS: AN IDEA WHOSE TIME HAS COME

David Mellinkoff, an outstanding writer on our topic says that legal writing has a strong tendency to be (1) wordy, (2) unclear, (3) pompous, and (4) dull, The Language of the Law (1963) 24. Another trenchant critic and law professor, Fred Rodell, puts it even higher. "There are two things wrong with almost all legal writing. One is its style. The other is its content" (1962) 48 Virginia L Rev 279.

The criticism can still be made notwithstanding the fact that it has long been made and long been the subject of severe penalty. Thus Mellinkoff mentions the steps taken by one sixteenth century Chancellor to curtail verbosity in legal pleadings. The plaintiff's replication had been stretched from an adequate 16 pages to 120. The Chancellor not only fined and imprisoned the litigant (not the draftman) but subjected him to ridicule. The Warden of the Fleet was ordered to take the litigant into custody and to bring him into Westminster Hall.

... and there and then shall cut a hole in the myddest of the same engrossed replication ... and put the said Richard's head through the same hole, and so let the same replication hang about his shoulders with the written side outward; and then, the same so hanging, shall lead the same Richard, bare headed and bare faced, round about Westminster Hall, whilst the courts are sitting, and shall shew him at the bar of every of the three courts within the Hall (p.191).

Francis Bacon as Chancellor extended the penalties (although not the humiliation) to counsel as well as to the litigants.

To be fair, important steps have at various times and now are being taken to meet the criticism. In New Zealand, as elsewhere, insurance companies increasingly see the advantages of better drafting and presentation of their policies - for marketing, for comprehension by customers (and their satisfaction), and for internal administration (and accordingly for costs and profits).

The Public Trust Office has successfully redrafted its standard wills and other documents with some of the same advantages. Wills (no longer wills and testaments) now simply give (rather than give, devise and bequeath) the property in question. Major law firms - and no doubt smaller ones too - are beginning to see the advantages of hard work in this area.

The most extensive recent demonstrations of the great values of plain drafting come from the United States. So a 1984 publication by its Department of Commerce, How Plain English Works for Business: Twelve Case Studies gives detailed evidence of businesses succeeding by simplifying consumer documents.

When a company simplifies its language, it builds business and saves time and money. It streamlines procedures, eliminates unnecessary forms, and reduces customer complaints. Its employees, as well as its customers, get a better grasp on how the company does business. This increases productivity and customer satisfaction.

The Director of Consumer Affairs adds the important caution and encouragement:

Simplifying documents is not easy. These case studies show there are false starts, uncertainty, and internal questioning as companies organize and manage their simplification projects. But each project results in useful plain English products that improve the company's image and its competitive position.

The case studies illustrate the improvements in language and design - and substance. The last often arises since the plainer drafting and structure of the document present more clearly or even for the first time the question whether substantive elements of the document are necessary. Thus Citibank, when simplifying its promissory note in 1973, found that many provisions in the original note either arose so rarely or added so little real benefit that while theoretically useful they could reasonably be deleted.

On language, Citibank applied the rules for good writing stated over the years by White and Strunk, George Orwell and others:

Sentences quickly became shorter; passive constructions became active; negatives became positives; and compound and complex sentences became simple.

On design, the Bank acted on studies showing the most effective line length, distances between lines, type size and design, margin formats, and different colours.

And the payoffs?

- . The new promissory note supported Citibank's efforts to increase its market share among New York consumers.
- . Praise poured in from consumer advocates who had traditionally been wary of the large banks.
- . In a joint experiment, Citibank and Ralph Nader's staff worked together to write a publication telling consumers how to use small claims court.
- . Within a few years of introducing the simplified note and the new collection processes, Citibank considerably reduced the number of suits it brought against consumers.

I have scarcely mentioned official documents. One interesting piece of evidence of the growing acceptance of plain writing at the official level comes from changes promoted in the United Kingdom. An earlier version of a pamphlet produced by the Cabinet Office had a Junior Civil Service department minister on the back page. The last version I have seen has Mrs Thatcher on the front page. (The Word is ... Plain English (1984); Making it Plain (1988)).

The proposition in the pamphlet is that the Government wishes to communicate in a more straightforward and direct way with the governed. One of the advantages of this direct communication is great savings of government spending arising for instance from the fact that official forms do not have to be sent back and forth for correction.

A New Zealand example is the improvement a few years ago of the electoral enrolment forms. That did cost valuable Parliamentary Counsel Office time. But now that time has been recovered many times over in the offices of the Chief Electoral Officer - forms are now more often accurately completed - not to mention the time of all the prospective voters (Legislation and its Interpretation (NZLC PP8 1988) 55 and 80).

More important than those savings of time and money is that those better forms help ensure that the people exercise their democratic rights. That is to say the better preparation of legislative forms helps promote the better enforcement of the law and the more effective realisation of rights.

At last I have come to legislation. My lengthy introduction is deliberate. The drafting of legislation does of course have special characteristics, but legislation, like the other documents mentioned, is designed to communicate rules and principles governing behaviour. In this case there is the difference that the rules are stated with the authority of the State. I do not think that that reduces the lessons that can be learned from the practice I have mentioned and from the disciplines that practice draws from.

2. PLAIN DRAFTING OF LEGISLATION IN NEW ZEALAND: SOME RELEVANT STEPS ALREADY TAKEN

Many have brought together the criticisms of the drafting of legislation. In New Zealand, as a counter point, we can point to a very positive beginning: a direction by Queen Victoria in 1840 to her first Governor that all laws "be drawn up in a simple and compendious form, avoiding as far as may be all prolixity and tautology". 145 years later Parliament gave a similar direction to the Law Commission; it is to advise on ways in which the law can be made as understandable as is practicable, and as well is to have regard to the desirability of simplifying the expression and content of the law, again as far as that is practicable.

It is easier to state those principles than to apply them. But over the past 150 years in New Zealand (if I may engage in the invidious business of giving examples)¹ we have some outstanding examples of good drafting reaching from the very first Supreme Court and conveyancing ordinances, through the criminal code of 1893 (heavily influenced of course by the Stephens work), the native land legislation of 1909 (and much else for which Sir John Salmond was responsible), the consolidation statutes of the 1920s, the shipping and seamen consolidation of 1952, the family law reforms of the 1960s and 1970s, the Ombudsmen legislation of 1962 (a major New Zealand export) ...

The high quality of such statutes is of course the consequence of several factors, including usually clear thinking and decision making (a matter I come back to at the end of this paper), good instructions to Parliamentary Counsel, a good grasp by those involved (in the executive branch and in Parliament) of the wider political, administrative, legal and constitutional context, and sufficient time. As Parliamentary Counsel point out with good reason, all those elements do not often coexist, eg Walter Iles QC in Legislation and its Interpretation (NZLC PP8 1988) 79-80.

Design of statutes

Steps have however been taken to ensure better legislation and more can be, even in the face of great pressure. I now mention some of the steps already taken. The design of the statute book has been changed throughout this century. So the page is now smaller than a century ago, the setting easier on the eye, and the line length shorter. Numbers are no longer spelled out in words and references to statutory provisions are shorter.

Statements of purpose

More statutes now include an express statement of purpose, in the title, a preamble, or more commonly in a substantive provision, see eg respectively the Matrimonial Property Act 1976, the Maori Language Act 1987 and the Labour Relations Act 1987 (which has several object provisions in separate Parts).

¹

I do that here and later to make my points concretely. For a related discussion see "A Lawyer looks at Parliament" in Sir John Marshall (ed) *The Reform of Parliament* (1978) 26.

Accessibility of inherited law

Parliament, building on work done throughout the Commonwealth (especially in Australia), recently provided a definitive list of our inherited statute law, Imperial Laws Application Act 1988 (see Imperial Legislation in Force in New Zealand (NZLC R1 1987) for the texts and for a more direct draft Bill than the original). It thereby made that part of our law more comprehensible and accessible.

The internal organisation of statutes

The organisation of statutes more often places the important substantive provisions first and the less significant institutional and procedural matters last (compare the Dental Act 1988 with its predecessor and other professional and occupational regulation statutes).

Consistent approach to principle

The substance of statutes increasingly reflects a consistent approach to recurring matters of principle. This is especially so in the legislation stating, limiting and controlling public power. An earlier example is the insistence since 1961 on a narrow objectively worded statement of provisions empowering the making of regulations. The Regulations Review Committee is now building on this and related experience.

The practice of departments, Parliamentary Counsel, and of the Public and Administrative Law Reform Committee has established further principles and practices. Many of them are brought together by the Legislation Advisory Committee in Legislative Change: Guidelines on Process and Content published in 1987 and endorsed by Cabinet later that year.

In the preface to that report Mr Palmer, then Deputy Prime Minister and Minister of Justice, said:

Legislation is a vital function of government. ...

Experience teaches that both the process for the making of legislation and the content of legislation can be improved. This paper ... is designed to set out central aspects of that process and elements of the content of legislation that should always be addressed. ... The intention is that Ministers, departments and other bodies responsible for legislation would be guided by the paper.

The message is clear. If we need legislation - a matter which should not be taken for granted - we must follow proper procedures in preparing it and we must, in the absence of good reason, comply with established principles.

The message in this paper is for the whole of government - for ministers, for senior officials, for departmental lawyers, and for all others concerned with the preparation of legislation.

The administration has the primary responsibility for applying the principles. But the Legislation Advisory Committee has continued to develop those principles both in specific cases and in general statements arising from that particular experience (see its second and forthcoming fifth reports). So it has further developed the principles relating to the conferral of powers on administrative tribunals, their organisation, and appeals from their decisions (Report No 3), it has reported on departmental statutes (recommending that in general they are not needed and should not be enacted) (Report No 4), and is currently considering the practice and principles relating to a range of advisory bodies. The Cabinet has endorsed the general reports - on Legislative Change, Administrative Tribunals and Departmental Statutes, and many (but of course not all) of the Committee's recommendations on particular bills have been accepted.

The Committee's task in examining particular legislative proposals can be put in three questions -

Does the legislation give effect to the policy of the Government?

Does it do so consistently with legal principle?

Is the legislation necessary?

3. FURTHER STEPS IN NEW ZEALAND

Central to the further improvement of legislation is the development of the practices reflected in the work of the Legislation Advisory Committee. Those sponsoring and advising on legislative proposals - Ministers and officials - have to address more consistently than they do the three questions just asked.

Is the legislation needed?

The last of the questions - the need for the legislation - is increasingly being answered negatively (illustrated by the absence of detailed departmental legislation for several of the new and reorganised departments of state). But that question has to be asked more rigorously. For instance some statutes appear on the legislative agenda for amendment year after year. In some cases there will be a perceived political imperative (might it not more frequently be resisted), but in many others that does not appear to be so. Let me give an example.

In 1983 the social security and war pensions legislation was amended, at the urging of the Controller and Auditor-General who was concerned by the illegal early payment of benefit increases, to allow the changes to be made by Order in Council. It would not then be necessary to seek timely Parliamentary approval - although that approval was required (after the event) before the end of the session. Those provisions, designed in part to reduce pressure on the parliamentary process, have now each been amended on five occasions in just six years - and that in addition to the confirming statutes enacted essentially on an annual basis since.

Has the policy of the government been clearly stated?

Such instances of detailed repetitive fragmented legislation take up the time, often unnecessarily, of those involved - officials, Ministers, Parliamentary Counsel, Members of Parliament, and members of the public who are affected or interested. That is one cost. Another, to revert to the first question stated at the end of the last section, is that the policy of the government may not appear clearly from such a fragmented approach. One recent example involves the 1989 amendment to the Ministry of Agriculture and Fisheries Act 1953 to regulate the ownership and use of intellectual property developed within that Ministry. That issue arises of course for several other departments of state and at least one other department has specific statutory provision. It is not clear that legislation is needed at all: why cannot the matter be handled by contract as it is in other similar organisations in the private sector? But if legislation is required for the state sector the argument for generally applicable (rather than piecemeal) legislation is strong.

Has the policy been measured against principle?

If policy does not appear clearly in such provisions it may also not be possible properly to measure the policy against relevant principle. So, when the port companies were being established a short time ago, the general question of the application to local authority

commercial companies of the Ombudsmen and official information legislation appears not to have been squarely faced. That is to be contrasted with the comprehensive way in which that question arose, was debated, and was answered in respect of the central government State-Owned Enterprises. Fortunately, the matter is now on the agenda in a general way with the report of the State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee (1990 AJHR I 22A) which recommends that local authority trading enterprises be made subject to that legislation.

The preparation of a Legislation Manual

That further development and application of principle will be assisted by the preparation of a Legislation Manual which will build on the practice as found in part in Legislative Change, manuals found elsewhere, and related expertise. This is the next major project of the Law Commission in meeting its broad responsibilities in respect of legislation. Success in it depends of course on close co-operation with the Parliamentary Counsel Office. Related to that is the adequate resourcing of that office - a matter on which I understand action is also being taken.

Improvements in style

That manual project will involve, in addition to matters of principle, questions of style and design. The Commission has already made several relevant proposals and illustrated them in its reports. So it

- . includes purpose provisions rather than long titles in its draft Bills
- . uses different typography and different settings of the words on the page to facilitate reading
- . removes capital letters which in the present statute book appear inappropriately in the middle of sentences
- . uses Arabic rather than Roman numbers for parts of Bills
- . avoids archaic or unusual words such as "thereof" and "hereby"
- . removes unnecessary fictions
- . removes unnecessary qualifications on propositions
- . tries to present the material in a clear, logical order
- . writes the provisions in the present text
- . in general writes in the active voice rather than the passive
- . in general uses short sentences

A new Interpretation Act

Related to those matters is the preparation of a new Interpretation Act. That draft is part and parcel of a clearer, better organised statute book. To use the words of the purpose provision included in the latest Commission draft, an Interpretation Act should

- (a) state principles and rules for the interpretation of legislation,
- (b) shorten legislation by avoiding repetition, and

- (c) promote consistency in the language and form of legislation.

The potential of computers

A final matter, being considered by the Conference of Commonwealth Legislative Counsel at its meeting in Auckland this month, is the use of computers to help both access to the statute book and the drafting of legislation. The New Zealand statute book will soon all be available on computer - as are the last three years of statutes. We have yet, I think, properly to assess the computer's potential for a much more accessible, principled and coherent statute book.

4. THE MOST IMPORTANT REASON FOR THE PLAIN DRAFTING OF LEGISLATION

I have mentioned several reasons for the plain drafting of legal documents. This is not just a matter of form or of misplaced pedantry. The examples mentioned show that customers can better understand and comply with the documents, those who apply then can more easily administer them, rights are more effectively realised, and costs are saved. All those are important, even critical matters.

Even more important, I suggest, is the democratic value of the plain drafting of legislation. The confused, poorly drafted and fragmented character of legislation must sometimes mean that Ministers have not made knowledgeable decisions on that legislation. Clear proposals have not been put to them or finally been worked out by them. Members of Parliament and those making submissions to them are similarly not able to address clear proposals².

The consequence of this can be that the legislation when finally understood is seen to incorporate serious errors and policies which no Minister ever intended to present to Parliament. Our important select committee process means that these errors are sometimes discovered - but in the meantime serious consequences may have ensued. And the errors will not always be caught, or adequately remedied if they are.

I should make it clear that I am not striving for unattainable perfection. The best can be the enemy of the good. Governments are to govern. Reforming governments will make major demands on the legislative process. Our system has been under enormous strain and has produced much legislation of quality. But if governments are to have their will done, they must be enabled to elaborate that will in such a way that they can endorse it as their own, and present it for debate, acceptance or rejection, and application in practice - all on the basis that it is understood. The first purpose in the Official Information Act 1982 makes the general point in a closely related context. That purpose is to increase progressively the availability of official information to the people of New Zealand

- (a) to enable their more effective participation in the making and administration of laws and policies, and
- (b) to promote the accountability of Ministers of the Crown and officials

and thereby enhance respect for the law and promote the good government of New Zealand.

My thesis is that legislative information must not only be available. It must also be of good quality, if respect for the law is to be enhanced and good government promoted.

² That may mean that the relevant select committee with appropriate Ministerial and official input (itself a delicate matter) will develop a clearer position - but in that event those who have made submissions have made them on the wrong Bill.



The Public Trust Office

April 1990

PLAIN LANGUAGE AND LEGAL DRAFTING

Public Trust Office Plain English Wills

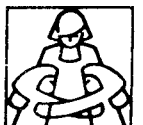
1. Background

- 1.1 In 1985 the Public Trust Office already had a comprehensive set of wills precedents of the highest standard. With over 100 years in the estates administration business the Public Trust Office took great pride in its will drafting expertise and made a point of revising the wills precedents from time to time. No interpretive problems had arisen.
- 1.2 Increasingly, however, clients from all backgrounds were beginning to question some of the more traditional wording (eg I give devise and bequeath), the lack of punctuation and the long paragraphs. Many of their comments were both intelligent and perceptive. While the answer of "tried and tested" precedents could be given, staff sometimes found their own answers unconvincing.
- 1.3 Rather than merely "tinker" with the precedents to remove what might be described as the more obvious excesses, the Public Trust Office decided that an attempt should be made to gain a market advantage over competitors by completely rewriting the precedents using plain language. This would be complimented by a modern lay-out intended to invite and encourage will makers to read their wills and also to be a practical reading aid.

2. How it was Done

- 2.1 Two Senior staff Solicitors rewrote the 240 wills precedents during the months of October and November 1985. At two-weekly intervals the redrafted precedents were sent to all the other Staff Solicitors for comment. This provided not only valuable professional feedback for the two solicitors but also familiarised the other solicitors with the new precedents and strengthened their commitment to the change.
- 2.2 The two solicitors consulted a Wellington Technical Institute lecturer who had written several textbooks and was a member of the Consumer Council of New Zealand. She was able to help with stylistic changes. Among the more important ones were:
 - (a) Long paragraphs were broken down into clauses and sub-clauses.

- (b) Clauses were drafted in the active rather than the passive.
 - (c) Clauses were given headings to aid the client find his or her way around the will.
 - (d) A modern numbering system was introduced.
 - (e) Punctuation!
- 2.3 A forms designer was also consulted regarding the lay-out and the colour of the new wills form.
- 2.4 Three examples of the traditional precedents translated into a new style are annexed. The first is a typical short will, the other two examples show even how a longer more complex will can be made easier to read.
3. Testing and Market Research
- 3.1 The initial feedback from our staff Solicitors assisted in the development of the new precedents. In addition the Public Trust Office commissioned a market research company to "consumer test" the proposed new precedents.
- 3.2 The purpose of the testing was to measure consumer reaction to the format and layout of both our traditional wills and the new plain English will. To remove possible bias in respect of the new stationery design the wills that formed part of the survey were all produced on similar stationery.
- 3.3 There was a very favourable overall reaction to the plain English will, especially from younger respondents. Overall 67% of respondents indicated a definite preference for the plain English will. It was seen as clear and easy to understand, brief and to the point, well set out and in sections with appropriate and relevant headings. Some 23% of respondents (mainly older respondents) preferred the traditional will but the majority of respondents (including the majority of older respondents) stated that the traditional will contained too many legal words and was too involved.
- 3.4 No interpretive problems have arisen since plain English wills were introduced in March 1986.
4. Implementation and Results
- 4.1 Following a national training programme for both staff Solicitors and other officers involved in the will drafting process the plain English wills precedents were nationally introduced. After a period of familiarisation advertising campaigns encouraging clients to make plain English wills commenced. For the business year to 31 March 1988 a record number of wills were drafted by the Public Trust Office and



again in the 1989 business year a record number of clients revised their wills with the Office.

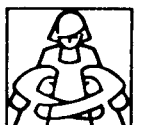
- 4.2 The reaction of customers has been encouraging with many new and existing customers requesting that their wills be written in plain English.
- 4.3 From the example of plain English and traditional wills attached it can be appreciated that the new drafting style, layout and wording has produced substantial savings for the Public Trust Office in the time taken for drafting and checking wills. Savings have also arisen in the costs of preparing, storing and handling wills due to their reduced length. In addition the will makers provide a further quality control - they are able to interpret and understand their will - this ensures that it meets their needs.
- 4.4 The New Zealand Plain English Campaign awarded the Public Trust Office their inaugural Plain English Award in 1986.

5. Summary

- 5.1 It must be acknowledged that the needs of some clients are such that their wills (even in the new style) remain complex. In the past, such clients would have found that the length of some unpunctuated clauses left them not only speechless, but breathless as well! Happily the Public Trust Office can now assure clients that this will not happen to them.
- 5.2 Due to the success of plain English wills plain language concepts are being extended into other documents, precedents and communications in the Public Trust Office.



(W B R Hawkins)
Public Trustee





The Public Trust Office

Its origins and place in New Zealand Society

The Public Trust Office in New Zealand was established under a public Act of Parliament and commenced business in 1873. It is structured as a corporation, the Public Trustee being technically a corporation sole with the status of a legal entity separate and distinct from the Crown.

In establishing the first Public Trust Office in the world, the New Zealand Government provided a secure, independent, state backed trustee organisation, on which many other countries, including England and Wales, modelled their own Public Trust Offices.

The Public Trust Office in New Zealand provides services to clients as executor, trustee, manager or agent. In addition besides performing statutory duties, it is the trustee of last resort. A further output sought by the Office is the promotion, facilitation and making of appropriate voluntary arrangements by the public for the management of their affairs in the event of death or incapacity.

Wills are held on behalf of nearly 363,000 New Zealanders, that figure representing 16% of the adult population.

Will

Made by:

DAVID GREENE

of Wellington, Manager.

Dated:

Earlier Wills

1. I cancel my earlier wills.

Executor and Trustee

2. I appoint the PUBLIC TRUSTEE of New Zealand ("my trustee") the executor and trustee of this will.

Guardian

3. If my wife dies before me, I appoint my sister AMY the guardian of my children.

Residue

- 4.0 I direct my trustee to hold the whole of my estate on trust:
- 4.1 To pay my debts and funeral expenses, my trustee's administration expenses, and any death duty payable on my estate.
- 4.2 To transfer the residue to my wife MARIE GREENE.
- 4.3 If my wife dies before me, to divide the residue equally among my children PETER GREENE, PAUL GREENE and MARY GREENE living at my death. However, if any of them die before me leaving a child or children living at my death, then that child will take, or those children will take equally, the share which the parent would otherwise have taken under this clause 4.3.

Maintenance Power

5. My trustee may use all or part of the share or interest of any child or grandchild of mine in clause 4.3 for that child's or grandchild's maintenance, education, advancement or benefit. Payments may be made for those purposes to a guardian of a child or grandchild without the Public Trustee requiring the guardian to account.

Signed by DAVID GREENE in)
our presence and attested)
by us in his presence:)



THIS IS THE LAST WILL of me DAVID GREENE of Wellington in New Zealand, Manager.

1. I REVOKE all wills and testamentary dispositions at any time heretofore executed by me.

2. I APPOINT THE PUBLIC TRUSTEE of New Zealand (hereinafter referred to as "my trustee") to be the executor and trustee of this my will.

3. SHOULD my wife predecease me I APPOINT my sister AMY OLIVER to be the guardian of each of my children who is a minor and who has not married.

4. I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever nature and wheresoever situate unto my trustee UPON TRUST to pay thereout my just debts funeral and testamentary expenses and all death duty payable in respect of my estate and to stand possessed of the residue for my wife MARIE GREENE but should she predecease me then for such of them my children PETER GREENE PAUL GREENE and MARY GREENE as are living at my death and if more than one in equal shares PROVIDED HOWEVER AND I DECLARE should any abovenamed child of mine predecease leaving a child or children living at my death then and in every such case such grandchild or grandchildren of mine shall take if more than one in equal shares the share or interest which his or her or their parent would have taken under this paragraph 4 had such parent be living at my death.

5. I DECLARE that the statutory powers of maintenance and advancement contained in the Trustee Act 1956 or any Act amending

2.

modifying or replacing the same shall apply to this my will

PROVIDED ALWAYS AND I DECLARE that the power to make payments out of capital contained in Section 41 of the said Act in its application to the powers of my trustee shall be construed in all respects as if the proviso in paragraph (a) of the said Section 41 were omitted.

AS WITNESS my hand this day of One
thousand nine hundred and eighty-six (1986).

SIGNED by the abovenamed)
DAVID GREENE as his last)
will in our presence and)
attested by us in his)
presence:)

DATED

1986

WILL

OF

DAVID GREENE

THE PUBLIC TRUSTEE

Will

Made by:

JOHN GRAY

of Christchurch, Company Director.

Dated:

Earlier Wills

1. I cancel my earlier wills.

Executor and Trustee

2. I appoint the PUBLIC TRUSTEE of New Zealand ("my trustee") the executor and trustee of this will.

Advisory Trustee

3. I appoint my brother ALAN GRAY the advisory trustee of this will.

Disposal of Body

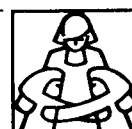
4. I request that my body be used for the purposes of anatomical examination, medical education and research. Subject to this request, I direct that my body be cremated.

Gifts

5. I give my interest as beneficiary in the estate of my late father EDWARD GRAY which at my death has not been transferred to me to my son PETER GRAY if he is living at my death.
6. I give Five thousand dollars (\$5,000) to my godson EVAN BLACK if he is living at my death and reaches the age of 21. This gift will carry interest from the date of my death.

Option to Purchase

- 7.0 I direct my trustee as soon as practicable after my death to give to my daughter MARY GRAY the option to purchase my house and land at 12 Seaside Road, Akaroa ("my bach") on these terms and conditions:
 - 7.1 This option is personal to my daughter and cannot be exercised by anyone else.
 - 7.2 The purchase price will be 75 per cent of the fair market value of my bach at my death.



- 7.3 After consulting a registered valuer my trustee will assess the fair market value of my bach but need not accept any valuation made by that valuer. My trustee's assessment will be binding on my beneficiaries.
- 7.4 My trustee will then notify my daughter in writing of the purchase price. My daughter must notify my trustee in writing whether she exercises the option or rejects it. If she does not do this within 3 months from the date of my trustee's written notice she will be taken to have rejected the option.
- 7.5 My trustee may apply all or part of my daughter's share in the estate which is not subject to a prior interest in the payment of the purchase price.
- 7.6 My trustee may give the option on any additional terms and conditions which he thinks reasonable.

Residue

- 8.0 I direct my trustee to hold the rest of my estate on trust:
- 8.1 To pay my debts and funeral expenses, my trustee's administration expenses, and any death duty payable on my estate.
- 8.2 To pay the income from the residue ("my residuary estate") to my wife ALICE GRAY while she is my widow.
- 8.3 From the first point in time ("the expiry date") when I have died and my wife has died or sooner remarried, to divide my residuary estate equally among my children PETER GRAY, PAUL GRAY and MARY GRAY living at the expiry date. However, if any of them die at or before the expiry date leaving a child or children living at the expiry date, then that child will take, or those children will take equally, the share which the parent would otherwise have taken under this clause 8.3.

No Apportionment of Income

9. My trustee will not apportion or treat as capital any income he receives after my death or after the expiry date. Instead, my trustee will treat the income as though it has accrued and become payable at the time he received it.

Signed by JOHN GRAY in our)
presence and attested)
us in his presence:)



THIS IS THE LAST WILL of me JOHN GRAY of Christchurch in New Zealand, Company Director.

1. I REVOKE all wills and testamentary dispositions at any time heretofore executed by me.

2. I APPOINT THE PUBLIC TRUSTEE of New Zealand (hereinafter referred to as "my trustee") to be the executor and trustee of this my will.

3. I APPOINT my brother ALAN GRAY to be advisory trustee of this my will.

4. I DIRECT that if it can conveniently be arranged my remains after my death be made available to the School of Anatomy of the Medical School nearest the place of my death for the purposes of anatomical examination and research and that subject as aforesaid if it can conveniently be arranged my remains after my death be cremated.

5. I GIVE DEVISE AND BEQUEATH to my son PETER GRAY should he be living at my death all that my right title share or interest in the estate of my late father EDWARD GRAY which at my death has not been paid over transferred or assigned to me as beneficial owner.

6. I DIRECT my trustee to set apart and appropriate out of my estate as at my death the sum of Five thousand dollars (\$5,000) and to hold such sum UPON TRUST for my godson EVAN BLACK should he be living at my death and attain or have attained the age of 21 years.

7. I DIRECT my trustee as soon as conveniently possible after my death to give to my daughter MARY GRAY if living the option to purchase the dwellinghouse and land owned by me at the date of this my will situate at and known as Number 12 Seaside Road, Akaroa (hereinafter referred to as "my house property") at a price equal to seventy-five per centum (75%) of the fair market value of my bach at the date of my death which fair market value shall be assessed by my trustee AND I DECLARE that it is my wish that before assessing the fair market value of my bach my trustee will consult an independent valuer but my trustee shall not be bound to accept any valuation made by such valuer AND I FURTHER DIRECT that upon the price having been determined in the manner aforesaid my trustee shall immediately notify my said daughter in writing of the amount of the said price AND I FURTHER DIRECT that my said daughter shall be required to notify my trustee in writing within the period of three (3) months after the amount of the price has been communicated in writing to her by my trustee whether or not she exercises this option AND I FURTHER DIRECT that if my said daughter fails refuses or neglects to notify my trustee in writing whether or not she exercises the option within the period hereinbefore prescribed for so doing then she shall be deemed to have rejected the option AND I DECLARE that this option shall be personal to my said daughter and shall not be exercisable by her executor or administrator or

by any other person or persons AND I FURTHER DECLARE that subject to any prior interest therein the share of my said daughter in my residuary estate may in my trustee's discretion be applied wholly or partly (as the case may be) in payment of the purchase money AND I FURTHER DECLARE that the decision of my trustee as to the fair market value of my bach shall be final and binding on all persons beneficially interested under this my will AND I FURTHER DECLARE that the option may in addition to the terms and conditions hereinbefore mentioned be given by my trustee upon and subject to such other reasonable terms and conditions as he may prescribe.

8. I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever nature and wheresoever situate not hereinbefore otherwise disposed of unto my trustee UPON TRUST to pay thereout my just debts funeral and testamentary expenses and all death duty payable in respect of my estate and to stand possessed on the residue (herein referred to as "my residuary estate") upon the following trusts namely :-

- (a) UPON TRUST as from my death to pay the income from time to time arising from my residuary estate to my wife ALICE GRAY during her widowhood.
- (b) UPON TRUST from and after the arrival of the first point of time when I shall have died and my said

wife has died or sooner remarried (hereinafter referred to as "the period of distribution") as to my residuary estate for such of them my children PAUL GRAY and the said PETER GRAY and MARY GRAY as survive the period of distribution and if more than one in equal shares PROVIDED HOWEVER AND I DECLARE that should any abovenamed child of mine die at or before the period of distribution leaving a child or children living at the period of distribution then and in every such case such grandchild or grandchildren of mine shall take and if more than one in equal shares the share or interest which his or her parent would have taken under this subparagraph (b) had such parent survived the period of distribution.

9. I DECLARE that dividends, rents, interest, annuities, remuneration, social security benefits and other periodical payments in the nature of income (whether or not continuing to accrue after my death) received after my death in respect of a period wholly or partly prior to my death shall not be apportionable in respect of time or be treated as capital of my estate and that dividends, rents, interest and other periodical payments in the nature of income received after the period of distribution in respect of a period wholly or partly prior to the period of distribution shall not be apportionable in respect of time or belong to my said wife

or her legal personal representative AND I FURTHER DECLARE that the whole of each such periodical payment (whether received in respect of a period either wholly or partly prior to my death or wholly or partly prior to the period of distribution) shall belong to the person or persons who would be entitled thereto under this my will if it had not accrued throughout any period but had all accrued and become payable to my trustee as income at the time at which it was received AND I FURTHER DECLARE that if interest on moneys held by any bank or other corporation (including money in any National Savings account or held by the Public Trustee) is normally credited in account but not actually paid until required that interest shall for the purposes of this provision be deemed to be received at the end of the period for which it is credited in account in the normal way.

10. I DIRECT my trustee to invest all capital money forming part of my estate and available for investment by him as two separate funds upon the following basis :-

- (i) As nearly as possible having regard however to the provisions of sub-paragraph (a) hereof to 75 percent thereof shall be invested in the Common Fund of the Public Trust Office.
- (ii) The remaining 25 percent or as nearly as possible thereto having regard however to the provisions of

sub-paragraph (a) hereof shall not be invested in the said Common Fund but shall be invested in or upon any of the other modes of investment for the time being authorised by the law of New Zealand for the investment of trust funds with power at his discretion to vary or transpose any investments made by him hereunder into or for others hereby authorised.

AND I FURTHER DECLARE AND DIRECT that :-

- (a) When moneys become available for investment my trustee shall invest them in such manner as will so far as practicable at that time achieve maintain or restore the percentages hereinbefore referred to having regard to any prior payments and distributions and any changes in values of investments PROVIDED HOWEVER that my trustee shall also have regard to anticipated payments or distributions and he shall not be bound to adhere strictly to such percentages.
- (b) My trustee may from time to time determine the value of each of the said funds and of the investments comprising the same in such manner as he shall in his sole discretion think fit.
- (c) Nothing in this paragraph contained or implied shall restrict the discretion of my trustee in the exercise of any other duty or power vested in him and in

particular nothing herein contained shall in any way restrict the making of any payment or distribution out of any part of my estate whether or not wholly or partly out of either one or other of the separate funds hereinbefore referred to.

- (d) My trustee may if he shall in his discretion think fit to do so at any time realise any investments of either of the two separate funds referred to or any other assets of my estate which he has authority to realise in order to maintain the value of each of the separate funds in the proportions hereinbefore referred to but nothing herein contained shall impose upon him any obligation to maintain such proportions.
- (e) The decisions of my trustee as to whether when and how the duties powers and discretions conferred on him by this paragraph 10 shall be exercised shall be final and binding on all persons beneficially interested under this my will.
- (f) My trustee shall be absolutely indemnified by and out of my estate for and in respect of any loss or liability which may be sustained or incurred by reason of the exercise or mode of exercise of the powers and discretions conferred by this paragraph 10 of this my will.

8.

AS WITNESS my hand this day of One
thousand nine hundred and eighty six (1986).

SIGNED by the abovenamed)
JOHN GRAY as his last will)
in our presence and)
attested by us in his)
presence:)

DATED

1986

WILL

OF

JOHN GRAY

THE PUBLIC TRUSTEE

Will

Made by:

ALICE BROWNE

of Auckland, Widow.

Dated:

Earlier Wills

1. I cancel my earlier wills.

Executor and Trustee

2. I appoint the PUBLIC TRUSTEE of New Zealand ("my trustee") the executor and trustee of this will.

Burial

3. I direct that my body be buried with that of my late husband DAVID BROWNE in the Potts Point Cemetery. My trustee may spend as much as he thinks reasonable on gravework, and treat the cost of that work as an administration expense.

Gifts

4. I give all money (including interest) which I have at my death in the Post Office Savings Bank to my nephew ALAN SIMON. This gift excludes any money representing unclaimed Bonus Bond prizes or matured National Development Bonds deposited under Part VII of the Post Office Act 1959.
5. I give Five thousand dollars (\$5,000) to my niece JOANNA SIMON. If she dies before me, this gift is to be divided equally among her children living at my death.
6. I give Five thousand dollars (\$5,000) to the CANCER SOCIETY OF NEW ZEALAND (WELLINGTON DIVISION) INCORPORATED for research purposes. A receipt appearing to my trustee to be given on behalf of the Society will be a complete discharge to my trustee for the gift.

My Home

- 7.1 I give my house and land at 10 South Street, Auckland, together with all fitted floor coverings, blinds, curtains and light fittings in my house at my death ("my home") to my trustee on the trusts set out in this clause.
- 7.2 My trustee will let my daughter MARY BROWNE have the free use of my home and the income from it for her lifetime on these terms and conditions:
 - (1) She will pay the rates, insurance premiums, and other outgoings usually paid from income on my home.



- (2) She will keep my home in the same condition it is in at my death. My trustee may put any part of my home not in good condition at my death into good condition to his satisfaction and charge the cost to my residuary estate. If he does so then my daughter must keep it in that improved condition to my trustee's satisfaction.
 - (3) She will not be responsible for any damage or loss to my home caused by fire, earthquake, storm or other inevitable accident.
- 7.3 From the death of the survivor of my daughter and me, my trustee will transfer my home to my sons PETER BROWNE and PAUL BROWNE equally if both are living at my death, or if only one is living at my death, then to that one.

Residue

- 8.0 I direct my trustee to hold the rest of my estate on trust:
- 8.1 To pay my debts and funeral expenses, my trustee's administration expenses, and any death duty payable on my estate.
- 8.2 To divide the residue equally among my children MARY BROWNE, PETER BROWNE and PAUL BROWNE living at my death. However, if any of them die before me leaving a child or children living at my death, then that child will take, or those children will take equally, the share which the parent would otherwise have taken under this clause 8.2.

Replacement Home

- 9.1 If at any time before the expiry date my daughter asks my trustee to sell my home, or any replacement home purchased under this power, then he may do so.
- 9.2 If at any time before the expiry date my daughter asks my trustee to purchase any replacement home then he may do so out of the proceeds of the sale of my home or of any replacement home ("the property fund").
- 9.3 My trustee will not be restricted in the exercise of this power by the nature or the terms of the ownership of any replacement home. He will not be liable for any loss resulting from the exercise of this power.
- 9.4 This power includes the right to:
- (1) Purchase land and build a home on it;



- (2) Repair, renovate, improve or landscape any replacement home.
- 9.5 Instead of purchasing a replacement home my trustee may lend all or part of the property fund to my daughter so that she can purchase a replacement home in her name. She will give my trustee such mortgage or other security as he may require but it need not be one authorised by law for the investment of trust funds.
- 9.6 My trustee will hold any replacement home, any mortgage or other security given to him by my daughter, and the balance (if any) of the property fund on the same trusts as apply to my home.

Administration Powers

10.0 My trustee will have these powers:

- 10.1 He may retain any investments which I own at my death, even if they are not investments which could properly be made by a trustee. He will not be liable for any loss caused by their retention.
- 10.2 He may let any part of my estate on such terms and conditions as he thinks desirable. He may also manage any leases and tenancies in my estate and accept surrenders of them.
- 10.3 He may sell all or part of my estate in the manner and on the terms he chooses, including a term allowing all or part of the purchase price to remain owing on mortgage.
- 10.4 He may postpone the sale, calling in and conversion of any part of my estate for so long as he thinks desirable even if it is of a wasting, speculative or reversionary nature.
- 10.5 He may transfer or divide any asset in my estate in or towards the payment of the share of any of my beneficiaries. If in exercising this power my trustee cannot maintain the relativity of the shares of my beneficiaries, he may charge any of the shares with the payment of a sum of money to restore that relativity. For this purpose my trustee may fix the value of any asset, and his decision on the valuation, transfer or division of any asset will be binding on my beneficiaries.



Extension of Administration Powers

11. The powers given to my trustee my clauses 10.2 and 10.3 apply to my home, but he may not exercise those powers in respect of my home without the legal consent of my daughter while she is legally capable of giving such consent.

Signed by ALICE BROWNE in)
our presence and attested)
by us in her presence:)



THIS IS THE LAST WILL of me ALICE BROWNE of Auckland in New Zealand, Widow.

1. I REVOKE all wills and testamentary dispositions at any time heretofore executed by me.

2. I APPOINT THE PUBLIC TRUSTEE of New Zealand (hereinafter referred to as "my trustee") to be the executor and trustee of this my will.

3. I DIRECT that my remains after my death be buried with those of my late husband DAVID BROWNE in the Potts Points Cemetery AND I AUTHORISE AND EMPOWER my trustee to expend out of my estate as a testamentary expense such sum as he in his discretion thinks reasonable and concreting over the grave and having the existing headstone suitably inscribed to my memory.

4. I GIVE AND BEQUEATH to my nephew ALAN SIMON all moneys (including interest) standing to my credit at my death in any ordinary deposit account or ordinary deposit accounts in the Post Office Savings Bank other than any moneys and interest thereon held or deemed to be held on my behalf in any ordinary deposit account in the Post Office Savings Bank solely by operation of the provisions of the Post Office Act 1959 or any statutory provisions for the time being modifying or replacing the same in respect of the proceeds of any Bonus Bond, Post Office National Development Bond or registered security issued under Part VII of the said Act or in respect of any prize money or interest arising therefrom AND I DECLARE that the term ordinary deposit accounts shall

have the same meaning herein as that which it has in the said Part VII of the Post Office Act 1959.

5. I GIVE AND BEQUEATH the sum of Five thousand dollars (\$5,000) to my niece JOANNE SIMON but should she predecease me then to such of her children as are living at my death if more than one in equal shares.

6. I GIVE AND BEQUEATH the sum of Five thousand dollars (\$5,000) to the CANCER SOCIETY OF NEW ZEALAND WELLINGTON DIVISION INCORPORATED for research purposes AND I DECLARE that the receipt of the Secretary Treasurer or other person or persons appearing to my trustee to be authorised to give receipts on behalf of the said Society shall be a full insufficient discharge to my trustee for this legacy and my trustee shall not be obliged to see to the application thereof.

7. I GIVE DEVISE AND BEQUEATH the dwellinghouse and land owned by me at the date of this my will situate at and known as Number 10 South Street Auckland together with the fitted floor coverings blinds curtains drapes and light fittings in the dwelling house at my death (hereinafter referred to as "my house property") unto my trustee upon the following trusts, namely:-

(a) UPON TRUST as from my death to permit my daughter MARIE BROWNE to have the free use income occupation and enjoyment thereof during her lifetime (the death of the

survivor of my said daughter and me being hereinafter referred to as "the period of distribution") subject to her paying all rates taxes interest insurance premiums and other outgoings usually payable out of income from time to time payable in connection therewith and to her keeping the same in good order repair and condition to the satisfaction of my trustee except in respect of any injury or deterioration occasioned by fire lightning earthquake tempest or other inevitable accident

PROVIDED HOWEVER AND I DECLARE that should any part of my house property not be in good order repair and condition at the date of my death then notwithstanding anything hereinbefore contained until my trustee shall have put such part in good order repair and condition under the power so to do hereinafter conferred on him my said daughter shall be liable as to such part to keep it only in the same order repair and condition as it was in at my death and without liability to make good any injury or deterioration occasioned by fire lightning earthquake tempest or other inevitable accident AND I EMPOWER my trustee at his discretion but without imposing upon him any obligation so to do to put any such part of my house property in good order repair and condition to the satisfaction of my trustee and to charge the cost of so doing to the capital of my residuary estate.

(b) UPON TRUST from and after the period of distribution to hold my house property for my sons PETER BROWNE and PAUL

BROWNE in equal shares should they both be living at my death or should only one of them be living at my death then for such one solely.

8. I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever nature and wheresoever situate unto my trustee UPON TRUST to pay thereout my just debts funeral and testamentary expenses and all death duty payable in respect of my estate and to stand possessed of the residue for such of them my said children MARIE BROWNE PETER BROWNE and PAUL BROWNE as are living at my death and if more than one in equal shares PROVIDED HOWEVER AND I DECLARE that should any of my abovenamed children predecease me leaving a child or children living at my death then and in every such case such grandchild or grandchildren of mine shall take if more than one in equal shares the share or interest which his her or their parent would have taken under this paragraph 8 of this my will had such parent be living at my death.

9. IF at any time or times prior to the period of distribution my said daughter MARIE BROWNE requests my trustee in writing so to do then and on each such occasion I AUTHORISE AND EMPOWER my trustee to sell my house property or any residential property acquired by him in substitution therefor under the provisions of this paragraph AND I FURTHER AUTHORISE AND EMPOWER my trustee if at any time or times prior to the period of distribution my said daughter

requests him in writing so to do to either -

(a) Expend out of the proceeds of sale of my house property or out of the proceeds of sale of any substituted residential property acquired by him hereunder or out of any other moneys for the time being in his hands representing my house property or such substituted residential property or advance to my said daughter hereunder (such proceeds of sale or other moneys being hereinafter referred to as "the property fund") such sum or sums as he thinks fit in acquiring as an asset of my estate a residential property in New Zealand suitable in the opinion of my trustee as a home for my said daughter that in exercising this power my trustee may -

(i) Acquire freehold or leasehold land with a dwellinghouse thereon and whether then or at some subsequent time expend out of the property fund such sum or sums as my trustee thinks fit in carrying out such repairs or renovations as are in my trustee's opinion reasonably necessary or desirable at the date of the acquisition or in altering adding to or improving the same or

(ii) Acquire freehold or leasehold land and erect a dwellinghouse thereon together with such other buildings fences gates paths and other amenities and improvements as my trustee thinks fit or

(iii) Acquire a flat or apartment or the right to occupy a flat or apartment by such means as my trustee considers

appropriate (whether by acquiring shares in a company or an undivided share or interest in the land on which the premises are erected or in any other way) and at his discretion enter into any lease licence agreement or other arrangement under which my trustee or his nominee or my said daughter has the right to occupy the flat or apartment (including an arrangement whereby any company shares and the benefit of any such lease licence or agreement may be held by my said daughter or some other nominee of my trustee upon trust for him) or

- (b) Advance out of the property fund by way of loan to my said daughter upon and subject to such terms and conditions as he thinks fit such sum or sums as my trustee thinks fit in order to enable my said daughter to acquire in her own name a residential property in New Zealand intended for use by my said daughter as a home for her subject to my said daughter giving my trustee such mortgage encumbrance or other security for the advance as my trustee shall require AND I DECLARE that my trustee shall be at liberty to accept such mortgage encumbrance or other security for the advance as he in his sole discretion thinks fit notwithstanding that the same may be subject to any prior encumbrance or encumbrances or may for any other reason not be a security authorised by law for the investment of trust funds.

AND I DECLARE that any residential property acquired by my trustee under the foregoing provisions and any advance made to

my said wife as aforesaid and any portion of the property fund which may not for the time being have been expended or advanced or readvanced by my trustee under the foregoing provisions shall be held by my trustee upon and subject to the same trusts powers and provisions (with any necessary changes) as apply to my house property AND I LASTLY DECLARE that my trustee shall be absolutely indemnified by and out of my real and personal estate for and in respect of any losses which he may sustain by reason of his acting in accordance with the foregoing powers and authorities or any of them.

10. I DECLARE that my trustee may at his discretion exercise the following powers and authorities or any of the same namely:-

- (a) TO SELL all or any part of my real and personal property either by public auction or private contract or in such manner and subject to such terms and conditions as my trustee shall in his absolute discretion think fit with power to allow the whole or such part of the purchase money as he thinks fit to remain on mortgage of the property sold.
- (b) TO LET any real and personal property for the time being remaining unsold either from year to year or for any term of years or otherwise at such rent and subject to such covenants and conditions as he thinks fit also to accept surrenders of leases and tenancies and generally to manage the same as he thinks fit.
- (c) TO RETAIN all or any of the investments owned by me at my death notwithstanding that they may not be investments authorised by law for the investment of trust funds AND I DIRECT that my trustee shall be absolutely indemnified by and out of my real and personal estate for and in respect of any losses which he may sustain by reason of his so retaining any such investments as aforesaid.
- (d) TO POSTPONE the sale calling in and conversion of my real and personal estate or any part thereof for so long as he thinks fit notwithstanding that it may be of a wasting speculative or reversionary nature.

- (e) TO APPROPRIATE AND PARTITION any real or personal property forming part of my estate in or towards satisfaction of the share of any person or persons in the trusts hereinbefore contained and to charge any share with such sums by way of equality of partition as my trustee may think fit and for such purpose to fix the value of any part of my estate as he thinks fit and every such valuation appropriation and partition shall be final and binding on all persons beneficially interested under this my will.

AND I FURTHER DECLARE that the powers conferred on my trustee by sub-paragraphs (b) and (c) of paragraph 10 of this my will shall extend and apply to the assets devised and bequeathed by paragraph 7 of this my will and may be exercised in respect of such assets at my trustee's discretion provided he has first obtained the written consent of my said daughter MARIE BROWNE should she be living and sui juris at the time of the proposed exercise thereof.

AS WITNESS my hand this day of One
thousand nine hundred and eighty-six (1986).

SIGNED by the abovenamed)
ALICE BROWNE as her last)
will in our presence and)
attested by us in her)
presence:)

DATED

1986

WILL

OF

ALICE BROWNE

THE PUBLIC TRUSTEE

MUTUAL ASSISTANCE IN CRIMINAL MATTERS

FORFEITURE OF THE PROCEEDS OF CRIME

A paper prepared for the Commonwealth Secretariat
by Professor David McClean

1. The purpose of this paper is to identify the legal and practical issues which arise in what is increasingly recognised as being a most important and fast-developing area of criminal law enforcement. There are, of course, outline provisions dealing with "Tracing, Seizing and Confiscating the Proceeds or Instrumentalities of Crime" in the Harare Scheme for Mutual Assistance in Criminal Matters in the Commonwealth, and recommendations for the improvement of those provisions are to be considered at the Meeting (see LMM(90)12). Related material can also be found in LMM(90)3 (Dr Gilmore's paper on International Action against Drug Trafficking) and the issue of bank secrecy (discussed in LMM(90)8 from the Government of New Zealand) is also very relevant.

2. It needs constantly to be stressed that the importance of adequate legal provisions and practical mechanisms for the forfeiture of the proceeds of crime is not limited to the area of drug trafficking. That is undoubtedly the area in which the greatest "return" (i.e. illicit profit) is to be found, and for that reason it is associated in some countries with organised crime and racketeering. It is also an area in which the signature of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 has required the attention of Governments, and that Convention will need detailed implementing legislation. This does not, however, lead to a necessary conclusion that legislative provision should be limited to drugs offences; the United Kingdom, having first legislated in the drug trafficking field, has twice extended the scope of its legislation, firstly for other general criminal offences and secondly in the special context of terrorism. Although contained in three distinct statutes, much of the legislation is identical in the three contexts.

Tracing the proceeds of crime

3. As is well-known, a major problem for criminals (and a major opportunity for law enforcement agencies) is that of "laundering" their profits. In the case of sophisticated commercial frauds this will typically involve the use of a large number of bank accounts in several jurisdictions. For obvious reasons, jurisdictions with bank secrecy laws or with relatively lax control over the establishment and operation of banks are preferred. In the case of drugs successfully sold at "street" level, the profits will initially be in the form of used bank-notes, and drug syndicates have to find means of depositing this cash into bank accounts (for future laundering and recycling) without attracting undue attention.

4. Tracing raises three practical issues: the effect of bank secrecy laws; the creation of a reporting obligation on banks and other financial institutions; and the monitoring of cross-border transfers of money.

5. Bank secrecy laws, were they in absolute terms, would be a formidable obstacle to effective law enforcement in this field. There is growing recognition that tracing the proceeds of crime (at least in the case of serious crime, including drug trafficking, and organised crime) is an appropriate justification for an exception to bank secrecy laws. The Swiss Confederation accepted this in its negotiations with the United States towards

what became the first of the recent series of bilateral mutual assistance treaties negotiated by the United States Government. It is notable that the provision of the Drug Trafficking Offences Act 1986 (United Kingdom), that an order to make material available for the purpose of an investigation into drug trafficking "shall have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise", has been reproduced unchanged, despite the very different approach to bank secrecy, in the Bahamas: Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986, s.22(8)(b) (Bahamas). In the drugs context, Article 5(3) of the UN Convention of 1988 expressly provides that, in carrying out its Convention obligation to legislate for the identification, tracing and seizure of proceeds of drugs offences, a Party shall enable its authorities to obtain bank, financial and commercial records and that a Party may not decline to act in that respect on the ground of bank secrecy.

6. In modern legislation, there is a growing practice of imposing upon banks and similar financial institutions an obligation to report certain types of financial transaction (chosen because of their potential relevance in money laundering) or more generally to report transactions creating a suspicion of money-laundering activities.

7. An indication of the range of possible provisions can be obtained from the comprehensive legislation introduced in Australia. Under the Cash Transaction Reports legislation, a "cash dealer" is under an obligation to report "significant cash transactions" to the Director of the Cash Transaction Reports Agency. The term "cash dealer" is given a very wide interpretation, including for example securities dealers, unit trust managers, bullion dealers, casino operators and bookmakers. A "significant cash transaction" is one involving the transfer of currency of not less than \$Australian 10,000. If foreign currency is involved the report is required within a day of the transaction; fifteen days is allowed in other cases. Under the Proceeds of Crime Act 1987, a judge may make a "monitoring order" directing a financial institution (a bank, building society or credit union) to give information to a law enforcement authority; the information which may be obtained relates to transactions conducted through an account held by a specified person. Related provisions require financial institutions to retain for a seven-year period certain classes of document of value in tracing the movement of funds, for example opening and closing accounts, transmitting funds abroad, and opening or using a deposit box.

8. A different technique is used in the United Kingdom. It is an offence to assist another to retain the benefit of drug trafficking, and this will be committed by anyone (including a bank) which, suspecting the source of the funds, facilitates their concealment, removal from the jurisdiction, or other acts serving to enable the funds to be retained or controlled by the criminal. Disclosure of the suspicion to the police is made a defence, and the effect is to impose a duty of disclosure once suspicions are aroused. The House of Commons Home Affairs Committee, reporting in 1989, supported this approach (despite some concerns as to its observance by the smaller banks, including overseas banks with branches in London, perhaps as a result of ignorance of the relevant provisions) in preference to the Australian approach of mandatory reporting of all transactions over a certain value.

9. So far as drugs offences are concerned, States ratifying the UN Convention will be obliged to legislate to implement Article 3. This requires the creation of a range of criminal offences. These include

"the conversion or transfer of property, knowing that such property is derived from [drugs offences] ... for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence ... to evade the legal consequences of his actions"; and "the concealment

or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from [drugs offences]."

So far as international co-operation is concerned, these offences are expressly excluded from the categories of "fiscal" and "political offences".

10. It will have been noted that the Australian provisions as to the reporting obligation deal expressly with the transmission of funds overseas. This is of obvious importance, and practical difficulties have been experienced, or are feared, where States have dismantled exchange controls or are entering into regional arrangements which reduce border controls. It is important in such contexts that the law enforcement considerations are kept in mind and made the subject of special legislation if necessary.

Seizure of property: restraining orders

11. Once relevant property has been identified it is clearly of the greatest importance that it be made subject to some procedure by which its further removal or dissipation is restrained. The usual legislative provision is for some sort of "restraining order" to this effect, well described as the criminal law equivalent of the Mareva injunction.

12. In most legislation, restraining orders are sought ex parte; speed and confidentiality are of the essence. It is usually necessary to provide for a limited period of validity, so that either the order expires unless confiscation proceedings are commenced within a prescribed number of days or it has to be renewed (or is open to challenge) in subsequent inter partes proceedings. If the whole of an individual's property is restrained, there must be some provision enabling him to obtain sufficient funds for reasonable living expenses and legal costs. Some States have also found it desirable to make fairly full provision to safeguard the interests of third parties; others leave such protection to the confiscation stage.

Confiscation

13. An order for the confiscation of property, although an essential weapon in the armoury of law enforcement agencies in this field, does raise a number of legal issues of some complexity, and these may have constitutional implications. These arise out of the practical realities of the case. It is almost inevitable that funds illegally obtained will be mixed, perhaps inextricably mixed, with funds obtained by more orthodox means; it is most unlikely that clear and accurate accounts will be maintained; an assortment of third parties will have interests in the funds, some of whom will be wholly innocent of complicity in the criminal enterprise. There will be a range of degrees of independence of the third parties: some will be associates of the criminals, some family members, some corporate bodies wholly or partly controlled (perhaps through a series of nominees and holding companies) by those involved in the offences.

14. This state of affairs has prompted legislators in a number of jurisdictions to place the burden of proof upon those resisting a confiscation order. In the Guyana legislation in the drugs area (the Narcotics Drugs and Psychotropic Substances (Control) Act 1988), all the offender's property is liable to forfeiture unless it is shown to have been innocently acquired. In the United Kingdom Drug Trafficking Offences Act there is a presumption (described in the Act as an "assumption") that property received in the six years before criminal proceedings were commenced was a payment or reward for drug trafficking. There may well be States in which such a reversal of the burden of proof would raise constitutional issues, which could not necessarily be avoided by classifying

the forfeiture proceedings as "civil" rather than criminal in nature. Devising procedures for the protection of third party interests is a complex matter, but a number of legislative models now exist.

15. The recent report of the United Kingdom House of Commons Home Affairs Committee drew attention to two weaknesses in the legislation of that State which may well be present elsewhere. If confiscation powers are expressed in terms of property obtained or derived from criminal activity, this may not catch (as many would think desirable) moneys obtained by the subsequent legitimate use of that property, such as interest earned on funds deposited in an interest-bearing account. The making of a confiscation order may also have the effect of "closing the accounts", operating once for all, so that the subsequent discovery of additional funds derived from the relevant offences may be too late for effective confiscation.

Money-laundering

16. Widely-drawn money-laundering offences are of considerable importance. The Canadian Criminal Code, in a provision added in 1988, creates this offence:

Everyone commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of an enterprise crime offence or a designated drug offence; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated drug offence.

17. This is of particular importance in the context of mutual assistance between States. As discussions of the Harare Scheme have revealed, there are constitutional difficulties in a number of countries in providing for the confiscation of property within that State as a consequence of the conviction in another State of X, who is not the current possessor of the property. The creation of a money-laundering offence on the Canadian model, which will be committed within the State where enforcement is sought by the current possessor of the funds and which can itself attract restraining and confiscation order powers, removes most if not all of these difficulties.

Resources

18. A final, and obvious, point: however well-drafted the legislation, covering all the problem areas neatly and effectively and making full provision for mutual assistance in the context of international crime, nothing will be achieved unless law enforcement agencies have the resources they need. In a number of States, some or all of the funds confiscated are made available for the specialist agencies involved. Tracing the proceeds of crime can be a very expensive and time-consuming operation, making heavy claims on the limited skilled manpower available to law enforcement agencies; there are considerable political advantages in ensuring that the funds recovered are at the very least clearly identifiable as the results of the investment of these resources.

AMENDMENTS TO COMMONWEALTH SCHEMES ON MUTUAL ASSISTANCE IN THE ADMINISTRATION OF JUSTICE

At their meeting in Harare in 1986 Law Ministers adopted two new Schemes as recommended to them by Senior Officials - on Mutual Assistance in Criminal Matters and on the Transfer of Convicted Offenders, in addition to adopting a number of changes to the 1966 Scheme on Rendition of Fugitive Offenders. They also established, on a more formal basis, a procedure for future reviews of Commonwealth mutual assistance arrangements, by inviting the Commonwealth Secretary-General, as the need arose, to convene meetings at Senior Official level to undertake the task of reviewing the schemes and monitoring their implementation.

Pursuant to this mandate and in preparation for the Law Ministers Meeting in Christchurch, the Legal Division organised a series of regional workshops which focused attention specifically on the Scheme relating to Mutual Assistance in Criminal Matters, followed by a pan-Commonwealth meeting of Senior Officials in London in June 1989. The June 1989 meeting, inter alia, reviewed the status of the implementation of the three Schemes in the criminal area and, in particular, considered a suggested streamlining of extradition procedures. The present paper sets out and explains the amendments which Senior Officials recommended should be made in the Commonwealth Schemes dealing with Mutual Assistance in the administration of justice. A separate report dealing with the Extradition Scheme and specifically with the issue of prima facie case requirement will be prepared and placed before Law Ministers after a meeting of Senior Officials due to be held in Auckland on 19 April.

Legal Division
Commonwealth Secretariat

March 1990

AMENDMENTS TO COMMONWEALTH SCHEMES ON MUTUAL ASSISTANCE IN THE ADMINISTRATION OF JUSTICE

INTRODUCTION

1. This paper sets out and explains a number of amendments which Senior Officials, meeting in Lancaster House, London in June 1989, recommended should be made in two of the Commonwealth Schemes dealing with mutual assistance in the administration of justice. Senior Officials spent some time at their June 1989 meeting in detailed discussion of possible amendments to the third of those Schemes, that on the Rendition of Fugitive Offenders within the Commonwealth; those discussions are to be continued in Auckland, and are the subject of a separate paper.

TRANSFER OF CONVICTED OFFENDERS

2. Senior Officials recommend one change in the text of this Scheme as agreed in Harare. Paragraph 19 of that text deals with Acceptance of the Scheme and reads as follows:

Any country may notify the Commonwealth Secretary-General that the provisions of this Scheme shall govern the transfer of prisoners between that country and any other country that accepts the Scheme, and shall inform him of the proper channel for communications.

3. It is recommended that the paragraph be replaced by the following:

Any country which enacts legislation to give effect to this Scheme shall notify the Commonwealth Secretary-General of that fact and shall inform him of the proper channel for communication and deposit with him a copy of the legislation.

4. This amendment was originally proposed by the British Government. Its purpose is to tighten the notification procedure, especially by linking it to the enactment of legislation, so that it is easier for Governments to ascertain which countries are actually able to give effect to the Scheme.

MUTUAL ASSISTANCE IN CRIMINAL MATTERS

5. The Scheme relating to Mutual Assistance in Criminal Matters also agreed by Law Ministers in Harare, was fully discussed at the three Workshops held during 1988 at which almost all Commonwealth jurisdictions were represented. Consideration was also given at those Workshops to successive drafts of a model Mutual Assistance in Criminal Matters Bill produced to assist the preparation of the necessary implementing legislation. The discussions of the Scheme and of the draft Bill at the Workshops identified a number of points at which relatively minor adjustments to the Scheme could usefully be made. The recommended changes are set out in Appendix A and the text of the Scheme as it would stand were these amendments agreed forms Appendix B.

Paragraph 1 (Purpose and Scope)

6. Paragraph 1(3)(i) of the Scheme, as reproduced in the Minutes volume of the Law Ministers' Meeting at Harare, refers to:

'tracing, and forfeiting the proceeds of criminal activities'

but it is believed that a reference to 'seizing' should have been included (and a text used at the Workshops in 1988 contained the word 'seizure'). It is recommended that the word 'seizing' be included in the text as formally agreed.

Paragraph 3 (Criminal Matter)

7. This paragraph is important in defining the scope of the Scheme. As agreed at Harare, it referred exclusively to criminal proceedings (either instituted or certified as likely to be instituted). In Malaysia (and possibly in future other Commonwealth countries) the procedure for dealing with proceeds of crime involves proceedings which are technically civil in character. Under the Dangerous Drugs (Forfeiture of Property) Act 1988 of Malaysia, application may be made to the High Court for the forfeiture of proceeds with provision for persons affected to show cause why the forfeiture should not take effect. Although dealt with by the High Court in the exercise of its criminal jurisdiction, these proceedings were arguably not within paragraph 3 of the Scheme.

8. Senior Officials recommend that paragraph 3 be amended in order to make it clear that assistance can be requested in respect of 'forfeiture proceedings' which have been instituted in the requesting country. The proposed amended text contains a full definition of 'forfeiture proceedings' which covers proceedings to restrain dealings with property as well as its actual confiscation, and also the imposition of pecuniary penalties calculated by reference to its value, whether they be characterised as criminal or civil proceedings.

9. It is important to note that the widening of paragraph 3 is without prejudice to paragraph 7(3) of the Scheme which enables a requested country to refuse assistance insofar as the steps required in order to comply with a request cannot be taken under the law of the requested country in respect of criminal matters arising in that country.

Paragraph 15 (Service of Documents)

10. During their meeting in June 1989, Senior Officials discussed, in the context of paragraph 15, questions about the service of subpoenas addressed to witnesses resident in the requested country but required to attend a trial in the requesting country. Paragraphs 23 and 24 are also relevant to this set of questions, but do not address the question of penalties for non-compliance with a subpoena issued in another country. Senior Officials agreed to return to the matter, on the basis of a paper containing a full exploration of the issues, in Auckland.

Paragraph 21 (Transmission and Return of Material) and Paragraph 22 (Authentication)

11. Paragraph 22 of the Scheme as agreed in Harare provides as follows:

- (1) The requested country shall authenticate material that is to be transmitted by that country.
- (2) Authentication shall be by a stamp or seal of a Minister, ministry, government department or Central Authority of the requested country.

12. Detailed discussion of this paragraph at the 1988 Workshops revealed the desirability of some improvements in this text. It would be appropriate to deal with the need in some cases for material emanating from the requesting as well as the requested country to be authenticated (for example, a certificate of conviction relevant to forfeiture proceedings); it was desirable to refer to the option of verification by the

oath of a witness or public official; and the text could usefully be cast in language more appropriate to the issue of admissibility in evidence, by providing that material should be 'deemed to be duly authenticated' in the prescribed circumstances.

13. These matters are all attended to in the recommended revised text of paragraph 22, the former paragraph 22(1) being retained but becoming a new third sub-paragraph of paragraph 21.

Paragraphs 26 to 29 (Proceeds of Crime)

14. It will be remembered that the text of the Harare Scheme had been considered in draft at a meeting of Senior Officials held in London in January 1986. At that stage no provisions had been drafted on the subject of the forfeiture of the proceeds of crime. Some further work was done on that area and it was possible as a result to include what became paragraphs 26 to 29 inclusive of the Scheme. Senior Officials met in Harare to consider this new material, and recognised both the importance of the topic and also the necessarily tentative nature of what was then placed before Ministers, given the very limited extent of legislative provisions in Commonwealth countries. Since 1986 further legislation on the forfeiture of the proceeds of crime has been enacted in Australia, the Bahamas, Canada, and the United Kingdom, and a number of other countries (including Guyana, Mauritius and Malaysia) have new forfeiture provisions limited to the proceeds of drugs offences. This corpus of legislation was noted by the 1988 Workshops, and the amendments now recommended draw on this material.

15. The main changes recommended are:

- (a) the extension of the provisions to include the 'instrumentalities' as well as the 'proceeds' of crime;
- (b) the use to describe the proceeds of crime of language referring to 'property derived or obtained, directly or indirectly, from the commission of an offence', which language seems to have commended itself to parliamentary counsel in a number of jurisdictions;
- (c) the inclusion of an express reference to orders imposing pecuniary penalties calculated by reference to the value of such property, used in a number of jurisdictions as an alternative to forfeiture or confiscation orders; and
- (d) the inclusion of the enforcement of interim seizure or restraining orders made in the requesting country.

16. The amendments preserve the principle, set out in the recommended text of paragraph 27(5) that it is the law of the requested country which applies to determine the circumstances and the manner in which an order may be made, recognised or enforced in response to a request. Senior Officials have recognised at each stage in their discussions that constitutional and general policy considerations would lead to considerable diversity in legislation in this field; the Scheme merely provides for the availability to other Commonwealth countries of procedures deemed appropriate in the law of a requested country.

AMENDMENTS RECOMMENDED TO THE SCHEME FOR MUTUAL ASSISTANCE
IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH

1. Paragraph 1(3)(i)

To read:

- (i) tracing, seizing and forfeiting the proceeds of criminal activities.

2. Paragraph 3(1)

To read:

For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted.

Insert a new paragraph 3(3):

"Forfeiture proceedings" means proceedings, whether civil or criminal, for an order -

- (a) restraining dealings with any property in respect of which there is reasonable cause to believe that it has been -
 - (i) derived or obtained, whether directly or indirectly, from; or
 - (ii) used in, or in connection with,
the commission of an offence;
- (b) confiscating any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii); or
- (c) imposing a pecuniary penalty calculated by reference to the value of any property so derived or obtained or so used.

3. Transfer paragraph 22(1) to become paragraph 21(3), and omit paragraph 22(2).

4. Insert a revised text of paragraph 22:

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

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

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

5. Delete paragraphs 26 to 29 and substitute:

TRACING THE PROCEEDS OR INSTRUMENTALITIES OF CRIME

- 26 (1) A request under this Scheme may seek assistance in identifying, locating, and assessing the value of, property believed to have been derived or obtained, directly or indirectly, from, or to have been used in, or in connection with, the commission of an offence and believed to be within the requested country.
- (2) The request shall contain such information as is available to the Central Authority of the requesting country as to the nature and location of the property and as to any person in whose possession or control the property is believed to be.

SEIZING AND CONFISCATING THE PROCEEDS OR INSTRUMENTALITIES OF CRIME

- 27 (1) A request under this Scheme may seek assistance in securing:
- (a) the making in the requested country of an order relating to the proceeds or instrumentalities of crime; or
 - (b) the recognition or enforcement in that country of such an order made in the requesting country.
- (2) For the purpose of this paragraph, "an order relating to the proceeds or instrumentalities of crime" means
- (a) an order restraining dealings with any property in respect of which there is reasonable cause to believe that it has been derived or obtained, directly or indirectly, from, or used in, or in connection with, the commission of an offence;
 - (b) an order confiscating property derived or obtained, directly or indirectly, from, or used in or in connection with, the commission of an offence; and
 - (c) an order imposing a pecuniary penalty calculated by reference to the value of any property so derived, obtained or used.
- (3) Where the requested country cannot enforce an order made in the requesting country, the requesting country may request the making of any similar order available under the law of the requested country.
- (4) The request shall be accompanied by a copy of any order made in the requesting country and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required in connection with the procedures to be followed in the requested country.

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

DISPOSAL OR RELEASE OF PROPERTY

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

- (a) forfeited; or
- (b) obtained as a result of the enforcement of a pecuniary penalty order

as a result of a request under this Scheme.

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

6. The remaining paragraphs to be renumbered appropriately.

SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS
WITHIN THE COMMONWEALTH
including amendments recommended in June 1989

PURPOSE AND SCOPE

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

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

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

- (a) identifying and locating persons;
- (b) serving documents;
- (c) examining witnesses;
- (d) search and seizure;
- (e) obtaining evidence;
- (f) facilitating the personal appearance of witnesses;
- (g) effecting a temporary transfer of persons in custody to appear as a witness;
- (h) obtaining production of judicial or official records; and
- (i) tracing, seizing and forfeiting the proceeds of criminal activities.

MEANING OF COUNTRY

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

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

CRIMINAL MATTER

3. (1) For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted has been committed.

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

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

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

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

(ii) used in, or in connection with,

the commission of an offence;

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

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

CENTRAL AUTHORITIES

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

ACTION IN THE REQUESTING COUNTRY

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

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

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

ACTION IN THE REQUESTED COUNTRY

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

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

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

- (a) that the request does not comply with the provisions of this Scheme, or
- (b) that in accordance with the provisions of this Scheme the request for assistance is to be refused in whole or in part, or
- (c) that the request cannot be complied with, in whole or in part, or
- (d) that there are circumstances which are likely to cause a significant delay in complying with the request,

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

REFUSAL OF ASSISTANCE

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

- (a) conduct which would not constitute an offence under the law of that country; or
- (b) an offence or proceedings of a political character; or
- (c) conduct which in the requesting country is an offence only under military law or a law relating to military obligations; or
- (d) conduct in relation to which the person accused or suspected of having committed an offence has been acquitted or convicted by a court in the requested country.

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

- (a) to the extent that it appears to the Central Authority of that country that compliance would be contrary to the Constitution of that country, or would prejudice the security, international relations or other essential public interests of that country; or
- (b) where there are substantial grounds leading the Central Authority of that country to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request.

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

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

MEASURES OF COMPULSION

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

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

SCHEME NOT TO COVER ARREST OR EXTRADITION

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

CONFIDENTIALITY

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

LIMITATION OF USE OF INFORMATION OR EVIDENCE

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

EXPENSES OF COMPLIANCE

12. (1) Except as provided in the following provisions of this paragraph, compliance with a request under this Scheme shall not give rise to any claim against their requesting country for expenses incurred by the Central Authority or other competent authorities of the requested country.

(2) The requesting country shall be responsible for the travel and incidental expenses of witnesses travelling to the requesting country, including those of accompanying officials, for fees of experts, and for the costs of any translation required by the requesting country.

(3) If in the opinion of the requested country the expenses required in order to comply with the request are of an extraordinary nature, the Central Authority of the requested country shall consult with the Central Authority of the requesting country as to the terms and conditions under which compliance with the request may continue, and in the absence of agreement the requested country may refuse to comply further with the request.

CONTENTS OF REQUEST FOR ASSISTANCE

13. (1) A request under the Scheme shall:

- (a) specify the nature of the assistance requested;
- (b) contain the information appropriate to the assistance sought as specified in the following provisions of this Scheme;
- (c) indicate any time-limit within which compliance with the request is desired, stating reasons;
- (d) contain the following information:
 - (i) the identity of the agency or authority initiating the request;
 - (ii) the nature of the criminal matters; and
 - (iii) whether or not criminal proceedings have been instituted;
- (e) where criminal proceedings have been instituted, contain the following information:
 - (i) the court exercising jurisdiction in the proceedings;
 - (ii) the identity of the accused person;
 - (iii) the offences of which he stands accused, and a summary of the facts;
 - (iv) the stage reached in the proceedings; and
 - (v) any date fixed for further stages in the proceedings;
- (f) where criminal proceedings have not been instituted, state the offence which the Central Authority of the requesting country has reasonable cause to believe to have been committed, with a summary of the known facts.

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

IDENTIFYING AND LOCATING PERSONS

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

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

SERVICE OF DOCUMENTS

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

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

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

- (a) by any particular method stated in the request, unless such method is incompatible with the law of that country; or
- (b) by any method prescribed by the law of that country for the service of documents in criminal proceedings.

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

EXAMINATION OF WITNESSES

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

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

- (a) the names and addresses or the official designations of the witnesses to be examined;
- (b) the questions to be put to the witnesses or the subject-matter about which they are to be examined;
- (c) whether it is desired that the witnesses be examined orally or in writing;
- (d) whether it is desired that the oath be administered to the witnesses (or, as the law of the requested country allows, that they be required to make their solemn affirmation);
- (e) any provisions of the law of the requesting country as to privilege or exemption from giving evidence which appear especially relevant to the request; and

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

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

SEARCH AND SEIZURE

17. (1) A request under this Scheme may seek assistance in the search for and seizure of property in the requested country.

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

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

OTHER ASSISTANCE IN OBTAINING EVIDENCE

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

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

- (a) the documents, records or property to be inspected, preserved, photographed, copied or transmitted;
- (b) the samples of any property to be taken, examined or transmitted; and
- (c) the site to be viewed or photographed.

PRIVILEGE

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

- (a) in criminal proceedings in that country; or
- (b) in criminal proceedings in the requesting country.

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

PRODUCTION OF JUDICIAL OR OFFICIAL RECORDS

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

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

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

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

TRANSMISSION AND RETURN OF MATERIAL

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

- (a) may postpone the transmission of the material if it is required in connection with proceedings in that country, and in such a case shall provide certified copies of a document or record pending transmission of the original;
- (b) may require the requesting country to agree to terms and conditions to protect third party interests in the material to be transmitted and may refuse to effect such transmission pending such agreement.

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

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

AUTHENTICATION

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

- (a) purports to be signed or certified by a judge or magistrate, or to bear the stamp or seal of a Minister, government department or Central Authority; or
- (b) is certified by the oath of a witness or of a public officer of the Commonwealth country from which the document or material emanates.

PERSONAL APPEARANCE OF WITNESSES IN THE REQUESTING COUNTRY

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

(2) The request shall specify

- (a) the subject matter upon which it is desired to examine the witnesses;
- (b) the reasons for which the personal appearance of the witnesses is required; and
- (c) details of the travelling, subsistence and other expenses payable by the requesting country in respect of the personal appearance of the witnesses.

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

- (a) ask whether they agree to appear;
- (b) inform the Central Authority of the requesting country of their answer; and
- (c) if they are willing to appear, make appropriate arrangements to facilitate the personal appearance of the witnesses.

PERSONAL APPEARANCE OF PERSONS IN CUSTODY

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

(2) The request shall specify

- (a) the subject matter upon which it is desired to examine the witnesses;
- (b) the reasons for which the personal appearance of the witnesses is required;

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

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

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

- (a) the dates upon which the persons are due under the law of the requested country to be released from custody and
- (b) the dates by which the requested country requires the return of the persons and shall notify any variations in such dates.

(6) The requesting country shall keep the persons transferred in custody, and shall return the persons to the requested country when their presence as witnesses in the requesting country is no longer required, and in any case by the earlier of the dates notified under sub paragraph (5).

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

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

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

IMMUNITY OF PERSONS APPEARING

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

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

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

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

TRACING THE PROCEEDS OR INSTRUMENTALITIES OF CRIME

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

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

SEIZING AND CONFISCATING THE PROCEEDS OR INSTRUMENTALITIES OF CRIME

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

- (a) the making in the requested country of an order relating to the proceeds or instrumentalities of crime; or
- (b) the recognition or enforcement in that country of such an order made in the requesting country.

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

- (a) an order restraining dealings with any property in respect of which there is reasonable cause to believe that it has been derived or obtained, directly or indirectly, from, or used in, or in connection with, the commission of an offence;
- (b) an order confiscating property derived or obtained, directly or indirectly, from, or used in or in connection with, the commission of an offence; and
- (c) an order imposing a pecuniary penalty calculated by reference to the value of any property so derived, obtained or used.

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

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

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

DISPOSAL OR RELEASE OF PROPERTY

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

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

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

CONSULTATION

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

OTHER ASSISTANCE

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

NOTIFICATION OF DESIGNATIONS

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

SERVICE OF INTERNATIONAL WITNESS SUMMONSES

Introduction

1. This paper has been prepared at the request of, and in the light of discussion at, the Senior Officials meeting held in Lancaster House, London, in June 1989. Although the matter had been touched upon in some of the earlier meetings concerning the Scheme for Mutual Assistance in Criminal Matters, it came to Senior Officials as a direct result of the deliberations of the Workshop held in Bermuda in December 1988.

2. That Workshop had before it the text of the Treaty between the United States of America and the Commonwealth of the Bahamas on Mutual Assistance in Criminal Matters (see Volume Three of the Materials on the Scheme, p.181 et seq.). Article 17(1) of that Treaty reads as follows:

The Requested State shall effect service of any document relating to or forming part of any request for assistance properly made under the provisions of this Treaty transmitted to it for this purpose by the Requesting State; provided that the Requested State shall not be obliged to serve any subpoena or other process requiring the attendance of any person before any authority or tribunal in the Requesting State.

The proviso (emphasised above) was added in the course of negotiating the Treaty. An identical text appears in the United Kingdom-United States Treaty concerning mutual assistance between the United States and the Cayman Islands (Materials, volume 3, p.263 et seq.; the relevant provision is Article 13(1)). It was the absence of any corresponding provision in paragraph 15 of the Commonwealth Scheme which attracted comment in Bermuda.

3. For ease of reference, paragraph 15 of the Scheme is reproduced:

Service of documents

- 15 (1) A request under this Scheme may seek assistance in the service of documents relevant to a criminal matter arising in the requesting country.
- (2) The request shall be accompanied by the documents to be served and, where those documents relate to attendance in the requesting country, such notice as the Central Authority of that country is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.
- (3) The Central Authority of the requested country shall endeavour to have the documents served
- (a) by any particular method stated in the request, unless such method is incompatible with the law of that country; or
- (b) by any method prescribed by the law of that country for the service of documents in criminal proceedings.
- (4) The requested country shall transmit to the Central Authority of the requesting country a certificate as to the service of the documents or, if they have not been served, as to the reasons which have prevented service.

The issues for consideration

4. The basic question concerns the attitude which should be taken to a request from a foreign Government for assistance in serving a document in the nature of a summons or subpoena where:

- (a) the foreign Government wishes measures of compulsion to be available in and under the law of the requested country; or
- (b) failure to obey the summons will expose the person on whom it is served to penalties under the law of the requesting country; or
- (c) to obey the summons will expose that person to prosecution for a crime in connection with which the summons was issued; or
- (d) to obey the summons will expose that person to prosecution for other crimes or to other penalties or legal proceedings.

The 'international subpoena'

5. The first issue identified in paragraph 4(a) above (where a foreign Government wishes measures of compulsion to be available in the requested country) is actually better known as the question of the 'international subpoena'. This was fully discussed at the meeting of Senior Officials held in Marlborough House in January 1986 to consider the draft of what became the Harare Scheme, and the introduction of any provision in the draft Scheme along the lines of the 'international subpoena' was decisively rejected.

6. It may be useful to give a brief resumé of the arguments. The case for the 'international subpoena' was developed in a Working Paper prepared for the meeting by the Government of Australia. It pointed out that in a number of cases (especially drug conspiracy cases but other criminal cases also) evidence taken abroad on commission might be inadmissible; the absence of an opportunity for cross-examination by the defendant was cited as a possible ground for inadmissibility. It was argued that service of an enforceable subpoena might be an advantage even to willing witnesses, who could more easily obtain leave of absence from an employer and might be released from some obligations of confidentiality which would otherwise apply. Under the proposal made by the Australian Government, service of such a subpoena and its enforcement would be discretionary and would be refused were it to be judged harsh or unconscionable (see Criminal Working Paper No.3 of the January 1986 Meetings).

7. Senior Officials from Australia and Malaysia testified to the usefulness of regional provision for 'backing' witness summonses, giving them the status of 'international subpoenas'; Australia had such arrangements with New Zealand and Fiji; Malaysia with Singapore and Brunei. However, Senior Officials from Lesotho, Trinidad and Tobago, Zimbabwe, Jamaica, Botswana, Britain, India and Canada all raised objections, citing practical human rights and constitutional considerations; in many of those countries, it was judged most unlikely that Parliamentary approval for the necessary legislation would be forthcoming (see Summary Record of the January 1986 Meeting, pp.51-52).

8. International treaty practice reveals little support for the 'international subpoena' notion. There is, exceptionally, provision in the United States-Italian Mutual Assistance Treaty for the compulsory appearance of a witness in the requesting State (applying both to witnesses in custody for other reasons in the requested State - art.16(1) - and those at liberty there - art.15(1)); persons compelled to appear are given immunity from prosecution based on truthful testimony given pursuant to a request under the Treaty (art.17(1)). In general, however, international practice is that "witnesses and

experts are completely free not to go to the requesting country" (Explanatory Report to the European Convention on Mutual Assistance, art.8). It is significant that even in the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, the obligation to provide assistance in this context is merely to "facilitate or encourage, to the extent consistent with ... domestic law and practice, the presence" of witnesses "who consent to assist in investigations or participate in proceedings" (art.7(4)).

9. In the Criminal Justice (International Co-operation) Bill introduced in the United Kingdom Parliament in 1989, this practice is reflected in Clause 1 which provides in relevant part:

1. (1) This section has effect where the Secretary of State receives from the government of, or other authority in, a country or territory outside the United Kingdom -

- (a) a summons or other process requiring a person to appear as defendant or attend as a witness in criminal proceedings in that country or territory; or
- (b) a document issued by a court exercising criminal jurisdiction in that country or territory and recording a decision of the court made in the exercise of that jurisdiction,

together with a request for it to be served on a person in the United Kingdom.

(2) The Secretary of State, or where the person to be served is in Scotland, the Lord Advocate may cause the process or document to be served by post or, if the request is for personal service, direct the chief officer of police for the area in which that person appears to be to cause it to be personally served on him.

(3) Service by virtue of this section of any such process as is mentioned in subsection (1)(a) above shall not impose any obligation under the law of any part of the United Kingdom to comply with it.

(4) Any such process served by virtue of this section shall be accompanied by a notice -

- (a) stating the effect of subsection (3) above;
- (b) indicating that the person on whom it is served may wish to seek advice as to the possible consequences of his failing to comply with the process under the law of the country or territory where it was issued; and
- (c) indicating that under that law he may not, as a witness, be accorded the same rights and privileges as would be accorded to him in criminal proceedings in the United Kingdom.

Enforceability of penalties

10. Much closer to the concerns aired in Bermuda is the issue identified in paragraph 4(b), the question arising where failure to obey the summons will expose the person on whom it is served to penalties under the law of the requesting country.

11. Here international treaty practice seeks to exclude (or at least severely limit) the possibility of such penalties being applied. Amongst treaties which exclude that possibility entirely is the European Convention on Mutual Assistance, article 8 of which reads:

A witness or expert who has failed to answer a summons to appear, service of which has been requested [under the Convention] shall not, even if the summons contains a notice of penalty, be subjected to any punishment or measure of restraint, unless subsequently he voluntarily enters the territory of the requesting Party and is there again duly summoned.

12. Similarly, recent treaties entered into by Australia (which has been conspicuously active in this field) contain a provision on the following lines:

A person who does not answer a summons to appear [in the Requesting State] as a witness or expert shall not by reason thereof be liable to any penalty or be subjected to any coercive measures notwithstanding any contrary statement in the summons (Australia-Austria Treaty, art.10(4). See to the same effect the Treaties with Italy, art.14(5); Luxembourg, art.13(5); Netherlands, art.14(4).

Enforceability of penalties - limited exclusion

13. A more qualified provision is found in some treaties. In the United States-Switzerland Treaty (the first bilateral mutual assistance treaty negotiated by the United States), article 24(1) provides:

A person, other than a national of the requesting State, who has been served with legal process calling for his appearance in the requesting State, pursuant to Article 22, shall not be subjected to any civil or criminal forfeiture, other legal sanction or measure of restraint because of his failure to comply therewith, even if the document contains a notice of penalty. (Emphasis added).

14. This position was also taken by the Government of Jamaica in its Reservation in respect of paragraph 15 of the Commonwealth Scheme. Jamaica reserved the right to protect from legal sanction for failure to appear in proceedings in obedience to a document served pursuant to the Scheme any person who is not a national of the requesting country.

Prohibition of service if penalties attached

15. It will be seen that the position taken by the Bahamas in its treaty negotiations with the United States goes further than that reflected in the material cited in the paragraphs immediately above. It involves the reservation of a right to refuse to serve any subpoena or other process requiring the attendance of a person before a court in the Requesting State. Presumably "subpoena" is used in its literal sense, of a document to which penalties or sanctions are attached; the reservation of the right to refuse to serve "other process", including witness summonses carrying no (overt) sanctions, takes the position still further.

Summons addressed to defendants

16. It is convenient at this stage to refer to the question of summons addressed to potential defendants, identified in paragraph 4(c) above. The Commonwealth Scheme does not appear to provide for this type of assistance, the provisions in paragraphs 23 and 24 of the Scheme referring expressly to a request relating to appearance "as witness", and paragraph 25 conferring immunity from prosecution in respect of criminal acts committed before the witnesses departed, in response to the request, from the requested country.

17. Nonetheless, the Government of Jamaica in its reservation in respect of paragraph 15 of the Scheme, reserved the right to refuse to serve documents on a person other than a national of the requesting country where that person would be a defendant in criminal proceedings. This particular reservation, including its reference to nationality, was inspired by article 22(2) of the U.S. - Switzerland Treaty.

18. The European Convention does provide for the service of summonses addressed to defendants; the provision is designed to assist the issuing of default judgements (i.e. in the absence of any appearance by the defendant) which are common in civil law jurisdictions.

What is the practice of States?

19. In the discussions leading up to the preparation of the Harare Scheme, some reference was made to article 8 of the European Convention, set out in paragraph 11 above. The inclusion of a similar provision in the Commonwealth Scheme was thought unnecessary. It has been asserted, at several points in discussions of the Scheme, that Commonwealth countries do not in criminal matters issue subpoenas for service outside the jurisdiction with sanctions for non-compliance. The recent United Kingdom Bill already referred to provides as follows, clause 2(3) being especially pertinent:

2 (1) Process of the following descriptions, that is to say:

- (a) a summons requiring a person charged with an offence to appear before a court in the United Kingdom; and
- (b) a summons or order requiring a person to attend before a court in the United Kingdom for the purpose of giving evidence in criminal proceedings,

may be issued or made notwithstanding that the person in question is outside the United Kingdom and may be served outside the United Kingdom in accordance with arrangements made by the Secretary of State.

(2) [Relates to Scotland]

(3) Service of any process outside the United Kingdom by virtue of this section shall not impose any obligation under the law of any part of the United Kingdom to comply with it and accordingly failure to do so shall not constitute contempt of any court or be a ground for issuing a warrant to secure the attendance of the person in question or, in Scotland, for imposing any penalty.

(4) Subsection (2) [sic; (3) seems to have been intended] above is without prejudice to the service of any process (with the usual consequences for non-compliance) on the person in question if subsequently effected in the United Kingdom.

20. If this does indeed reflect the general practice in Commonwealth countries, the inclusion of further safeguards in paragraph 15 of the Harare Scheme is probably unnecessary, though it might be judged desirable to include a provision to emphasise what is already generally accepted. The issue would nonetheless continue to be important in negotiating treaties with non-Commonwealth countries.

21. An examination has been made of United States practice, for this was a source of some anxiety in the Bermuda discussion especially to those for whom international travel almost always entailed transit via the United States. The fear was that service of a

subpoena in the Bahamas under a treaty with the United States might expose the person on whom it was served to penalties for non-compliance when he next visited the relevant U.S. jurisdiction; and of course the same could be true in respect of other treaty partners of the U.S.A.

22. In the Federal Rules of Criminal Procedure applied in U.S. District Courts it is provided, in effect, that a subpoena directed to a witness in a foreign country may be issued where the witness is a national or resident of the United States but currently abroad (see F.R. Crim. P., rule 17 (e) (2), applying 28 U.S. Code s.1783). There are a number of judicial decisions emphasising that subpoenas cannot be addressed to aliens resident abroad. In practice, therefore, the anxiety referred to in the previous paragraph is soundly based only in respect of U.S. citizens or others ordinarily resident within the U.S. This does not mean, of course, that a prospective treaty partner of the U.S. can ignore the issue; but it is significant that the Swiss treaty and the Jamaican position (cited in paragraphs 13 and 14, above, respectively) include reference to the nationality factor. In effect they provide facilities to jurisdictions such as the United States in respect of service upon its own nationals, but not upon others ordinarily resident in that jurisdiction and on that basis regarded by the law of that jurisdiction as being within its subpoena powers.

Immunities of witnesses

23. Paragraph 4(a) and (d), above, identified various risks which might be run by a person voluntarily obeying a summons to appear as a witness served under the Commonwealth Scheme or similar treaty provision. This is dealt with in the Scheme in paragraph 25, as follows:

Immunity of persons appearing

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

(2) The immunity provided for in this paragraph shall cease

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

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

24. Some countries are prepared to give more extensive immunities. So, section 19 of the Mutual Assistance in Criminal Matters Act (No.85 of 1987) of Australia provides that the person concerned shall not

"be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that occurred, before the person's departure from the foreign country pursuant to the request" (s.19(1)(d))

and also shall not

"be required to give evidence in any proceeding in Australia other than the proceeding to which the request relates (if any)" (s.19(1)(e)).

25. These matters were considered at the meeting of Senior Officials in January 1986 and the general opinion was that paragraph 25 should not refer to civil actions (following in this respect extradition practice). This decision does not of course prevent Commonwealth Governments from making more generous provision along the lines of the Australian provision if policy and general legal considerations so indicate.

Appropriate action

26. The provision of compulsory measures in support of subpoenas issued in other countries (i.e. the 'international subpoena') is referred to in this paper solely because it stands at one end of the range of opinion on relevant issues. It was fully discussed in 1986 and it is believed that Senior Officials will not wish to reopen the matter.

27. On the point directly arising out of the discussions at the Bermuda Workshop, there remains some uncertainty (which can readily be resolved at the meeting of Senior Officials) as to whether any Commonwealth country does in practice issue subpoenas for service out of the jurisdiction and treat non-compliance as punishable contempt of court. If this practice is found, and it is thought desirable to limit its effect, consideration will have to be given to a further amendment of the Commonwealth Scheme. It may in any event be judged desirable to amend the Scheme on this point in the interests of clarity. This might take the form of an additional provision in each of paragraphs 23 (personal appearance of witnesses in the requesting country) and 24 (personal appearance of persons in custody). (The full text of paragraphs 23 and 24 in their present form is given for ease of reference in an Appendix).

28. The provisions might read:

23(4) A person whose appearance as a witness is the subject of a request and who does not agree to appear shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or the requested country.

24(4A) A person in custody whose transfer is the subject of a request and who does not consent to the transfer shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or the requested country.

29. It will be seen that this neither excludes service of a document altogether (as in the Bahamas-U.S. Treaty) nor allows the imposition of sanctions on a national of the requesting country (as in the Swiss-U.S. Treaty, and not excluded by the Jamaican reservation to the Commonwealth Scheme).

30. There does not appear to be any need for amendment to paragraph 25 of the Scheme on immunities granted to persons appearing as witnesses.

APPENDIX: PRESENT TEXT OF PARAGRAPHS 23 AND 24

Personal appearance of witnesses in the requesting country

23. (1) A request under this Scheme may seek assistance in facilitating the personal appearance of witnesses before a court exercising jurisdiction in the requesting country.
- (2) The request shall specify
- (a) the subject matter upon which it is desired to examine the witnesses;
 - (b) the reasons for which the personal appearance of the witnesses is required; and
 - (c) details of the travelling, subsistence and other expenses payable by the requesting country in respect of the personal appearance of the witnesses.
- (3) The competent authorities of the requested country shall invite persons whose appearance as witnesses in the requesting country is desired; and
- (a) ask whether they agree to appear;
 - (b) inform the Central Authority of the requesting country of their answer; and
 - (c) if they are willing to appear, make appropriate arrangements to facilitate the personal appearance of the witnesses.

Personal appearance of persons in custody

24. (1) A request under this Scheme may seek the temporary transfer of persons in custody in the requested country to appear as witnesses before a court exercising jurisdiction in the requesting country.
- (2) The request shall specify
- (a) the subject matter upon which it is desired to examine the witnesses;
 - (b) the reasons for which the personal appearance of the witnesses is required.
- (3) The requested country shall refuse to comply with a request for the transfer of persons in custody if the persons concerned do not consent to the transfer.
- (4) The requested country may refuse to comply with a request for the transfer of persons in custody and shall be under no obligation to inform the requesting country of the reasons for such refusal.
- (5) Where persons in custody are transferred, the requested country shall notify the requesting country of:

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

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

and shall notify any variations in such dates.

- (6) The requesting country shall keep the persons transferred in custody, and shall return the persons to the requested country when their presence as witnesses in the requesting country is no longer required, and in any case, by the earlier of the dates notified under sub-paragraph (5).
- (7) The obligation to return the persons transferred shall subsist notwithstanding the fact that they are nationals of the requesting country.
- (8) The period during which the persons transferred are in custody in the requesting country shall be deemed to be service in the requested country of an equivalent period of custody in that country for all purposes.
- (9) Nothing in this paragraph shall preclude the release in the requesting country without return to the requested country of any person transferred where the two countries and the person concerned agree.

INTERNATIONAL ACTION AGAINST DRUG TRAFFICKING: TRENDS IN UNITED KINGDOM LAW AND PRACTICE THROUGHOUT THE 1980s

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1. INTRODUCTION AND RECOMMENDATIONS

During the 1980s the issue of how best to combat the illicit traffic in narcotic drugs and psychotropic substances has come to occupy a central position in the international political agenda. That it has done so is not merely a result of the escalating nature of the problem but is also a reflection of an enhanced understanding of its negative social impact, its implications for domestic political stability and its distortive effects on economies. Indeed, it is clear from recent events in Central America that, in extreme circumstances, the drugs trade can indirectly threaten the maintenance of international peace and security itself. Similarly, while the practical issues present themselves in radically different fashions in and among source, transit and consumer countries the drugs trade is now universally recognised as a global problem affecting in a significant way developed and developing countries alike. Given this fact, major emphasis in recent years has been placed on the need to improve the effectiveness and extend the scope of international co-operation in this area.

In reiterating their concern over drug abuse and illicit trafficking at Kuala Lumpur in October 1989 Commonwealth Heads of Government stressed that "the Commonwealth should take the lead in promoting more effective national and international action on a number of key fronts". These included, among others, action against drug trafficking and money laundering, "including provisions for the confiscation of the illicit assets of convicted drug traffickers", the implementation of the Commonwealth Scheme for Mutual Assistance in Criminal Matters, and securing the efficient extradition of fugitive offenders. This paper attempts to provide an overview of the initiatives taken by the United Kingdom throughout the 1980's to meet these and related goals.

The changes brought about in British law and practice have, as will be seen, been extremely wide-ranging. Many have required the enactment of detailed and complex legislation which, even with a broad measure of cross-party support, have placed considerable demands on Parliamentary time. The result has been, however, a radical transformation in the ability of the United Kingdom to co-operate with other countries in combating international crime.

Although much of value can be learned from the British experience, sight should not be lost of the fact that a growing number of other Commonwealth countries from a wide variety of geographic areas, and representing the varied socio-economic character of its membership, have also taken significant initiatives in many of the areas discussed here. Though lying beyond the scope of this study, it should not be forgotten that such law and practice constitutes an invaluable source of information and experience for officials, policy makers and legislators to draw on in the future when directing their attention to the needs of effective international co-operation.

It should also be stressed that all of the areas covered in this paper in which the United Kingdom has taken action in the course of the last decade are now addressed in the 1988 UN Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic

Substances. At Kuala Lumpur Commonwealth Heads of Government "urged all members of the international community to accord priority to its early ratification and implementation". The Bahamas and Nigeria are amongst those who have already taken this step. Many other Commonwealth countries have signed the Convention and some, such as the United Kingdom, are actively paving the way for early ratification. Though a highly complex international instrument which will require extensive implementing legislation by most, if not all, states which decide to become bound by it, it does constitute an obvious common focus for future governmental discussion of action to be taken against drug traffickers.

Given the above, and in the light of the study which follows, there are a number of practical matters which might be considered within a Commonwealth context including:

- (i) the desirability of enhancing the flow of information between Commonwealth members on developments in domestic legislation, case law, and the conclusion of international treaties, agreements and arrangements so that full advantage can be taken of, and lessons learned from, that experience;
- (ii) the need for a detailed practical guide to the 1988 U.N. Convention to facilitate its consideration by governments and its early and effective entry into force. Given the diverse membership of the Commonwealth and the nature of the 1988 Convention any such guide should cover the full range of possibilities from the minimum action required to the maximum action permitted under its terms;
- (iii) the possible need of some members for practical expert assistance in drafting the complex legislation which will often be required in order to give appropriate effect to the obligations and rights which flow from participation in the Convention regime; and
- (iv) the possible need of some members for practical expert assistance in the negotiation of bilateral and regional treaties, agreements and arrangements relevant to the fight against the illicit trade in narcotic drugs and psychotropic substances.

2. THE CONTEXT

In recent years the problems associated with the illicit use and misuse of narcotic drugs and psychotropic substances have assumed greater political and social prominence in the United Kingdom than ever before. This results, in part, from the fact that the scale of the problem has increased significantly throughout the 1980s. All of the admittedly imperfect statistical indicators, including the volume of drugs seized, the numbers of persons convicted or cautioned for drug offences, and the number of drug 'addicts' notified to the government by medical practitioners, tell the same disturbing story¹. In addition, "[t]here is evidence that drug misuse has become more pervasive. In the 1960s it tended to be associated with an alternative youth sub-culture, mainly centred in London, or - in the case of cocaine - with people in the higher socio-economic brackets. But drug misuse is now encountered in all social classes and in all parts of the country"².

Not only has illicit drug use in the United Kingdom expanded in scope it has also started to change in nature. In 1985 the House of Commons Home Affairs Committee, troubled by the pattern of cocaine abuse in the United States, expressed the fear that "unless immediate and effective action is taken Britain and Europe stand to inherit the American drug problem in less than five years. We see this as the most serious peace-time threat to our national well-being"³. In spite of this warning, and subsequent governmental action, the Home Office in early 1989 confirmed that "the perceived threat from cocaine has materialised"⁴. As the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs was to inform Parliament on 11 January 1989:

"There is, unfortunately, a considerable amount of evidence that the drugs cartels have targeted the whole of Europe for an increase in the export of cocaine, especially from Latin America. Also, because of the difference between the wholesale price of cocaine in London and in the United States, there is an increasing trend towards exporting refined cocaine directly from the United States to the United Kingdom and elsewhere in Europe"⁵.

A further factor, worthy of note at this stage, is that "[d]rug-related mortality is in the process of being disastrously inflated by the advent of the Acquired Immune Deficiency Syndrome (AIDS)"⁶. Research has demonstrated that this results from the practice followed by intravenous drug users in certain parts of the country, and particularly in Scotland, of sharing infected equipment⁷. As Plant has recently noted: "Most of the infected drug users are young, sexually active and heterosexual. Some are working prostitutes. The possible implications of this development for public health are extremely grave and threaten to dwarf those of illegal drug use itself"⁸.

In the face of this ever growing threat the British Government has evolved a comprehensive strategy⁹ which affords full recognition to the global nature of the problem¹⁰ and the consequent need for international co-operation¹¹. As the Home Office, which has the lead departmental responsibility for combating drug misuse,¹² recently stated in a report to a Parliamentary Committee: "A very high proportion of the drugs misused in this country are illegally imported. Support for international action to curb illicit drug production and trafficking is therefore a key element in the Government's strategy against drug trafficking and abuse"¹³.

The global dimension to British policy has been evident for some years through, for example, its commitment to the Single Convention on Narcotic Drugs, as amended by the 1972 Protocol¹⁴. As has been pointed out elsewhere this "provides for international controls over the production and availability of opium and its derivatives, synthetic drugs having similar effects, cocaine and cannabis"¹⁵. However, as a consequence of a number of reservations as to the efficacy of the 1971 United Nations Convention on Psychotropic Substances,¹⁶ which extends the concept of international control to a wide range of synthetic drugs,¹⁷ the United Kingdom initially refrained from ratifying it. However, in the mid 1980s the position was re-examined and the conclusion was reached that "these reservations are outweighed by the value of the Convention in combating drug misuse, and in promoting international co-operation"¹⁸. The UK took the necessary steps to secure full participation in 1986¹⁹. The British Government has also given its full support to new multilateral initiatives. It was an active participant in the June 1987 International Conference on Drug Abuse and Illicit Trafficking,²⁰ and was one of the first signatories of the 19 December 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances²¹. Similarly, the Government has actively encouraged European regional co-operation through, for example, its participation in the Council of Europe's "Pompidou Group"²².

Significant though the above initiatives have been, bilateral co-operation continues to play the central role in British policy. It is in this sphere that the most dramatic strides in international co-operation have been secured and on which the principal burden is likely to fall in the future. It is, thus, to some of the more significant developments relevant to this area that this study now turns.

3. EXTRADITION

Extradition has been and seems likely to continue to be the major mechanism through which the United Kingdom co-operates with other states in criminal matters including drug trafficking²³. In addition, the procedure of extradition lies at the heart of the enforcement system provided in the Single Convention on Narcotic Drugs, as amended,²⁴ and the Convention on Psychotropic Substances²⁵ and continues to occupy an important place in the more ambitious structure provided for in the 1988 United Nations Convention²⁶.

In the United Kingdom the subject of extradition has been governed by a number of statutes of which the most important, and the most antiquated, has been the Extradition Act, 1870²⁷. For a number of years there has been concern in governmental circles that the law concerning extradition to foreign states was both outdated and overly stringent; that the legislative scheme was incapable of dealing with "a substantial expansion in international crime, such as drug trafficking"²⁸.

For these and other reasons the issue was remitted to an Interdepartmental Working Party which reported in 1982²⁹. The radical reforms envisaged by that study were, in turn, subject to further examination and consultation in the context of a 1985 Green Paper³⁰. Finally the Government signified its agreement to seek wholesale change through legislation in the Criminal Justice White Paper of 1986³¹.

Following a lengthy Parliamentary passage, due in part to the intervening British general election of 1987, the Criminal Justice Act received the Royal Assent on 29 July 1988. As expected this Act³² paved the way for the introduction of profound changes in the law of extradition which are outlined, in brief, below. However, subsequent to the enactment of this statute, and prior to the entry into force of the relevant provisions, the decision was taken to consolidate the many Acts dealing with extradition to foreign states and to Commonwealth jurisdictions, the latter being governed by the Fugitive Offenders Act, 1967³³. Following the Report on the Consolidation of Legislation Relating to Extradition, prepared by the Law Commission and the Scottish Law Commission,³⁴ Parliament swiftly passed the Extradition Act 1989³⁵ which entered into force on 27 September of the same year³⁶.

From what has been said above it will come as no surprise to learn that the reforms thus brought about in United Kingdom law are far from straightforward. In particular, the system provided by the Extradition Act, 1870, as amended, has not been entirely abandoned and will continue to govern proceedings with foreign states with which the UK enjoys extradition treaties until such time as new agreements are concluded with them³⁷. It should also be noted that the 1989 Act does not address the subject of the return of offenders as between the United Kingdom and the Republic of Ireland which remains governed by the simplified procedure provided for in the Backing of Warrants (Republic of Ireland) Act 1965³⁸.

The 1989 British legislation brings into effect a number of major changes which will impact on the ability of the United Kingdom to extradite persons sought by third states for drug related offences. The first such important innovation relates to ad hoc extradition. In international law it is accepted that a State has no duty to extradite in the absence of a treaty³⁹. However, it is equally clear that there is no customary international law rule to preclude extradition where no treaty subsists between the requesting and requested state and many civil law countries provide such a facility⁴⁰. By way of contrast, British law has traditionally contained no legal authority to extradite to a foreign state in the absence of such a treaty⁴¹. The United Kingdom currently enjoys formal bilateral extradition relationships with just over 40 foreign states including the United States⁴². In recent years the Government has continued to

actively pursue negotiations and, in 1986, a new general extradition treaty was concluded with Spain⁴³ as well as a Supplementary Treaty with the US⁴⁴. This leaves, however, in excess of 60 states with which Britain has no general extradition arrangements⁴⁵. In the course of the review, it was concluded that provision should be made to permit extradition even in the absence of a treaty. This facility is commonly described as ad hoc extradition. As the Earl of Caithness stated in the House of Lords on 20 October 1987:

"It remains our policy to maintain treaties as the normal basis for extradition but we believe that ad hoc extradition might be a useful supplement to our present arrangements"⁴⁶.

The principal argument in favour of this change is the administrative convenience which it offers. Furthermore, the Government believes that while treaties help to ensure reciprocity the UK should not regard reciprocity in the extradition field as necessary in all circumstances. Finally, it is pointed out that arrangements with the Commonwealth are based, not on treaties, but on substantially uniform legislation among its members⁴⁷.

The Extradition Act 1989 thus empowers the Secretary of State to make special extradition arrangements for particular cases with states with which there are no general extradition arrangements⁴⁸. In such cases the statutory safeguards for the fugitive apply in the same manner as they would to extradition pursuant to a "general extradition arrangement" or treaty⁴⁹. Following the recommendations of the working party there is no specified requirement as to reciprocity.

A second major departure from tradition concerns the prima facie case requirement. Under the 1870 Act the requesting state was obliged to provide the Courts with adequate evidence of the conviction or guilt of the individual in question before extradition could take place. In so far as the former is concerned the only major problem which has arisen in practice concerns those cases in which the individual was convicted in absentia. In this context the Government concluded that the law afforded inadequate safeguards. Consequently the Act provides that an individual "shall not" be returned if it appears to either the Secretary of State or the Courts that: (a) the conviction was obtained in his absence; and (b) it would not be in the interests of justice to return him on the grounds of that conviction⁵⁰.

Considerable difficulties did, however, arise in cases where the individual had been accused but not yet convicted of a criminal offence. In these circumstances section 10 of the 1870 Act required the foreign state to produce evidence which in English law would be sufficient "to justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England" This is what is known as the prima facie case requirement. The need to satisfy this requirement has been the source of considerable dissatisfaction among foreign states and particularly those in Western Europe. As the 1985 Green Paper noted:

"Something like a third of applications made to the United Kingdom fail, often because of the inability of the requesting state to satisfy the prima facie case requirement. Furthermore there are occasions on which some states are deterred from making a request at all because they believe it will be too difficult to meet the requirement"⁵¹.

Eventually the Government decided that it should in principle be for the requesting state to judge the sufficiency of the evidence for a trial of the fugitive. Thus, in the Criminal Justice White Paper the intention to abolish the requirement was announced⁵². In arriving at this controversial decision the Government was seemingly persuaded by the view that other elements in British extradition law, such as double criminality, speciality and the political safeguard, would ensure "that a fugitive is not surrendered in circumstances where this would be manifestly unjust or oppressive"⁵³.

However, when the Criminal Justice Bill was first presented to Parliament a somewhat less far reaching scheme was envisaged apparently as a result of further consideration of British-American relations. This made provision for the progressive abolition of the prima facie requirement, by Order in Council, on a state by state basis. Even in this form, however, the proposal attracted considerable opposition in Parliament. There it was characterised as extradition on demand and as the elimination of an important and long established protection for the individual. In short, it was widely regarded as going too far in changing the balance of law against the defendant⁵⁴.

In the face of this opposition, particularly in the House of Lords, the Government made a number of concessions. First, it indicated that it would, in practice, take steps to abolish the requirement only in the context of the relationships with Western European states and parties to the 1957 European Convention on Extradition which the UK now intends to ratify⁵⁵. Second, the Government accepted an amendment whereby all Orders in Council which seek to dispense with the prima facie rule "shall be subject to annulment in pursuance of a resolution of either House of Parliament"⁵⁶.

Thus, under the 1989 Act a state requesting the return of an individual accused of an offence under a general extradition arrangement must satisfy the Court, unless an Order in Council otherwise provides, "that the evidence would be sufficient to warrant his trial if the extradition crime had taken place within the jurisdiction of the Court"⁵⁷. The requirement also remains in all cases of ad hoc extradition⁵⁸. In addition, the traditional prima facie case requirement continues to govern proceedings brought under the 1870 Act procedures and in respect of Commonwealth countries⁵⁹.

Finally, a number of improvements have been obtained which should permit the fugitive to make more effective use of his right to make representations to the Secretary of State against his return, and to seek judicial review of any order by the Secretary of State authorising his return⁶⁰.

Another consequence of the 1989 Act is to expand significantly the range of offences which attract extradition. This has been accomplished primarily through the abandonment of the system of specifically listing offences which are extraditable in UK law⁶¹. It has been decided to substitute this with a "no list" or "eliminitive" method which defines extraditable offences in terms of severity of punishment. This is the procedure favoured by many civil law jurisdictions and the one which is used in the European Convention of 1957⁶². The Act defines an extradition crime as:

"conduct in the territory of a foreign state, a designated Commonwealth country or a colony which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, Commonwealth country or colony is so punishable under that law"⁶³.

For these purposes the law of the UK "includes the law of any part of the United Kingdom"⁶⁴. At the Commonwealth Law Ministers' Meeting in Harare in 1986 the British Government sought and obtained agreement to the use of the eliminative method in the Commonwealth scheme and the Act makes appropriate provision to this end⁶⁵.

Under the new system all common law offences and a substantial number of additional statutory offences will become appropriate vehicles for extradition⁶⁶. Perhaps for this reason the Government unexpectedly accepted the need to include a statutory safeguard against surrender on grounds of the triviality of the offence. Similarly, extradition is precluded if it appears that because of the passage of time or because the accusation was not made in good faith "it would, having regard to all the circumstances, be unjust or oppressive to return him"⁶⁷.

Given the fact that provisions deriving from the 1870 Act will continue to govern many extradition cases, the opportunity was taken to add to the list of extradition crimes contained in Schedule I thereof. These include offences under s.24 of the Drug Trafficking Offences Act 1986⁶⁸.

Given the fact that the UK has for long been wedded to the territorial principle of jurisdiction it will come as no surprise to learn that the 1870 Act was formulated on the assumption that there would be a strong territorial connection between the offence complained of and the requesting state. In practice extradition was possible when the offence took place in the requesting state's land territory, territorial waters or other locations "generally treated as part of its territory" such as on ships and aircraft registered in the requesting state⁶⁹.

It will be recalled, however, that the UK has never relied exclusively on the territorial principle. As the English Law Commission noted in its 1978 Report on the Territorial and Extraterritorial Extent of the Criminal Law limited reliance has been placed on other jurisdictional grounds⁷⁰.

Given these factors the government has concluded that it is in the interests of justice that the United Kingdom should be able to surrender fugitives in respect of a broad range of extraterritorial offences⁷¹. To this end the Act makes provision for two specific categories:

- (1) where "in corresponding circumstances equivalent conduct would constitute an extra-territorial offence against the law of the United Kingdom ..." ⁷² and
- (2) other extra-territorial offences which satisfy all of the following conditions:
 - (a) the requesting state bases its jurisdiction on the nationality of the offender;
 - (b) the conduct occurred outside the UK; and,
 - (c) that, if it occurred in the UK, it would constitute an offence under the law of the UK⁷³.

This comprehensive recognition of the sufficiency of a nationality nexus for extradition purposes will again be of particular benefit to civil law countries which use it extensively.

Finally, it will be recalled that it is a general feature of extradition practice that "the requested state should exercise some control over the prosecution of the surrendered fugitive for other crimes committed before his surrender" ⁷⁴. Under the Extradition Act 1870 this takes the form of requiring that the individual may not "be tried in that foreign state for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded" ⁷⁵. By way of contrast a much more flexible approach was adopted both in Article 14 of the European Convention on Extradition and section 4(3) of the Fugitive Offenders Act. The latter, for example, "enables the fugitive to be dealt with for any lesser offence proved by the facts or for any other relevant offence to which the Secretary of State consents" ⁷⁶. The Government reached the conclusion that the speciality rule should be relaxed along the lines of the 1967 Act and the Extradition Act 1989 makes provision to that end⁷⁷.

In the light of the above it must be concluded that the United Kingdom has through these measures ensured that it will in future be significantly easier for foreign states to secure the extradition of fugitives. As Warbrick has stated: "The Government intends that

there should be more extradition and the new law is influenced more by the co-operative aspect of extradition than by the protective understanding of the process ... If the Government is right that this country is being chosen as a refuge by fugitive criminals because they think they can count on protection against extradition, the new law will have a deterrent objective, although this can only work by diverting them to other jurisdictions"⁷⁸.

4. BILATERAL TREATY PRACTICE

In addition to modernising and reshaping the traditional weapon of extradition the enhanced awareness of the need for international co-operation to combat the illicit trade in narcotic drugs has led the United Kingdom into the conclusion of a number of innovative bilateral agreements. In this process the needs and demands of Anglo-American relations have been particularly influential.

(a) The Caribbean Connection

The first novel and drugs specific bilateral arrangement worthy of note was concluded with the United States in November 1981 and addressed the issue of narcotics interdiction at sea⁷⁹. The need for such an agreement, recently examined in detail elsewhere,⁸⁰ arose out of the frequent use of private foreign flag vessels to import marijuana and, to a lesser extent, cocaine into the United States⁸¹. Given the location of certain major source and transit countries in South and Central America and in the Caribbean this problem presented itself in a particularly acute form in Florida and along the Gulf coast. Among the foreign vessels involved in this illicit trade were some registered in the United Kingdom and in Britain's Caribbean dependencies⁸².

Although the international law of the sea affords to coastal states adequate law enforcement powers within territorial waters and the contiguous zone,⁸³ the United States, for practical reasons, wished to extend its maritime interdiction programme to the high seas⁸⁴. As US Circuit Judge Kravitch stated in US v Gonzalez: "One need only glance at a map of the [Caribbean] region and compare the vast length of the United States coast to the narrow straits between Yucatan and Cuba ... and the other narrow passages through the West Indies to understand the reasonableness of enforcing our drug laws outside of our territorial sea"⁸⁵.

The central international legal difficulty raised by such an interdiction strategy is reflected in the universally accepted doctrine of exclusive flag state jurisdiction on the high seas⁸⁶. Thus, if the strategy was to be effective and comport with international law the cooperation of the relevant foreign flag states was essential.

The initial approach adopted by the Department of State was to request ad hoc consent from foreign governments, including that of the United Kingdom,⁸⁷ to search and, if warranted, seize vessels suspected of narcotics trafficking⁸⁸.

This process was clearly an unsatisfactory one in that it was bound to be time consuming with attendant practical disadvantages for effective law enforcement⁸⁹. These matters were eventually addressed in negotiations between the two governments during which it was agreed to dispense with the need for case-by-case UK consent in a formal agreement. This goal was realised in the conclusion of the 13 November 1981 Exchange of Notes on Co-operation in the Suppression of the Unlawful Importation of Narcotic Drugs into the United States⁹⁰. This Agreement is essentially non-reciprocal in nature and is designed solely to facilitate the effective enforcement of US law subject to a number of necessary safeguards for the UK.

Paragraph 1 of the Exchange of Notes which triggers US involvement in any instance provides that the British Government "will not object to the boarding by the authorities of the United States of private vessels under the British flag in any case in which those authorities reasonably believe that the vessel has on board a cargo of drugs for importation into the United States in violation of the laws of the United States". The area in which this right to board is afforded is defined in paragraph 9. It includes all of the Gulf of Mexico and the Caribbean Sea, an extensive area of the Atlantic Ocean "South of latitude 30 North and all other areas within 150 miles of the Atlantic coast of the United States"⁹¹. Subsequent provisions govern the search and seizure of crew and vessel⁹². The Agreement also provides a number of safeguards⁹³ including the right of the United Kingdom, within specified time periods, to object to the continued exercise of US jurisdiction over the vessel⁹⁴ and to the prosecution of any United Kingdom national found on board the vessel⁹⁵. The consequence of such an objection is to require the United States to release the vessel or person in respect of which the objection has been lodged.

In spite of the obvious ability of the UK to frustrate the operation of this Agreement through the frequent use of the power to require the release of vessels and prevent the prosecution of nationals this does not appear to have happened in practice. Indeed the evidence suggests that it has been a valuable tool in actual law enforcement⁹⁶ and the relevant reported cases do not reveal that the nature or terms of the Agreement have restricted the ability of US prosecutors to secure convictions⁹⁷.

The second major innovation in British narcotics treaty practice also involved the United States and arose in the highly charged context of the debate on the proper limits to American assertions of extraterritoriality⁹⁸. More specifically, as Nadelmann has explained, the most pervasive example of judicial extraterritoriality "has been the demands by US prosecutors for production of documents and other evidence located abroad which are deemed necessary to government investigations and court proceedings. Such demands, most often issued in the form of subpoenas for documents or testimony, have placed the recipients in the uncomfortable position of having to choose between complying, and thereby violating their own domestic law, and refusing to comply and thereby being charged with contempt by the American court"⁹⁹. Many states consider such unilateral American measures as violations of international law¹⁰⁰.

British involvement in this context flowed from the spectacular growth throughout the 1960s and 1970s of its small Caribbean dependency of the Cayman Islands as an offshore financial centre. As one commentator has noted, "[i]n 1964 the Cayman Islands had two banks and no offshore business. By 1981 the Caymans had 360 branches of US and foreign banks, over 8,000 registered companies, and more telex machines per capita ... than any other country".¹⁰¹ Through its convenient location "a short suitcase journey from Miami",¹⁰² its well developed bank secrecy legislation,¹⁰³ its tax free status,¹⁰⁴ and its political stability, among other factors,¹⁰⁵ the Cayman Islands had become, in the words of one American commentator, "the quintessential secrecy haven in this hemisphere...."¹⁰⁶.

In the course of time both the American Government and US prosecutors became convinced that this British dependency was being extensively used both for the evasion of US revenue laws and for the "laundering"¹⁰⁷ of the illicit profits derived from narcotics trafficking and other criminal activities¹⁰⁸. In these circumstances clashes between the needs of US prosecutors and the requirements of Caymanian secrecy legislation were, perhaps, inevitable¹⁰⁹.

In spite of efforts to address the issue of the need for enhanced co-operation through diplomatic channels,¹¹⁰ and the occasional use of non-controversial methods to obtain confidential information located in the Cayman Islands,¹¹¹ matters came to a head in

1983. The specific cause of tension between the two states arose when the Miami branch of the Bank of Nova Scotia was fined \$1,825,000 for a civil contempt of court which resulted, in part,¹¹² from its failure to produce documents held by its branch in the Cayman Islands even though compliance with the grand jury subpoena, issued in the course of a narcotics investigation, would have constituted a violation of the secrecy laws of that jurisdiction¹¹³.

The Bank of Nova Scotia case coloured relations between the two states and, in the words of the English Attorney-General, Sir Michael Havers, "prompted the UK and US Governments in the context of the extraterritoriality talks then being held to agree to talks to try and reach a settlement acceptable to all parties involved for dealing with narcotics cases in future"¹¹⁴. The outcome was the 26 July 1984 Exchange of Letters between them "concerning the Cayman Islands and Matters connected with, arising from, related to, or resulting from any Narcotics Activity referred to in the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961"¹¹⁵. The Agreement entered into force in the following month after the Cayman Islands legislature enacted The Narcotic Drugs (Evidence) (United States of America) Law which was needed in order to give domestic legal effect to its terms¹¹⁶.

This agreement, which is non-reciprocal in nature, establishes a simple and straightforward procedure whereby the United States can obtain assistance in investigations and prosecutions involving drug trafficking¹¹⁷. Provision is made, upon receipt of a certificate from the Attorney-General of the United States,¹¹⁸ for the "production of documents and records, together with provision of foundation testimony, authentication, and certification necessary for these documents and records to be admissible in court in the United States"¹¹⁹. In exchange for these concessions the American Government agreed to limit the use of unilateral measures in narcotics cases. This is provided for in Article 6 which reads:

"No Federal subpoena (including a Grand Jury subpoena) relating to documentary information located in Cayman in any matter falling within this Agreement will be enforced in the United States without the prior agreement of either the United Kingdom Government or the Cayman Government."

Although this dealt with the specific source of friction at issue in the Bank of Nova Scotia case it was not a complete solution to the judicial extraterritoriality controversy in that it did not seek to "prevent the Americans from obtaining subpoenas in non-narcotics cases"¹²⁰.

Since the agreement entered into force it has been extensively used and of practical utility in law enforcement. As early as 30 June 1986 the English Attorney-General, in the course of a speech to the American Bar Association, was able to report that the evidence produced as a result of the Agreement "has been instrumental in furthering federal investigation into several hundred million dollars of drugs trafficking. Several notorious drugs offenders have been put behind bars as a result"¹²¹. Similarly, the evidence suggests that "[p]rosecutors and agents concerned with drug cases ... have been largely satisfied with the Agreement's limited but effective reach"¹²². Indeed, so pleased have the respective Governments been with the experiment that they have since concluded similar Agreements in respect of all of the remaining Caribbean dependencies of the United Kingdom¹²³.

The process of British-American co-operation in criminal matters in a Caribbean context did not, and was not intended to, end with the 1984 Exchange of Notes¹²⁴. Indeed, the text of the Agreement expressly directed the parties to take active steps to consider a treaty of wider scope concerning the Cayman Islands. Article 7(3) reads: "The Governments of the United States and United Kingdom, including Cayman, will use their best endeavours to

conclude a Law Enforcement Treaty within fifteen months of the date this Agreement comes into operation with the intention to bring such a treaty into force as soon thereafter as their constitutional procedures will allow".

In order to give effect to this undertaking it was arranged that the first round of negotiations would take place in November 1985. "The meetings between the Governments of the United Kingdom, the United States and Cayman were preceded by discussions in London between the Cayman Islands and the United Kingdom to agree strategy for the negotiations"¹²⁵. These essentially tripartite discussions, later described by the Attorney-General of the Cayman Islands as "long and arduous",¹²⁶ were brought to a successful conclusion in the following year. The product of these efforts was the 3 July 1986 "Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters"¹²⁷.

Although, subject to what is said below, the Cayman Islands Mutual Legal Assistance Treaty (MLAT) is broadly similar in nature to earlier such treaties entered into by the US¹²⁸ it nonetheless "represents a major breakthrough in United States efforts to enlist the co-operation of Caribbean 'bank secrecy' jurisdictions in the investigation and prosecution of transborder crime"¹²⁹. For the United Kingdom the Treaty, though confined geographically to a dependency, also sets a potentially important precedent in that it is the first, and thus far the only, instance of British participation in either bilateral or multilateral full scale MLATs in the criminal law sphere¹³⁰.

The Treaty which, unlike the 1984 Agreement, is fully reciprocal in nature, makes provision for a wide variety of differing forms of assistance including: "(a) taking the testimony or statements of persons; (b) providing documents, records and articles of evidence; (c) serving documents; (d) locating persons; (e) transferring persons in custody for testimony; (f) executing requests for searches and seizures; (g) immobilizing criminally obtained assets; (h) assistance in proceedings relating to forfeiture, restitution and collection of fines; and (i) any other steps deemed appropriate by both Central Authorities"¹³¹. Such procedures are available "for the investigation, prosecution and suppression of criminal offences", as well as "civil and administrative proceedings" arising out of, relating to or resulting from narcotics trafficking¹³². It should be noted that the term "narcotics trafficking" is defined, in Article 19(3)(e) in a manner which is broader than that contained in the 1984 Exchange of Notes. This arises from the fact that it encompasses not only activities covered by the Single Convention on Narcotic Drugs but also "any other international agreements or arrangements binding upon both the Parties". As the Technical Analysis prepared by the US Departments of Justice and State opines: "This is significant because the United Kingdom has now, like the United States become a party to the Convention on Psychotropic Substances ... Other international agreements may come into force in the future, and the scope of offences covered by the treaty has the flexibility to grow as the international regulation of illegal narcotics trafficking grows"¹³³.

In the course of the negotiations it was concluded that the Treaty would not cover all criminal activity. The interaction of Article 3(1) and Article 19 results, in the words of the Attorney General of the Cayman Islands, in the fact that the treaty "does not extend to tax matters and it does not extend to trivial criminal offences"¹³⁴. The former restriction was deemed necessary by British and Caymanian negotiators in order to safeguard the viability of the latter's offshore financial business so critical to the local economy¹³⁵. The protection afforded in this regard is not, however, absolute in nature. As has been pointed out elsewhere "the treaty does authorise assistance in prosecuting two types of tax-related crime: fraud connected with income tax shelters and false statements on tax returns with respect to unlawful proceeds of other crimes covered by the treaty"¹³⁶. Finally, assistance is permitted in narcotics related tax matters. In

the words of the Technical Analysis "a civil or administrative tax proceeding involving the assets acquired through illegal drug trafficking could qualify as an offence under Article 19(3)(c) for which assistance could be provided under the Treaty"¹³⁷.

The restriction of the Treaty to what might be termed serious criminal offences is attained through the inclusion of a general rule limiting its scope to "[a]ny conduct punishable by more than one year's imprisonment under the laws of both the Requesting and Requested Parties"¹³⁸. There are, however, specified exceptions to the strict requirements of double criminality which include, in addition to narcotics trafficking, such offences as "racketeering" and "foreign corrupt practices"¹³⁹. A further element of flexibility has been provided in this regard by Article 19(3)(k) which states that the term criminal offence shall also include:

"Such further offences as may from time to time be agreed upon by exchange of diplomatic notes between the United States and the United Kingdom, including the Cayman Islands."

The prospect for using this provision to add to the list of criminal offences in a manner contrary to the perceived interests of the Cayman Islands should not, however, be overstated¹⁴⁰. As the Attorney-General informed the Cayman Islands Legislature: "We, the Government of the Cayman Islands, have a specific, categorical undertaking from our Sovereign Mother, the United Kingdom, that there will be no further offence added to this list, even though the United Kingdom and the United States both agree, without the specific consent, Sir, of the Government of the Cayman Islands. We have the say so. They cannot do it without us"¹⁴¹.

The Cayman Islands Treaty, like other MLATs concluded by the United States, contains a number of specified limitations on assistance. Thus assistance may be denied if the request is not made in conformity with the Treaty,¹⁴² or if it "relates to a political offence or to an offence under military law which would not be an offence under ordinary law",¹⁴³ or where the requested party, through its Attorney-General certifies "that the execution of the request is contrary to the public interest of the Requested Party"¹⁴⁴. In addition, however, and for the first time in US practice in this area, the Treaty permits assistance to be denied where:

"the request does not establish that there are reasonable grounds for believing:

- (i) that the criminal offence specified in the request has been committed; and
- (ii) that the information sought relates to the offence and is located in the territory of the Requested Party"¹⁴⁵.

This innovation was included in the text because the British and Caymanian negotiators wanted to ensure that the MLAT was not used as a mechanism for indulging in mere "fishing expeditions"¹⁴⁶. It is difficult to say whether or not this provision will cause difficulties in practice though it is apparent that problems may arise out of differing conceptions as to the exact burden of proof to be discharged by the requesting party. Thus, according to the US Technical Analysis "the phrase 'reasonable grounds to believe' is not the equivalent of a prima facie case Rather the phrase was intended to require each Party to support its request with a precise, rational explanation for its belief that a crime covered by the Treaty has occurred or will occur, and to set forth in detail the justification for seeking the evidence"¹⁴⁷. By way of contrast, the Attorney-General of the Cayman Islands has informed the territory's Legislature that the same phrase "basically is saying that there must be established, to use lawyers' terms, a good prima facie case"¹⁴⁸. The potential for friction between the parties is self-evident. However, "[t]he negotiators realized that occasionally there will be

differences of opinion which the law enforcement authorities who implement the Treaty will be unable to resolve despite the best of intentions. The second paragraph of Article 18 specifically recognizes that in such cases either side may seek the assistance of the diplomatic and political authorities to resolve the difficulty"¹⁴⁹.

One area in which the potential for friction has been reduced, but not eliminated, by the Treaty is that of judicial extraterritoriality. As has been pointed out elsewhere, "some methods of evidence gathering permitted under United States internal law have the practical result of evidence being collected in the Cayman Islands and being turned over to United States authorities without the permission of the Cayman Islands authorities, and are hence viewed by the Cayman Islands and the United Kingdom as impermissible intrusions into their sovereignty. They insisted that the Mutual Legal Assistance Treaty contain at least the same kind of restriction on United States extraterritorial evidence gathering that the Drug Information Agreement contains"¹⁵⁰.

Such concerns are addressed in Article 17, section 3 of which is of central importance and reads in full thus:

"3. No Party shall enforce any compulsory measure, including a grand jury subpoena, for the production of documents located in the territory of the other Party with respect to any criminal offense within the scope of this Treaty, unless its obligations under the Treaty have first been fulfilled pursuant to paragraph 4 of this Article with respect to a request concerning those documents."

It will be noted that this provision covers not only grand jury subpoenas but also other compulsory measures for the production of documents. The parties agreed that this wording encompasses trial subpoenas and "court orders to a person commanding that he sign a waiver of foreign bank secrecy or direct his bank abroad to turn over records to United States authorities ... Thus, this paragraph of the Treaty is somewhat broader in scope than the cognate provision of the Drug Information Agreement"¹⁵¹. Although this constitutes an improvement from the point of view of both the British and Caymanian governments other unilateral practices regarded as either undesirable or objectionable are not covered. As Secretary of State Shultz noted in his 23 July 1987 Letter of Submittal to the President: "The article does not, however, cover administrative summonses of agencies such as the Internal Revenue Service or the Securities and Exchange Commission, so long as the matter being investigated does not constitute a criminal offence under the Treaty. Neither does it preclude issuance of a subpoena or material witness warrant for any persons temporarily in the United States, even though the disclosure of information protected by Caymanian secrecy laws may be required"¹⁵².

The above should be read in conjunction with Article 17(4) which outlines the following procedure if a party wishes to free itself from the specified restrictions:

"4. Where denial of a request or unreasonable delay in its execution may be jeopardizing the successful completion of an investigation, prosecution or other proceeding, the Central Authority of the Requesting Party shall so inform the Central Authority of the Requested Party in writing. Thereafter, either Contracting Party may give at least 45 days' notice in writing to the other Contracting Party that, unless otherwise agreed, the Parties' obligations under this Article shall be deemed to have been fulfilled; provided that in no case shall the obligations under this Article be deemed to have been fulfilled sooner than 90 days after the date of receipt of the request for assistance."

As was pointed out in the Technical Analysis, "[t]he basic thrust of the paragraph is to insure that when the United States seeks records which are in the Cayman Islands in a case covered by the Treaty, it will use the Treaty as the avenue of first resort, and will not

utilize unilateral compulsory measures unless it has first notified the Caymanian authorities of the problem, sought their aid in the production of the records pursuant to Cayman law, accorded them a reasonable period of time for their response, then waited a further period to permit such diplomatic consultations as the parties deem appropriate"¹⁵³. Given the potential for conflict in this area Article 17 was the subject of a 3 July 1986 side letter between the American Embassy in London and the Foreign and Commonwealth Office which spelt out a number of non-binding understandings¹⁵⁴. Among other things the correspondence records that "[e]ven in those cases in which the Parties' obligations under Article 17 have been fulfilled with respect to a particular request, each Party shall continue to exercise moderation and restraint in considering the enforcement of unilateral measures to which the other objects for the production or withholding of evidence"¹⁵⁵.

Although the conclusion of the MLAT was a highly controversial issue in the domestic politics of the Cayman Islands¹⁵⁶ its legislature acted promptly to enact the necessary implementing legislation¹⁵⁷. In spite of this fact the Treaty, the terms of which can be extended by Exchange of Notes to the other British dependencies in the Caribbean region,¹⁵⁸ was not ratified by the US Senate until 24 October 1989: a situation which caused some dismay both in Cayman and in the United Kingdom¹⁵⁹.

(b) Other Bilateral Agreements and Significant Developments

Much though the above treaty practice broke new ground for the United Kingdom one should not lose sight of the fact that it was generated by, and in the main limited to, the actual and alleged misuse of the otherwise relatively insignificant Caribbean dependencies of the Crown for criminal purposes. The opportunity to involve the United Kingdom directly and centrally was not, however, to be for long neglected and again the subject of international action against drug trafficking was to act as the catalyst.

In the mid 1980s the British Government came to the conclusion that new legislative powers were needed to deprive narcotics traffickers of the proceeds of their criminal activities. In this they had the full support of the influential House of Commons Home Affairs Committee. In its May 1985 interim report on the "Misuse of Hard Drugs" the Committee stated: "The American practice, which we unhesitatingly support, is to give the courts draconian powers in both civil and criminal law to strip drug dealers of all the assets acquired from their dealings in drugs ... We recommend that the civil and criminal law of the United Kingdom be amended to provide for the seizure and forfeiture of assets connected with drug traffic in accordance with the American practice"¹⁶⁰.

This recommendation was, save in respect of civil forfeiture, generally accepted by government and was given legislative expression for England and Wales in the Drug Trafficking Offences Act, 1986¹⁶¹. As has been officially stated elsewhere: "The Act provides comprehensive new powers for tracing, freezing and confiscating the proceeds of drug trafficking, and measures to combat the laundering of illegal drugs money"¹⁶². Similar powers were assumed in respect of Scotland by the Criminal Justice (Scotland) Act 1987¹⁶³ while legislation along these lines for Northern Ireland "is expected to be introduced in the near future"¹⁶⁴. In addition to thus covering the United Kingdom proper "[l]egislation similar to the Drug Trafficking Offences Act 1986 has been enacted in the Isle of Man, Jersey, Guernsey and several dependent territories, and the necessary steps are being taken to enable the United Kingdom and all these territories to act on behalf of one another"¹⁶⁵.

It should be stressed that the above legislation is not limited to facilitating co-operation between the various jurisdictions within the United Kingdom and with the remaining dependencies. Provision is also made for the enforcement "of orders made by courts in designated countries for the recovery of the proceeds of drug trafficking. This will provide the basis for reciprocal agreements with other countries, with a view to the

enforcement overseas of orders made by our courts against assets held by convicted traffickers and vice versa"¹⁶⁶.

It is perhaps fitting that the first bilateral agreement to make use of these powers was concluded with the United States on 9 February 1988¹⁶⁷. As Sir Geoffrey Howe, the British Foreign Secretary, was to state at the signing ceremony in London: "It will strengthen the already close co-operation between our enforcement agencies. It will enable us jointly to trace, freeze and confiscate the assets of drug traffickers. The vicious circle of profiteering from the drug trade will be broken"¹⁶⁸. Since that time Britain has concluded similar agreements with Canada, Australia, the Bahamas, Switzerland, Spain, Nigeria, Malaysia and Sweden¹⁶⁹ and yet others are in prospect¹⁷⁰.

As with the Cayman Islands where a narcotics agreement led to the conclusion of a full mutual legal assistance treaty so the February 1988 Agreement with the United States commits the parties to enter into negotiations for a full MLAT within nine months of its entry into force¹⁷¹. As was noted above, the United Kingdom has not thus far directly joined in the growing practice of co-operation offered by this international mechanism. However, in February 1988 an interdepartmental working group issued a discussion paper in which it "concluded that there are strong arguments in favour of reform of United Kingdom mutual assistance law with a view to participation in formal mutual assistance arrangements"¹⁷². In late 1989 the Government introduced, in the House of Lords, the Criminal Justice (International Co-operation) Bill which is designed to give effect to this intention¹⁷³. Part I of the Bill provides the necessary powers to give domestic effect to any arrangement eventually concluded with the United States and facilitates British participation in the 1959 European Convention on Mutual Assistance in Criminal Matter¹⁷⁴ and the 1986 Commonwealth Scheme¹⁷⁵. In particular, the Bill makes provision, among other things, for: the service of process; the provision of evidence; the transfer of prisoners to give evidence or assist in investigations overseas; powers of entry, search and seizure in furtherance of overseas proceedings; and, the enforcement of certain overseas forfeiture orders. As the Minister of State for the Home Office, Earl Ferrers, was to state during the Second Reading of this measure: "having recognised the inadequacies of our existing legislation, we have been determined to secure arrangements which will place us in the first rank internationally in our ability to co-operate with other countries in this most important of areas"¹⁷⁶.

5. CONCLUSIONS

In recent years, as has been demonstrated, the United Kingdom has taken radical steps to enhance its ability to play a full and active role in the fight against international crime. In part this has taken the form of liberalising the law relating to extradition which will make it significantly easier for foreign states to secure the return from the United Kingdom of fugitives from justice.

Perhaps more importantly for the future, concern about the global nature of the drugs trade has been instrumental in the taking of the first major steps to set aside the traditional reluctance to aid other states in the execution of their penal laws. The new underlying approach of the British Government in respect of drug trafficking was articulated in 1988 by the Foreign Secretary thus: "The costs of this vice are incalculable. The misery all too clear. This is why [Her Majesty's Government] is taking a lead in fighting the menace of drug abuse. There is no place in our societies for drug traffickers. Alone we are weak in fighting them, but together we will win"¹⁷⁷.

The prospects for further developments in enhancing international law enforcement along a broader front are also bright¹⁷⁸. In the near term emphasis is to be placed on securing the passage of legislation to enable the United Kingdom to ratify the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This is seen as a

major advance, on the multilateral front, in the fight against this significant form of international crime. As has been recently stated at the Ministerial level: "It provides a comprehensive range of measures which parties are obliged to adopt in order to penalise trafficking and to co-operate more effectively with each other ¹⁷⁹ It should be noted, however, that in spite of the radical modernisation of British law which has taken place throughout the 1980s the changes which are still required, and which are currently being considered by Parliament, to enable ratification to take place are both wide-ranging and highly complex¹⁸⁰. It is nonetheless a worthwhile investment "in the fight against the evil men who produce, manufacture and distribute drugs, and who thereby corrupt society"¹⁸¹.

Footnotes

1. See, eg., Home Office, Tackling Drug Misuse: A Summary of the Government's Strategy (3rd ed, 1988: HMSO, London) at pp 5-6. In May 1989 the Home Secretary, Mr Douglas Hurd, stated: "In the United Kingdom, all the main indicators have risen substantially over the last few years and continue to do so." Pompidou Group Ministerial Meeting 18-19 May 1989, Opening by Home Secretary: Speaking Notes, (unpublished typescript provided by the Home Office), p.1.
2. Tackling Drug Misuse, id., at p.6. For a recent discussion of trends in drug use within the UK see, House of Commons, Home Affairs Committee, Drug Trafficking and Related Serious Crime, H.C. Paper No. 370-I, 1988-89, para. 6 - para. 13.
3. House of Commons, Home Affairs Committee, Misuse of Hard Drugs (Interim Report), H C Paper No 399, 1984-85, para. 2.
4. Home Affairs Committee inquiry into Drug Trafficking and Related Serious Crime: Memorandum Submitted by the Home Office H.C. Paper No.370-i, 1988-89, p.6. para. 40.
5. Parl. Deb., H.C., Vol 144, No 24, 11 January 1989 col 823-824 (Oral Answers). On the street price of selected illicit drugs in the UK see, Parl. Deb., H.C. Vol.149, No. 73, 21 March 1989 col. 538 (Written Answers). On the concern felt over the appearance in the UK of the cocaine derivative known as "crack" see, the remarks of the Parliamentary Under-Secretary of State for the Home Department, Parl. Deb., H.C., Vol. 154, No.118, 9 June 1989, col.520; House of Commons, Home Affairs Committee, Crack: The Threat of Hard Drugs in the Next Decade (Interim Report), H.C. Paper No.536, 1988-89; and statement of the Home Office Minister of State, Parl. Deb., H.C., Vol.163, No.14, 8 December, 1989, col. 598.
6. M Plant, The Epidemiology of Illicit Drug Use and Misuse in Britain, in S MacGregor (ed), Drugs in British Society (1989: Routledge, London) p.52, at p.61.
7. See, R Brett et al, Human immunodeficiency virus and drug misuse: the Edinburgh experience (1987) 295 British Medical Journal p.421. See also, J Robertson, Epidemic of AIDS related virus (HTLV-III/LAV) infection among intravenous drug abusers, (1986) 292 British Medical Journal p.527. On 8 December 1989 the Home Office Minister of State informed the House of Commons that "in Scotland over 50 per cent of the HIV-positive people obtained the virus through the sharing of drug-misusing equipment". Supra, note 5, at col. 597.
8. Plant, supra, note 6, at p.62. See also, the May 1989 remarks by the Home Secretary, supra, note 1, at p.2.
9. See generally, Tackling Drug Misuse, supra, note 1. The main strands are reducing supplies from abroad, increasing the effectiveness of enforcement, maintaining effective deterrents and tight domestic controls, developing prevention and education, and improving treatment and rehabilitation.
10. There is an ever growing literature on the global nature and extent of the problem of illicit drug use. See, eg., B Whitaker, The Global Fix: The Crisis of Drug Addiction (1988: Methuen, London). See also, Report of the International Narcotics Control Board for 1988 (1988: United Nations, New York).
11. See, eg., Tackling Drug Misuse, supra, note 1, at pp.9-12.

12. See, id., at p.36 for a breakdown on British departmental responsibilities in this area.
13. Supra, note 4, p.2, para.7. As the Home Affairs Select Committee recently noted: "About 95 per cent by weight of the drugs seized in this country are taken at ports or airports or on the high seas." Supra, note 2, para. 59.
14. See, United Nations Treaty Series, Vol.976, at p.106. The United Kingdom ratified the Single Convention on Narcotic Drugs on 2 September 1964 and ratified the amending Protocol of 1972 on 20 June 1978. See, Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1987 (1988: United Nations, New York), at p.243 and p.258.
15. See, Home Office Memorandum of December 1984, reproduced in House of Commons, Home Affairs Committee, Misuse of Hard Drugs, H.C. Paper No.66, 1985-86, Minutes of Evidence, 27 March, 1985, para.21.
16. See, United Nations Treaty Series, Vol. 1019, at p.176.
17. See, eg., S.K. Chatterjee, A Guide to the International Drugs Conventions (1988: Commonwealth Secretariat, London), at pp 17-19. For a brief overview of the international approach to narcotics matters see, A Noll, Drug Control International, Encyclopaedia of Public International Law, Vol.9, p.106.
18. Supra, note 15, para.21.
19. See, Multilateral Treaties Deposited with the Secretary-General, supra, note 14, at p.251.
20. See, (1988) 26 International Legal Materials p.1637. See also, UN Narcotics Conference Meets in Vienna (1987) (September) Department of State Bulletin p.77.
21. For the text see, (1989) (April) Department of State Bulletin, p.49. For the formal announcement of British signature see, Parl. Deb., H.C. Vol. 148, No.63, 8 March 1989, col 549 (Written Answers). As of the time of writing the United Kingdom has introduced into Parliament legislation which, when enacted, will permit ratification of this important Convention. See, Criminal Justice (International Co-operation) Bill. H L Bill 11, 1988-89. This government measure received its Second Reading in the House of Lords on 12 December 1989. At that time Earl Ferrers, Minister of State, noted that whilst some 75 states had signed the Convention as of that date only 3 (The Bahamas, Nigeria and China) had ratified it. See, Parl. Deb., H L, Vol.513, No.13, 12 December 1989, at col. 1217. He did not mention the important fact that the US Senate has given its advice and consent to the ratification of this measure. See 101st Cong, 1st Sess, Senate, Exec Rept 101-15.
22. See, eg., supra, note 4, p.3 para. 13 - para. 14. For a more detailed account of the history and nature of this body see, eg., 20 March 1985 supplementary memorandum submitted by the Home Office, reproduced in supra, note 15. See also, Nagler, The Council of Europe Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs (the Pompidou Group), (1987) 39 Bulletin on Narcotics No.1, p.31. The problem of the international trade in narcotic drugs now regularly appears on the agenda of multilateral fora in which the UK participates. See, eg., the Economic Declaration of 16 July 1989 issued by the 7 major industrialised nations and the President of the Commission of the European Communities (1989) (September) Department of State Bulletin p.13 at pp.16-17.

23. See, eg., supra, note 3, at para.6.
24. See, Art. 36, supra, note 14. On the nature and importance of extradition in this context see generally, Division of Narcotic Drugs, Extradition for Drug-Related Offences (1985: United Nations, New York). See also, K Fisher, Trends in Extraterritorial Narcotics Control: Slamming the Stable Door After the Horse has Bolted (1984) 16 New York University Journal of International Law and Politics p.353, at pp.382-383.
25. Art 22, supra, note 16.
26. Art 6, supra, note 21.
27. Ch.52, 1870 (UK). For a brief overview of UK extradition law see, E C S Wade and A W Bradley, Constitutional and Administrative Law (10th ed 1985: Longman, London), pp. 462-470.
28. Extradition, Cmnd.9421 (1985), p.1.
29. See generally, A Review of the Law and Practice of Extradition in the United Kingdom: Report of an Interdepartmental Working Party (1982: Home Office, London).
30. See, supra, note 28.
31. See, Criminal Justice: Plans for Legislation Cmnd.2658 (1986), para.47 - para. 52.
32. Criminal Justice Act 1988, 1988 c 33 (UK) (hereafter CJA) See generally, C Warbrick, Current Developments: International Law. III. Extradition (1989) 38 International and Comparative Law Quarterly p.424.
33. 1967 c 68 (UK) as amended by CJA, Sch 1, Part III.
34. Cm. 712 (1989). A Supplementary Report, dealing with issues arising in the context of certain multilateral treaties, is reproduced in H L Paper 68-II, 1988-89, at p.vii.
35. 1989, c.33 (UK) (hereafter EA).
36. Id., s.38(2).
37. Id., s.1(3) and Sch.1. As Mr James Rennie, Parliamentary Counsel, stated in evidence before the Joint Committee on Consolidation Bills: "The 1870 Act is still in force. I should explain to the Committee that it will continue to be in force because it will govern extradition between the United Kingdom and countries with which we have existing treaties until those treaties are denounced or replaced. There is no possibility now of a new 1870 treaty. That is prohibited by the 1988 Act. Any new extradition arrangements therefore will be made under the 1988 procedure The situation is therefore that there are three statutes, 1870, 1967 and 1988. We are consolidating all of them. As the 1870 Act will gradually become less important, it is set out in a Schedule, Schedule 1 to the Bill." H L Paper 68-II, 1988-89, p.8.
38. 1965, c 45 (UK), as amended by CJA, Sch 1, Part II. For the reasons behind and the nature of this bilateral arrangement see, supra, note 28, p.20.

39. See, eg., D W Greig, International Law (2nd ed 1976: Butterworths, London), at p 408. See also, Factor v Laubenheimer 290 US 276, 287 (1933).
40. See, T. Stein, Extradition, Encyclopaedia of Public International Law, Vol.8, p.222, at. p.223.
41. See, supra, note 28, at pp.14-15. But see, V. E. Hartley Booth, British Extradition Law and Procedure (1980: Sijthoff & Noordhoff, Alphen aan den Rijn), Vol.I, at pp.12-13 and p.300.
42. See, Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, 8 June, 1972. Cmd. 6723 (1977). For a listing of other bilateral treaties see, e.g., supra, note 29, at pp.117-118.
43. See, Cmd. 9869 (1986).
44. See, Cmd. 9915 (1986). See also, A V Lowe and C Warbrick, Current Legal Developments: II. Extradition: The Supplementary Extradition Treaty Between the United Kingdom and the United States (1987) 36 International and Comparative Law Quarterly p.404; B Kulman, Eliminating the Political Offence Exception for Violent Crimes: The Proposed United States-United Kingdom Supplementary Extradition Treaty, (1986) 26 Virginia Journal of International Law p.755; and, S Lubet, Extradition Unbound: A Reply to Professors Blakesley and Bassiouni (1989) 24 Texas International Law Journal, p.47.
45. This is non-inclusive of Commonwealth countries where the subject is governed by the 1966 "Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth" as amended. For the consolidated text see, Commonwealth Schemes on Mutual Assistance in the Administration of Justice (1989: Commonwealth Secretariat, London), at p.1. As the Legal Division of that body has explained "a 'Scheme' is not a formal multilateral Treaty or Convention, but rather a set of agreed recommendations endorsed by a Law Ministers' Meeting and collectively recommended as a guide to Commonwealth governments for adoption to regulate their relations with other member countries". Id., p.i. In addition, the UK has become a party to a relatively small number of multilateral treaties, dealing with certain types of serious crime of international concern, in which provision is commonly made for extradition. See, eg., supra, note 28, p.19. See also, EA s.22-s.25.
46. Parl. Deb., H.L., Vol. 489, No.20, col. 58.
47. See, supra, note 29, at pp.6-9. See also, supra, note 28, at pp.14-15.
48. EA, s.3(3)(b).
49. Id., s.15. It should be noted that no Parliamentary control over this process is provided for. However, there is an expectation that in such cases the Secretary of State will take such steps as are required to satisfy himself "that the standards of justice and penal administration in the requesting state were such that it would be in the interest of justice to surrender the fugitive". Supra, note 28, p.15.
50. EA, s.6(2).
51. Supra, note 28, p.4. See also, C Warbrick, The Criminal Justice Act 1988: (1) The New Law on Extradition (1989) Criminal Law Review p.4, at pp.9-10.
52. See, supra, note 31, at para.50.

53. Supra, note 28, p.5. See also, supra, note 31, para. 50.
54. See, eg., the speech of Lord Irvine of Lairg, Parl. Deb., H.L. 5th Ser., Vol. CDLXXXVIII, 14 July 1987, col. 950 - col. 954. The requirement remains in cases of ad hoc extradition. It also remains in respect of rendition to Commonwealth countries. Commonwealth Law Ministers reaffirmed their support for the requirement at their meeting in Harare in 1986 though certain other changes to the Scheme were agreed at that time. See, Commonwealth Law Ministers' Meeting Harare 26 July - 1 August, Communique (LMM (86)64).
55. See, eg., Parl. Deb., H.L., Vol. 489, No.20, 20 October 1987, col.27 (The Earl of Caithness). For the text of the European Convention on Extradition of 13 December 1957 see, United Nations Treaty Series, Vol. 359, p.274.
56. EA, s 4(5). See also, Parl. Deb., H.C. Vol. 125, No.74, 18 January 1988, col. 681-682 (Secretary of State for the Home Department); and, C Warbrick, supra, note 51, at p.11.
57. EA, s.9(8)(a).
58. Id.
59. See, clause 5(4)(a) of the 1966 Scheme, supra, note 45. It is understood that the issue of modification of this requirement remains under active discussion in relevant governmental circles within the Commonwealth.
60. See, EA, s.13.
61. See, supra, note 28, at pp. 9-11. For a listing of such offences see, supra, note 29, at pp.106-107. Most drug related offences are so included by virtue of s.1 of the Extradition Act 1932, 1932 c.39 (UK). See also, EA, Sch. 1, s.20 and Sch. 2.
62. See, Art. 2 of the European Convention, supra, note 55.
63. EA, s.2(1)(a). See also, s.2(4)(b) and (c).
64. EA, s.2(4)(a).
65. See, EA s.2(1)(a). This uses the 12 months punishment threshold in spite of the fact that the revised Commonwealth Scheme specifies the more exacting standard of "two years or a greater penalty". See, Clause 2(2) of the Scheme, supra, note 45. There is nothing to prevent a Commonwealth country adopting a more concessive policy in its legislation than that required by the Scheme.
66. See, eg., supra, note 29, at pp 108-116.
67. See, EA, s 11(3) and s 12(2)(a).
68. ie., assisting another to retain the benefit of drug trafficking. See, EA, s 38(4).
69. For a discussion of this issue see, supra, note 29, at pp 16-18.
70. Law Commission No.91 (1978: HMSO, London). See also, J. Lew, The Extraterritorial Criminal Jurisdiction of English Courts (1978) 27 International and Comparative Law Quarterly p.168; and, P Ferguson, Jurisdiction and Criminal Law in Scotland and England (1987) Juridical Review p. 179.

71. See, eg., supra, note 28, at p. 21.
72. EA, s.2(2). See also, Warbrick, supra, note 51, at p.8.
73. EA, s.2(3).
74. Supra, note 28, p.13.
75. Extradition Act, 1870, supra, note 27, s.3(2).
76. Supra, note 28, p.13.
77. EA, s.6(4)-(7). See also, s.18-s.20 for similar provisions governing the position of an individual returned to the UK.
78. Warbrick, supra, note 51, p 14. The ability of the UK to take full advantage of the new law is somewhat circumscribed by the recent decision by the European Court of Human Rights as to the relevance of the Convention in the context of extradition to a non-Convention state. See, Soering v United Kingdom (7 July 1989).
79. Exchange of Notes Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Concerning Co-operation in the Suppression of the Unlawful Importation of Narcotic Drugs into the United States, 13 November 1981, Cmnd. 8470 (1981).
80. See, W Gilmore, Narcotics Interdiction at Sea: UK-US Co-operation (1989) 13 Marine Policy p.218.
81. See, Congress of the United States, Office of Technology Assessment, The Border War on Drugs (1987: Washington DC) at p.24 and p.27.
82. Five such dependencies remain in the area of greatest concern in this context; viz, Montserrat, Anguilla, British Virgin Islands, Cayman Islands, and Turks and Caicos Islands.
83. The U.S. retained its traditional 3 mile territorial sea claim until 27 December 1988 when it was extended to 12 nm by Presidential Proclamation. See, (1989) 28 International Legal Materials p.284. Narcotics law enforcement within this zone is facilitated by Art. 19(1)(d) of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. The US and the UK are both parties to this convention. A limited contiguous zone claim is provided for in the US Anti-Smuggling Act of 1935. See, 19 USC 1701-1711. Such zones are now accepted in international law. See, eg., Art 24, 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.
84. See A W Anderson, In the Wake of the Dauntless: The Background and Development of Maritime Interdiction Operations, in T A Clingan (ed) The Law of the Sea: What Lies Ahead? (1988: Law of the Sea Institute, Honolulu), p.11.
85. 776 F. 2d 931 (1985) at 939.
86. See, Art. 6(1) and Art 22 of the 1958 Geneva Convention on the High Seas. See also, L Sohn, International Law of the Sea and Human Rights Issues, in T A Clingan (ed), supra, note 84, p.51, at p.59. Domestic law in the US was amended in 1980 to facilitate prosecution. See, 21 USC 955a-955d. See also, Fisher, supra, note 24 at pp.374-387; and, S Lewis, The Marijuana on the High Seas Act: Extending US Jurisdiction Beyond International Limits (1982) 8 Yale Journal of World Public Order

- p.359. US Law in this respect was further refined in the form of the 1986 Maritime Drug Law Enforcement Act. See, 46 USC 1901-1903.
87. For a description of British involvement see eg., US v Green 671 F 2d 46 (1982) at 49. For an example of a US seizure of a British flag vessel seemingly without prior consent see, US v Postal 589 F 2d 862 (1979).
 88. For a description by the US Department of State of the normal practice see, (1982) 72 American Journal of International Law, p.377, at p.377, at p.379.
 89. See, eg., testimony of Admiral Cuaroni of the US Coast Guard, in Defining Customs Waters for Certain Drug Offences: Hearing Before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, 16 May, 1985 (1986: Washington, D.C.), at p.55. See also, testimony of Stuart P Sidel, id., at p.47. In 1986 the US Congress found that "this process, and obtaining the consent of the country of registry to further law enforcement action, may delay the interdiction of the vessel by 3 or 4 days". See, annotations to 46 USC 1902.
 90. Supra, note 79. See Generally, J Siddle, Anglo-American Co-operation in the Suppression of Drug Smuggling, (1982) 31 International and Comparative Law Quarterly, p.726.
 91. Para. 1 has received judicial consideration in the United States. See, eg., US v. Reeh 780 F.2d 1541 (1986), at 1544; and US v Quemener 789 F.2d 145 (1986) at 145. The latter case also considers the terms of para. 9. See, id., at 148-153. See also, Gilmore, supra, note 80, at pp.222-225. The terms and conditions of the 1981 Agreement have been used as the basis for ad hoc seizures in other areas. See, eg., US v Biermann 678 F Supp. 1437 (1988), discussed by B Weinstein in (1989) 83 American Journal of International Law, p.99.
 92. See in particular, supra, note 79, para. 2 and para. 3.
 93. See eg., id., para. 6 and para. 7.
 94. See, id., para. 4.
 95. See, id., para. 5. See also, 13 November 1981 letter from the Head of the Maritime, Aviation and Environment Dept., Foreign and Commonwealth Office to the US Embassy, London, reproduced in (1981) British Year Book of International Law, at p.472.
 96. See, eg., US Coast Guard, General Law Enforcement Digest of Interdiction Statistics (3/31/89) (1989: Washington, D.C.), at pp.13-14. 1988 data reproduced in Gilmore, supra, note 80, at p.227.
 97. See, Gilmore, id., at p.227, note 73. The possibility of further co-operation among states in the interdiction of drug smugglers at sea is to be expected in the light of Article 17 of the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, supra, note 21. See also, Article 4(1)(b)(ii). The UK Government has submitted amendments to the Criminal Justice (International Co-operation) Bill, supra, note 21, in order to take full advantage of the above provisions. See, Parl. Deb., H.L. Vol. 513, No.13, 12 December 1989, col. 1218 (per Earl Ferrers) and, infra, note 180. See also, H C Paper No. 370-II, 1988-89, at p.165 for a similar statement by the Home Office. For a recent example of Royal Navy assistance to the US Coast Guard in the interdiction of a US registered vessel off the coast of Mexico see, "Royal Navy helps seize drug boat", The Independent (London) 4 September 1989. Also of interest in this context was the announcement, on 27 September 1989, that bilateral assistance to the Republic of Colombia would

include "Periodic deployments of Royal Navy vessels to assist the Colombians with maritime surveillance". "Policy Statement: British Foreign Secretary Announces Package of Anti-Drugs Assistance for Colombia", 27 September 1989 (unpublished: text provided by Embassy of Colombia, London). See also, "Navy to Join War on Drugs in Colombia" The Times (London) 28 September 1989. According to one report "The idea is that the frigate could act as a surveillance centre for identifying and tracking shipping on the Caribbean drug route from Colombia to the United States and Canada". "Aid Frigate Pays a Quiet Call" The Guardian (London) 5 October 1989.

98. See generally, A V Lowe, Extraterritorial Jurisdiction (1983: Grotius Publications, Cambridge). See also, Restatement of the Law Third: The Foreign Relations Law of the United States (1987: American Law Institute, St Paul, Minn.) Vol. I, pp.340-366.
99. E Nadelmann, Unlaundering Dirty Money Abroad: US Foreign Policy and Financial Secrecy Jurisdictions (1986) 18 Inter-American Law Review p.33 at p.50. See also, B Zagaris and J Rosenthal, Securing Documents Overseas by the United States, in M C Bassiouni (ed.) International Criminal Law: Volume II, Procedure (1986: Transnational Publishers, Dobbs Ferry, N.Y.), p.373.
100. See, eg., F Knecht, Extraterritorial Jurisdiction and the Federal Money Laundering Offence (1986) 22 Stanford Journal of International Law p.389, at pp.415-419; and R Geiger, Legal Assistance Between States in Criminal Matters, Encyclopaedia of Public International Law, Vol.9, p.248, at p.249. For an overview of the British position see, Sir Michael Havers, Good Fences Make Good Neighbours: A Discussion of Problems Concerning the Exercise of Jurisdiction (1983) 17 International Lawyer p.784.
101. E Nadelmann, Negotiations in Criminal Law Assistance Treaties (1985) 33 American Journal of Comparative Law p.467, at p.499.
102. R Blum, Offshore Haven Banks, Trusts, and Companies: The Business of Crime in the Euromarket (1984: Praeger, New York), p.62.
103. See, eg., G. Smith, Bank Secrecy in the Cayman Islands (1986) 10 West Indian Law Journal, p.114.
104. See, J Horowitz, Piercing Offshore Bank Secrecy Laws Used to Launder Illegal Narcotics Profits: The Cayman Islands Example (1985) 20 Texas International Law Journal p.133, at p.138.
105. In 1984 the US Department of the Treasury stated: "There is no single, clear, objective test which permits the identification of a country as a tax haven. There are, however, a number of factors which are generally accepted as characteristic of tax havens. These include: relatively low rates of tax; bank or commercial secrecy laws or administrative practices which the country is generally unwilling to breach; a banking and financial sector which is large in relation to general levels of domestic economic activity; the availability of modern communications facilities; the absence of currency controls on foreign deposits of foreign currencies; and self promotion as an offshore financial center". Department of the Treasury, Tax Havens in the Caribbean Basin (1984: Washington, D.C.) p.2. For a recent review of US law and practice in respect of such entities see, W Caccamise Jr., US Countermeasures Against Tax Haven Countries, (1988) 26 Columbia Journal of Transnational Law p.553.

106. Supra, note 104, p.136. In March 1989 the US Department of State noted that "The Cayman Islands has become the largest offshore banking center in the Caribbean". Department of State, Bureau of International Narcotics Matters, International Narcotics Control Strategy Report (1989: Washington, D.C.), p.41 (hereafter INCSR).
107. A 1987 Staff Report prepared for the use of the Senate Caucus on International Narcotics Control stated: "Money laundering is the process of changing money gained from illegal operations into a manageable form while concealing its illicit origins. Narcotics trafficking creates the largest demand for money laundering, but organised crime activities such as gambling and loan sharking also create a demand." Legislation Aimed at Combating International Drug Trafficking and Money Laundering, 100th Congress, 1st Session, S Print 100-67, p.13.
108. See, Department of the Treasury, supra, note 105, at p.34 and p.40. See also, supra, note 107, at p.15; and, A Grilli, Preventing Billions from being Washed Offshore: A Growing Approach to Stopping International Drug Trafficking (1987) 14 Syracuse Journal of International Law and Commerce p.65, at p.67.
109. The initial clash arose out of a tax evasion investigation and resulted in the celebrated case of In re Grand Jury Proceedings, US v Field, 532 F 2d 404 (1976). See, B Westreich, Federal Judicial Compulsion of an Alien's Testimony Contrary to the Mandate of the Laws of His Native Land (1977) 16 Columbia Journal of Transnational Law p.356. See also, supra, note 104, at pp 150-152. For a subsequent discussion of this case see, eg, In re Grand Jury Proceedings, US v Bank of Nova Scotia 691 F 2d 1384, at 1389-1391.
110. As with the so-called Gentlemen's Agreement of 1982. For the substance of this exchange see, In re Grand Jury Proceedings, US v Bank of Nova Scotia 740 F 2d 817 (1984) at 823-825. This was characterised by the US Court of Appeals as "not a binding, enforceable agreement but rather as an experimental and tentative alternative for the production of documents". Id, at 829-830.
111. As with the use of letters rogatory. For a discussion of the use of this procedure in the context of US-Cayman Islands relations see, supra, note 104, at pp.152-156. Also of interest more generally is L Paikin, Problems of Obtaining Evidence in Foreign States for Use in Federal Criminal Prosecutions (1984) 22 Columbia Journal of Transnational Law p.233, at pp.253-257.
112. As the US Court of Appeals stated supra, note 110, at 821, note 5: "of the \$1,825,000 fine imposed by the district court, only \$100,000 is attributable to the failure to produce records from both the Bahamas and the Cayman Islands. The remainder of the fine is imposed solely because of the failure to produce the Bahamian records ..."
113. This case, frequently cited as Bank of Nova Scotia II, has been much discussed in the scholarly literature. See, eg, Zagaris and Rosenthal, supra, note 99, at pp.382-383; S C Weiland, Congress and the Transnational Crime Problem (1986) 20 International Lawyer, p.1025, at pp.1026-1027; and, supra, note 104, at pp.158-161.
114. Reproduced in (1986) British Year Book of International Law, at p.574. See also, Nadelmann, supra, note 99, at pp.54-56. For one characterisation of the British view prior to these events see, supra, note 102, at pp.226-232.
115. Cmd. 9344 (1984).

116. Law 17 of 1984 (Cayman islands).
117. See, supra, note 115, Art.2.
118. See, id, Art.3. Upon receipt of such a certificate the Cayman Islands Attorney-General lacks a discretion to refuse. See, id, Art.3(2)(a). See also, supra, note 116, s.4.
119. See, "Joint Responses of Department of Justice and Department of State to Questions Asked by Senator Kerry", 101st Congress, 1st Session, Senate, Exec. Rept. No.101-8, p.101, at p.126. See also, supra, note 104, at pp.161-164; and, Nadelmann, supra, note 99, at p.56.
120. Nadelmann, supra, note 99, p.56, note 64.
121. Supra, note 114, at 574. As of August 1988 some 57 certificates had been issued by the United States pursuant to the Agreement, non-inclusive of supplementary requests. See, Banking Close-Up, Newstar (Grand Cayman, Cayman Islands), August 1988, p.10, at p.12.
122. Supra, note 101, at p.501. In 1989 Attorney-General Thornburgh informed the Senate Foreign Relations Committee that existing MLATs "and related Executive Agreements, particularly the one with the Cayman Islands, have been very successful". 101st Cong, 1st Sess, Senate, Exec Report 101-105, at p.186.
123. For the 18 September 1986 Exchange of Letters in respect of the Turks and Caicos Islands see, Cm 136 (1987). This was given legal effect within the territory by virtue of the terms of the Narcotic Drugs (Evidence) (United States of America) Ordinance 1986. Ordinance No.1 of 1986 (Turks and Caicos Islands). As of October 1988 only one certificate had been issued pursuant to this Agreement. See, eg., Narcotics Issues in the Bahamas and the Caribbean: Hearing Before the Committee on Foreign Affairs, House of Representatives, May 12, 1987 (1987: US Government Printing Office, Washington, DC), at p.92. For the Exchanges of Letters in respect of Montserrat, the British Virgin Islands and Anguilla see, Cm 426 (1988), Cm 216 (1987), and Cm 169 (1987) respectively. See also, Nadelmann, supra, note 99, at pp.58-59. There is no similar agreement with respect to Bermuda. For a description of the attitude of the Bermuda Government in this area see, S Froomkin, Money Laundering - An International Perspective, in Meeting of Law Officers of Small Commonwealth Jurisdictions: 5-9 December 1988, Hamilton, Bermuda (1989: Commonwealth Secretariat, London), p.144, at pp.149-150.
124. For example in 1987 two agreements between the UK and the USA were signed. One provided for the US "to deliver an aircraft to the Government of the Turks and Caicos Islands to be used in the fight against drug traffickers. The aircraft will also be used by the Government of the British Virgin Islands. A second Agreement has been signed to install an anti-drugs radar tracking station on the island of Providenciales in the Turks and Caicos Islands, thus extending US surveillance of the area to cover both the Bahamas and TCI". Foreign and Commonwealth Office Press Release, 31 July 1987. Neither agreement has thus far been published in the UK. See also, Parl Deb, H C, Vol. 145, No.33, 27 January 1989, col 791 (Written Answers). In 1988 the US transferred a patrol type vessel to the Cayman Islands and another to Anguilla pursuant to agreements, in the form of Memoranda of Understanding, with the UK. See, INCSR, at p.51. Other negotiations including the possible extension of the OPEAT arrangements with the Commonwealth of the Bahamas to the Turks and Caicos Islands, are taking place at the time of writing. See, eg, id, at p.123. The UK and the US also participate in certain

Caribbean regional initiatives. Thus, both accepted invitations to attend the Caribbean Ministerial Drugs Conference in Jamaica in October 1989. See, Foreign and Commonwealth Office Press Release No.134, 26 September 1989.

125. Cayman Islands Government Information, Press Release, 8 May 1986.
126. Statement of Michael Bradley, Attorney-General, during the Second Reading of the Mutual Legal Assistance (United States of America) Bill, 2-11 September 1986, (transcript provided by the Attorney-General, Grand Cayman).
127. Cmnd 9862 (1986).
128. See eg., R S Rendell's report on the Treaty on behalf of the American Bar Association in (1987) 21 International Lawyer, p.1240 at p.1241. See also, (1988) 82 American Journal of International Law pp.112-118. On the evolving US practice in this area see, eg, A Ellis and R Pisani, The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis, (1985) 19 International Lawyer p.189.
129. 23 July 1987 Letter of Submittal from Secretary of State Shultz to President Reagan, in 100th Congress, 1st Session, Senate, Treaty Doc 100-8, at v.
130. See, International Mutual Assistance in Criminal Matters - A Discussion Paper (1988: Home Office, London).
131. See, supra, note 127, Art 1(2). Requests are to be made through the Central Authority of each party. Id, Art 2. The Cayman Mutual Legal Assistance Authority "shall be the Chief Justice, who shall exercise his functions under the Treaty and this Law acting alone and in an administrative capacity, or another Judge of the Grand Court designated by the Chief Justice to Act on his behalf". Mutual Legal Assistance (United States of America) Law, 1986. Law 16 of 1986 (Cayman Islands), s 4. For the reasons behind his somewhat unusual decision see, supra, note 126.
132. Supra, note 127, Art 1(1).
133. Technical Analysis of the Treaty Between the United States and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters 101st Congress, 1st Session, Senate, Exec Rept No 101-8, p.8, at p.48, note 40.
134. Supra, note 126.
135. See, supra, note 133, at p 14.
136. Rendell, supra, note 128, p 1243.
137. Supra, note 133, p 14.
138. Supra, note 127, Art 19(3)(a). See also, Art 3(1)(b).
139. See, id., Art 19(3).
140. See, eg., Grilli, supra, note 108, at p 87.
141. Supra, note 126.

142. Supra, note 127, Art. 3(2)(a).
143. Id., Art. 3(2)(b). The US Technical Analysis records the view that "we would not expect the Central Authority of either party to deny a request as a 'political offence' if it involves the kind of conduct listed in the Supplementary Treaty to the Extradition Treaty between the United States and the United Kingdom". Supra, note 133, pp.14-15, note 8. See also, Testimony, supra, note 119, p.142.
144. Supra, note 127, Art 3(3). For the view of the US on this provision see, supra, note 133, at pp.15-16. For the views of the Caymanian authorities see, supra, note 126.
145. Supra, note 127, Art. 3(2)(c).
146. See, Testimony, supra, note 119, at pp.122-123.
147. Supra, note 133, p.15.
148. Supra, note 126.
149. Supra, note 133, p 47.
150. Id., p.44. See also, statement of Principal Deputy Legal Adviser, Department of State, id., p.219, at pp.220-221.
151. Id., p.45. The Caymanian courts have declined to accept compelled consents of this kind. See, In the Matter of ABC Ltd., 1984 CILR 130; and Attorney-General v Bank of Nova Scotia 1985 CILR 418. On 22 June 1988 the US Supreme Court upheld the constitutionality of this procedure in a case concerning, in part, the Cayman Islands. See, Doe v US 108 S Ct 2341 (1988).
152. Supra, note 129, p.xi.
153. Supra, note 133, p.46.
154. Reproduced in (1987) 26 International Legal Materials, p.550.
155. Id., p.551.
156. See, eg., Nadelmann, supra, note 99, at p.57.
157. Cited, supra, note 131.
158. See, Protocol, supra, note 127.
159. It is understood that the problem was not with the Cayman Islands Treaty as such but with two of the other five MLATs then before the Senate in the same ratification "package": viz, Mexico and the Bahamas. See, eg. 101st Congress, 1st Session, Senate, Exec Rept No 101-8, at p 6.
160. Supra, note 3, para 9.

161. 1986 c.32 (UK). For an account of the disinclination of the UK to follow the US example in respect of civil forfeiture see, eg., M Zander, *Confiscation and Forfeiture Law: English and American Comparisons* (1989: Police Foundation, London), at pp.44-45.
162. Tackling Drug Misuse, *supra*, note 1, p.20. On 12 December 1989 the Minister of State, Home Office, informed the House of Lords that: "Confiscation orders have been made totalling more than £13 million, and more than £22 million has been restrained." Parl. Deb., H L, Vol. 513, No.13, col. 1230. Since that time a number of significant confiscation orders have been reported in the press. See, eg., "Mastermind of Drugs Plot Jailed for Fifteen Years" *The Independent* (London) 22 December, 1989; and "Bags of Cash Deposited in London Bank", *The Independent* (London) 16 December 1989. In 1988 the provisions of the CJA extended the attack on assets to those derived from other serious crimes. See generally, D Feldman, *Criminal Confiscation Orders: The New Law* (1988: Butterworths, London). In 1989 a further initiative was adopted in respect of the assets of terrorists. See, Prevention of Terrorism (Temporary Provisions) Act 1989, 1989 c.4 (UK).
163. 1987, c.41 (UK). The subject of enacting legislation similar to the CJA is currently under review in Scotland. See, Scottish Law Commission, *Forfeiture and Confiscation* (Discussion Paper No 82) (1989: HMSO, Edinburgh).
164. *Supra*, note 4, p.11.
165. *Id.*, p.13. For the current position in the Cayman Islands see, Misuse of Drugs (Amendment) Law, 1988. Law 8 of 1988 (Cayman Islands); and Misuse of Drugs (Amendment) Law, 1989. Law 3 of 1989 (Cayman Islands). See also, *supra*, note 127, Art. 16. For the position in the Turks and Caicos Islands see, Control of Drugs (Trafficking) Ordinance 1988. Ordinance No.13 of 1988 (Turks and Caicos Islands). For an enactment outside of the Caribbean of great potential significance see, Drug Trafficking (Recovery of Proceeds) Ordinance 1989. Ordinance No.35/89 (Hong Kong). It is understood that final designation arrangements have been concluded with Anguilla, Bermuda and Gibraltar thus far.
166. Tackling Drug Misuse, *supra*, note 1, p.20. For an overview of the growing global practice in this regard see, eg., D McClean, Seizing the Proceeds of Crime: The State of the Art. (1989) 38 *International and Comparative Law Quarterly* p.334.
167. Agreement concerning the Investigation of Drug Trafficking Offences and the Seizure and Forfeiture of the Proceeds and Instrumentalities of Drug Trafficking, Cm 755 (1989).
168. Foreign and Commonwealth Office, Press Release, 9 February, 1988. Art. 1(2)(a) of the Agreement reads: "This Agreement shall apply: (a) in relation to the United Kingdom: to England and Wales, and subject to any necessary modifications, by agreement between the Parties embodied in an exchange of Notes, to Scotland and Northern Ireland and to any territories for the international relations of which the United Kingdom is responsible". The necessary domestic law designation in relation to England and Wales was provided by the Drug Trafficking Offences Act 1986 (United States of America) Order 1989. S I 1989 No. 485. See also, Parl. Deb., H C, Second Standing Committee on Statutory Instruments, 7 March 1989. Pursuant to Art. 14 of the Agreement it was brought into force on 11 April 1989. See, (1989) (June) *Department of State Bulletin* p.70. Press reports indicate that this Agreement was used by the United States in December 1989, following its military incursion in Panama, to freeze the UK based assets of General Noriega. See, "Noriega Sits Tight" *The Independent* (London) 29 December 1989. Similar co-operation has been

requested from other European governments. See, eg., "Nunciature Nine Surrender", The Independent (London), 28 December 1989.

169. See, May 1989 speech by the Home Secretary, supra, note 1, p.8. For the text of the Agreement with The Bahamas see, Cm 475 (1988). The Agreement with Nigeria is understood to break new ground in that it extends to the confiscation of the proceeds of crime generally and is not restricted to drug trafficking offences. See, Foreign and Commonwealth Office Press Conference, 18 September 1989 (unpublished: text provided by Foreign and Commonwealth Office). The most recent agreement, that with Sweden, also covers all serious crime. See, Foreign and Commonwealth Office, Press Release No 175, 14 December 1989.
170. See, id. See also, Parliamentary statement, supra, note 162, col. 524 and the 10 May 1989 evidence of Mr J Potts of the Home Office. H C Paper No.370-1, 1988-89, at p.14. Other arrangements, such as the United Kingdom/Brazil Drugs Agreement 1988, are somewhat less ambitious. It provides, in relevant part, as follows: "1. The two Governments, subject to the laws and regulations in force in their respective countries, propose to promote mutual co-operation to prevent the illicit production of, traffic in, and improper use of narcotic drugs and psychotropic substances, in accordance with the present Agreement, in the following fields: (d) exchange of information about the confiscation of goods obtained illicitly through traffic in drugs, as well as the examination of future complementary arrangements for reciprocal assistance in this field". Cm 769 (1989). It is understood that in March 1988 the UK concluded a Memorandum of Understanding with the Soviet Union on drugs related matters. The first substantive use of this procedure, Operation Diplomat, resulted in the breakup of the so-called Rose Organisation. See, eg., "Anglo-Soviet Inquiry Breaks Drug Ring", The Independent (London) 16 December 1989. The above initiatives are fully in accord with the Paris Economic Declaration of July 1989, supra, note 22, at p.17, where the participants, including the UK, resolved to "Conclude further bilateral or multilateral agreements and support initiatives and co-operation, where appropriate, which include measures to facilitate the identification, tracing, freezing, seizure and forfeiture of drug crime proceeds".
171. See, supra, note 167, Art. 13. It is understood that such negotiations are now under way.
172. Supra, note 130, p.6.
173. Criminal Justice (International Co-operation) Bill. H L Bill 11, 1989-90.
174. United Nations Treaty Series, Vol. 472, p.185.
175. For the text of the Commonwealth Scheme and an explanatory commentary thereon, see, eg., Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (1989: Commonwealth Secretariat, London) Vol. 4, pp.1-51. See also, D McClean, Mutual Assistance in Criminal Matters: The Commonwealth Initiative (1988) 37 International and Comparative Law Quarterly p.177. A further impetus for mutual assistance is provided by the terms of Art.7 of the 1988 UN Convention. See, supra note 21.
176. Parl. Deb., H L, Vol. 513, No.13, 12 December 1989, col. 1217.
177. Supra, note 168.

178. It should be noted that the nature and extent of UK-US co-operation is kept under periodic review, in part through the UK/US High Level Steering Group on Drugs Co-operation which met for the first time in July 1987. See, Foreign and Commonwealth Office Press Release, 23 July 1987. The two governments also co-operate in the provision of drugs related assistance to third countries. See, eg., Memorandum of Understanding between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Drug Detector Dog Training for Third Countries (unpublished agreement signed in Washington DC on 29 March 1988: text provided by the Foreign and Commonwealth Office). The value of the provision of this service was specifically recorded in para 25 of the "Drugs Law Enforcement Conference Communique" following the conclusion of a 25 country regional conference held in Barbados 7-9 March 1988 (unpublished text provided by the Foreign and Commonwealth Office). For one analysis of the legal status of such a memorandum of understanding see, A Aust, *The Theory and Practice of Informal International Instruments* (1986) 35 *International and Comparative Law Quarterly* p.787. Further co-operation between the UK and USA is facilitated by the presence of drugs law enforcement specialists within the jurisdiction of the other. Thus the British Drugs Liaison Officer scheme extends to the US. The US "have DEA staff, Customs staff and an FBI representative in London". See, Memorandum Submitted by the National Drugs Intelligence Unit to the Home Affairs Committee, 12 July 1989, H C Paper No.370-II, 1988-89, p.115, at p.117, para 4.4. For a recent examination of the British experience in the use of such liaison officers see, the report of the Home Affairs Committee, supra, note 2, at para 159 - para 166.
179. Supra, note 176, col. 1217.
180. See, Part II of the Criminal Justice (International Co-operation) Bill, supra, note 173; and, Criminal Justice (International Co-operation) Bill: Amendments to be Moved in Committee. H L Bill 11(a), 1989-90 (19 December 1989). For example, in order to make appropriate provision for narcotics interdiction at sea within a Convention context the Bill as amended utilizes, in whole or in part, five clauses and a detailed Schedule. For a discussion, in lay terms, of the extent of the need for legislation in the UK see, HC Paper No 370-II, 1988-89, at pp.163-165.
181. Supra, note 176, col.1217.

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MUTUAL ASSISTANCE BETWEEN BUSINESS REGULATORY AGENCIES

A paper by the Australian Attorney-General's Department

Introduction

1. The increasing internationalisation of the financial markets provides scope for the freedom of movement of financial instruments and the participants in those markets. The process of internationalisation is also producing growing interdependence and openness of national trading systems with those of other countries. At the same time this process creates administrative, jurisdictional, detection and enforcement problems in the regulation of national trading systems with those of other countries. At the same time this process creates administrative, jurisdictional, detection and enforcement problems in the regulation of national markets and the international aspects of trading. These problems are reflected by the increased scope for the pursuit of undesirable market practices across national boundaries, and the penetration of another country's markets by offenders and undesirable participants known to, or even prohibited from operating in, their home country but who are unknown to that other country.

2. As a result of these issues there is now an increasing awareness amongst Governments that the internationalisation of the financial system requires an appropriate policy response across a wide range of regulatory issues. Integral to the maintenance of investor confidence in, and the efficiency of, national financial markets must be the development of effective co-operation between the national business regulatory agencies responsible for administering and monitoring those markets. This co-operation involves the capacity to both seek from and provide to such agencies in other countries flexible, speedy and effective assistance.

The need for a Special Co-operative framework for Business Regulation

3. Senior officials from Commonwealth Law Ministries have recognised, at their meeting in London on 19-23 June 1989, the need to develop a more enhanced level of assistance between Commonwealth business regulatory agencies to combat securities market fraud: Mutual Assistance in the Administration of Justice: Co-operating to combat fraud in the Financial Markets: A memorandum presented by the Commonwealth Secretariat.

4. In particular, officials recognised the need to develop a mutual assistance regime that recognises the wide range of functions exercised by business regulatory agencies. The range of matters in respect of which regulatory agencies require co-operation cannot be adequately satisfied by relying on the established mechanisms for mutual assistance in traditional criminal matters.

5. The range of matters on which regulatory agencies may need assistance in areas outside established channels for assistance in criminal matters include:

- . the gathering of information regarding a decision whether to apply administrative sanctions such as
 - the refusal to admit, and

- the disqualification of, or the imposition of restrictions on, participants in the market;
 - . the taking of civil legal proceedings eg seeking injunctions or compliance orders, or the recovery pecuniary penalties, for market fraud and misconduct; and
 - . the investigation of, and bringing prosecutions for, market regulation offences which may not be regarded as part of the traditional criminal law in all countries.
6. Any scheme for enhanced co-operation between business regulatory agencies should recognise, and be flexible enough to accommodate the exercise of, such regulatory functions and the framework in which those agencies operate. The mechanisms for co-operation must be able to take account of the different structures and the varying types of agencies ranging from those jurisdictions having regulatory commissions with policing functions to those jurisdictions where the regulatory system is based on the concept of self regulation. In particular, because of the need to act quickly in a fast moving market system, there should be a capacity in any such scheme to provide assistance quickly and with a minimum of procedural formality appropriate to the circumstances of a particular request.
7. This paper examines the mechanisms and procedures to provide for enhanced international co-operation between Commonwealth and other national business regulatory authorities for the more effective policing of the financial markets nationally and internationally.

Current co-operative arrangements

8. There are generally two levels of assistance that have been developed between national regulatory agencies. The first level involves day to day co-operation on matters of policy and practice and the exchange of information, both public and confidential, between agencies. The second, and more formal level enables agencies to act in aid of one another by the exercise of mandatory information gathering powers under the law of one country to assist in the enforcement of the laws of another country.
9. With respect to the first level of co-operation there appears to be general willingness amongst regulatory agencies to co-operate informally with foreign agencies having corresponding functions. Such assistance, in the absence of specific legislative support, cannot usually extend beyond the sharing of information held by the relevant agency. The provision of such assistance does not involve the use of mandatory powers for that purpose. In the absence of authority specifically enabling the agency to divulge information of a confidential nature or already in its possession through the use of its compulsory powers in respect of matters arising under local law, the agency is bound to comply with its relevant legal obligations regarding the disclosure of information.
10. Such co-operation may be reinforced by formal arrangements made between regulatory agencies through the negotiation of bilateral memoranda of understanding (MOU) or multilateral undertakings, such as one entered into by a number of members of IOSCO (International Organisation of Securities Commission). These arrangements (including 'first generation' MOUs) neither provide a legal basis for the exercise of mandatory powers nor impose binding legal obligations to exercise such powers. They do, nevertheless, have a significant part to play particularly in both acknowledging the need for, and providing a voluntary mechanism to enable, cross-border co-operation for the effective regulation of, and maintenance of confidence in, financial markets.

11. With respect to enforcement matters and combating fraud in the markets, such arrangements may be useful in particular areas such as where a market participant operating in one country has come to the attention of an overseas regulatory, or where information in respect of a particular matter or investigation is otherwise in the possession of an overseas agency.

A Legislative Scheme for Mutual Assistance

12. However, these voluntary arrangements are not adequate to deal with the investigation of complex international securities market fraud where the relevant conduct or transaction has taken place in an overseas jurisdiction, and no breach of the law of the other country is involved which would enable it to investigate the matter under its own charter (and thereby pass on any information so obtained to the local agency under the voluntary arrangements described above). Neither can these arrangements effectively deal with such cases where documents or other evidence relevant to that conduct exist in another jurisdiction, or are in the possession of persons residing overseas.

13. For these reasons certain Commonwealth countries, such as the United Kingdom, New Zealand, and a number of Canadian provinces, as well as other key participants in the international financial markets, such as the United States, have developed legislative regimes for the exercise of mandatory powers by a domestic agency to assist investigations by overseas agencies. Other countries, including Australia, are considering the development of similar legislative schemes. Such powers are the most effective weapon in the armoury of national business regulatory agencies to deal with the challenges of international fraud and misconduct in the financial markets.

14. An examination of the legislative schemes that have been developed indicates adherence to the following general elements:

The mechanism is as simple as possible and capable of providing quick and flexible responses. The purpose of the mechanism is to provide effective assistance in particular bilateral circumstances, with a minimum of formality. The request for assistance, which requires no particular formal application, may be made by a business regulatory agency directly to the authority responsible for administering the laws in the other country - in most cases this is the relevant business regulatory agency, or in the case of the UK it is nominally the Secretary of State although the powers of the Secretary may be delegated under that legislation. Consistent with the objectives of speed and effectiveness there is no need for a formal Government to Government approach. Consequently, as discussed further below, the systems do not require the support of bilateral or multilateral treaties between national Governments.

The assistance provided generally corresponds to the regulatory and surveillance functions and compulsory powers of the agency concerned. Such powers may follow from existing investigative powers or be set out in stand-alone comprehensive provisions. It provides the capacity for the exercise by the regulatory authority of mandatory powers to gather information, including the oral provision of information, the production of documents or other assistance. Consistent with the business regulatory functions of the agencies involved, the assistance is available whether the outcome of the provision of assistance might be the taking of administrative action, or civil or criminal proceedings by the regulatory agency in the other country.

The provision of assistance is discretionary and enables account to be taken of public interest considerations in particular cases, which may require the request for assistance to be refused. The final decision to provide the assistance may be

exercised by the regulatory agency (such as in the United States) but, more usually, the function is given to the relevant responsible Minister of State. The types of considerations which usually may be taken into account in such a decision, include such matters as whether:

- reciprocal assistance would be given to the agency in that other country;
- the request relates to a matter which would be a contravention of the law in the jurisdiction in which the assistance is being sought.

Scope for the consideration of national interest on sovereignty matters is also a feature of such schemes. These considerations may be set out in specified criteria in the legislation, or left to be articulated in particular cases under a generally expressed discretion. The safeguarding of civil liberties of subjects in the gathering of information may be dealt with as part of the decision to provide the assistance, or the empowering legislation may specifically state that the requirement on the local citizen to provide the information may also be subject to similar civil liberties protections as would be available to a person in respect of an inquiry under their own laws.

15. A legislative scheme comprising these elements is adequate and appropriate to meet the objectives outlined above for an effective regime of mutual assistance between regulatory agencies. The proposed regime that is being developed for the consideration of the Australian Government is consistent with these schemes.

Inter-Governmental and Inter-Agency Arrangements

16. Consideration has been given to whether it would be necessary or desirable for such a regime to be supported by a bilateral or multilateral treaty system, or a system of MOUs between Governments. Commonwealth countries are parties to an arrangement between Governments relating to the provision of mutual assistance within the Commonwealth (the Harare Scheme). A treaty based scheme has been adopted by most Commonwealth countries in the provision of mutual assistance in criminal matters to non-Commonwealth nations. However, it is considered that such a regime based on inter-Governmental MOUs or treaties is neither necessary nor appropriate in the light of the policy objectives of a regime for mutual assistance between business regulatory agencies.

17. The inter-Governmental MOU/treaty model was established for mutual assistance in criminal matters because the requests for assistance made under that scheme relate directly to matters traditionally involving relations between foreign states, and the scheme therefore involves requests for assistance, and a decision on whether such assistance should be provided being made at the Government to Government level.

18. In the case of mutual assistance between regulatory agencies, as has been mentioned, the proposed legislative regime would be limited to the gathering of information on behalf of the overseas agency. Matters directly relating to the extradition of alleged securities market offenders, for example, would continue to be dealt with under the mutual assistance in criminal matters regime. The legislative regime would also be confined to national business regulatory agencies.

19. For these and the following reasons an inter-Governmental MOU/treaty system would be inappropriate for the proposed regime because -

the regime would be intended to be an administratively simple, speedy and convenient facility which may be utilized at the responsible agency to agency level, rather than directly between Governments;

the request by the relevant foreign agency would not, and would not be intended to give rise to a binding international legal obligation to provide the assistance requested; it would provide a facility to the domestic agency to provide the assistance requested in appropriate cases.

In the light of these matters the legislation empowering the regulatory agency to provide the assistance when so requested, and setting out the limitations subject to which such decisions are to be based, would provide a sufficient and publicly identifiable statement of the scope of the power in question.

20. A role is, however, seen for the use of 'Inter-Agency' MOUs to supplement such a regime. Such MOUs could, for example, either on a bilateral basis or multilateral basis, provide helpful recognition of the desirability of agencies providing such co-operation by way of use of the compulsory information gathering powers. It would need to be recognised that such Inter-Agency MOUs would not provide, and were not intended to provide, either a legal basis for the exercise of compulsory powers or binding legal obligations to exercise such powers. They could, however, provide a desirable and formal expression of the understanding between the respective agencies that they will co-operate to facilitate the exercise of powers and functions by the other in connection with the laws they administer. MOUs relating to the exercise of compulsory powers in aid of foreign agencies (known as 'second generation' MOUs) are presently being developed between some national agencies that have been conferred with such powers.

Conclusion

21. There is a need for national business regulatory agencies within the Commonwealth to further develop the level of co-operation which is presently available under voluntary arrangements.

22. There is also, however, a need for Commonwealth countries to agree on the need to develop an appropriate legal structure to enhance the level of assistance between business regulatory agencies within the Commonwealth. Such a legislative regime would, as outlined above, provide a capacity for the various agencies to compulsorily gather information on behalf of other agencies in appropriate cases.

23. The increasing impact of the international financial markets on national capital markets of Commonwealth countries, and on the business and financial ties between Commonwealth countries, points to a need for a level of co-operation between overseas agencies which would warrant the establishment of a mechanism that was not limited only to co-operation on Commonwealth matters. In this regard the mechanisms for co-operation developed within the Commonwealth should have regard to the approach adopted in equivalent non-Commonwealth countries, such as the multilateral arrangements agreed to by some of the members of IOSCO.

24. Commonwealth countries should agree to encourage their national business regulatory agencies to provide assistance to other agencies and to actively seek the development of agreements, such as MOU, between such agencies which recognise the need for and support the provision of such assistance.

TRANSNATIONAL CIVIL LITIGATION FOR COMMONWEALTH GOVERNMENTS

A Memorandum by the Commonwealth Secretariat

1. The pursuit of civil litigation by Commonwealth Governments in the Courts of other Commonwealth countries has gained prominence recently as a result of some important cases. Law Ministers have already considered the question of the return of cultural property following the Ortiz case brought by the New Zealand Government. More recently the transnational protection of confidential information has been litigated in the "Spycatcher" cases.
2. Because the subject involves some difficult issues of principle and procedure, the Legal Division of the Commonwealth Secretariat asked Dr Campbell McLachlan to prepare a background briefing paper for consideration by Law Ministers.

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TRANSNATIONAL CIVIL LITIGATION FOR
COMMONWEALTH GOVERNMENTS
by Campbell McLachlan*

I. INTRODUCTION

The resolution of transnational disputes between Governments and private parties is a subject of ever increasing importance, given global interdependence (particularly in the area of trade and investment), and given the prominent role taken by States as trading partners as well as regulators. No doubt arbitration will continue to be the preferred forum for the resolution of many disputes involving States.¹ Whatever its other shortcomings, arbitration can at least provide a neutral forum for balancing the interests of States and private contracting parties. The development of the International Centre for the Settlement of Investment Disputes² has led to a degree of specialist expertise in this area.³

However, states will continue to be litigants in foreign Courts. Much attention has been devoted to the position of the foreign state as defendant, where refinements in the law of sovereign immunity, both at the domestic and international level,⁴ have in general conferred a wider jurisdiction on national Courts over foreign States in the conduct of their commercial affairs. This is a matter which has frequently been discussed at Law Ministers' Meetings.⁵

The reverse situation of the Government as plaintiff in a foreign Court has attracted less discussion, despite the fact that some of the notable additions to the case law on the subject have occurred in intra-Commonwealth cases. In the cultural property field, it was Attorney-General of New Zealand v Ortiz [1984] AC 1, which sparked a major Commonwealth review of co-operation in the area.⁶ Even more

recently, the "Spycatcher" decisions have highlighted the competing policies involved in the context of the attempted enforcement of a duty of confidentiality.⁷

It is the purpose of this paper to sketch some of the practice and policy involved in litigating for a Commonwealth state in a foreign Court.

II. WHO IS THE PROPER PLAINTIFF?

The institution of proceedings involves an initial determination of who in law is the proper plaintiff. Domestic statutes and rules of the Court may well give individual Ministers of the Crown or Government Departments locus standi to sue and be sued.⁸ The Queen herself is of course conventionally cited as the prosecution in criminal cases in most Commonwealth countries. Abroad the matter is less certain. The books are full of a pot pourri of different plaintiffs appearing on behalf of a state: for example Solicitor for the Affairs of Her Majesty's Treasury v Bankers Trust 107 NE 2d 448 (1952); Her Majesty the Queen in Right of British Columbia v Gilbertson 597 F 2d 1161 (1979).

One point is clear as a matter of principle. A Government as such is not a legal person and therefore is not capable of suing or being sued. Thus in Sloman v The Governor and Government of New Zealand (1876) 1 CPD 563, it was held that: "There is no such corporation as a governor and government of New Zealand" (566).

In international practice, the State appears by its proper name since the State itself has legal personality in international law. This practice is adopted by Commonwealth countries before the International Court of Justice: Australia v France [1973] ICJ Rep 99, New Zealand v France [1973] ICJ Rep 135 (the nuclear test cases). It appears to be the correct practice when the State appears in foreign Courts as well: see, for example, United States of America v Inkley

[1988] 3 All ER 144; Republic of Italy v Hambros Bank Ltd
[1950] Ch 314.

However, as between Commonwealth countries, the convention (which is by no means strictly adhered to) is that the state appears through its proper legal officer, the Attorney-General: Attorney-General of New Zealand v Ortiz; Attorney-General for Tuvalu & anor v Philatelic Distribution Corporation Ltd.⁹ The practice has no doubt arisen by virtue of the Attorney-General's residual role as a representative of the Crown in legal proceedings.¹⁰ The constitutional features of the office of the Attorney-General make it particularly suited to the presentation of a legal claim on behalf of the State, in addition of course to the practical consideration that the Attorney-General may be the effective officer of State responsible for the conduct of proceedings. Nevertheless even this practice can be problematic, especially in non-unitary states. In the "Spycatcher" proceedings in New Zealand, the Plaintiff has been described as Her Majesty's Attorney-General in and for the United Kingdom. As Cooke P observed¹¹:

"In the light of the position of the Lord Advocate for Scotland we are not clear that the Attorney-General is correctly described in the title of these proceedings."

III. SPECIAL CHARACTERISTICS OF THE COMMONWEALTH ASSOCIATION

Does membership of the Commonwealth entitle a Commonwealth State to any special rights or privileges when it appears as plaintiff in the Courts of another Commonwealth country? In the light of the authorities, a Commonwealth state would seem to be in much the same position as any foreign state in asserting its legal rights. Membership of the Commonwealth should, it is submitted, ensure the recognition of that State within the Commonwealth, but the development of the modern Commonwealth as a free association of independent states has cast out such doctrines as the indivisibility of the Crown and the inter se doctrine under which relations between

Commonwealth members were said to follow different rules to those pertaining to relations between states in the international community generally.^{1 2} Although all members of the Commonwealth acknowledge the Queen as Head of the Commonwealth, the Crown, in any event only a convenient constitutional fiction, is divisible, and the consequence in litigation is that a Commonwealth state is, as a matter of strict law, placed in no better position than any other state.

Commonwealth membership may however provide an indication that the State is to be regarded as a friendly one, a fact which may itself be legally significant. Thus in Regazzoni v Sethia [1958] AC 301 the House of Lords held that English law should refuse to enforce a contract, the intent and purpose of which was a conspiracy to subvert the laws of a foreign friendly state, even where that state's law was not the proper law of the contract. In that case, the state was India and the contract concerned the export of jute bags to South Africa in contravention of Indian export control regulations.

Nevertheless, there would not seem to be any room left for arguing that the general rule against the enforcement of foreign public laws (discussed below) has been in any way modified by the courts in relation to intra-Commonwealth claims. When the Indian Government itself sought to prove in an English liquidation in order to recover taxes due to it in Government of India v Taylor [1955] AC 491, the House of Lords held (per Viscount Simonds, 507):

"Finally, it was urged that, whatever might be the position between this country and a foreign country, it was not the same as between different members of the British Commonwealth, including those members which, though within the Commonwealth, do not acknowledge the sovereignty of the Queen. For such a distinction there is no authority and I can see no reason. If such a change is to be made, it is not for the Courts to make it. It will be the task of Governments and Houses of Parliament. I do not think it will be an easy task."

The point was acknowledged both by Lord Denning in Ortiz¹³ and by the High Court of Australia in Attorney-General v Heinemann Publishers Australia Pty Ltd & Wright¹⁴. In both cases the Courts pointed out that they did not mean any disrespect or to belittle the considerable ties between the countries, but simply that this was a necessary recognition of their separate status as sovereign independent States. Interestingly, Cooke P. of the New Zealand Court of Appeal, in determining Attorney-General v New Zealand Newspapers Ltd, though applying this approach, held¹⁵:

"I would have preferred to determine this part of the case on the ground that Wright owed allegiance to the Crown in right of the United Kingdom, that New Zealand has the same sovereign, and that the Queen's courts will protect her interests wherever they originate."

He held that he was precluded from following this course by Ortiz and Government of India v Taylor.

While Commonwealth States may thus not be afforded any special status as litigants, the extent of Commonwealth legal co-operation presents many advantages to litigants generally.

Enduring similarities between Commonwealth legal systems reduce the many difficulties which otherwise arise in pleading cases in a foreign court. Not only do the basic similarities in substantive law allow a case to be pleaded and argued along lines broadly familiar to the plaintiff from his home jurisdiction, but, perhaps more significantly from a practical point of view, similarities in the practice and procedure, both of the courts and of the profession reduce the perils and the unanticipated procedural requirements which can bedevil foreign proceedings. Thus, to give two basic examples, the service of process is almost universally accepted in Commonwealth countries as a common concept based on personal service effected by the party or its agent. This may be contrasted with the civil law concept of the institution of proceedings as a judicial act, requiring service through official channels.¹⁶ Further, the rules of evidence share a

broad similarity, and in particular the concept of pretrial discovery of documents, which is largely unknown in civil law countries, it is an essential part of the preparation for trial in most Commonwealth countries.¹⁷

Commonwealth legal co-operation also takes a more tangible form in various shared legislative schemes. Most prominent amongst these are the schemes for the recognition and enforcement of foreign judgments, which provide a system of registration unrivalled internationally in the geographical scope.¹⁸ Similarly proof of foreign law is facilitated by Commonwealth legislation.¹⁹

IV. PROCEDURE

The normal consequence of electing to sue in a foreign court is that both parties must accept the regulation of the dispute according to the local rules.²⁰ This has a number of consequences for the state as litigant. Firstly, the institution of proceedings by the state is generally sufficient grounds for that state to be regarded as having submitted to the jurisdiction of the local courts, with the consequence that it submits to both interlocutory and final orders of the court (although the law of sovereign immunity may still place restrictions on the property of the state over which enforcement may be sought²¹). Submission by the institution of proceedings also lays the state open to counterclaims, provided they arise out of the same legal relationship or facts as the claim.²²

Another important procedural consequence of submission is the requirement to give discovery of documents. For the foreign state this may be a sensitive matter since it may require disclosure of otherwise highly confidential state papers, including cabinet minutes and policy documents. Such documents will generally be immune from disclosure in proceedings in the home state on grounds of public interest immunity²³, but it is doubtful whether it is an available

ground of privilege for a foreign state claimant. The State Immunity Act 1978 (UK) does provide that there should be no penalty by way of committal or fine by reason of a failure by the state to disclose or produce any document or other information for the purpose of proceedings to which it is a party.²⁴ But it would still be open for the defendant to seek to strike out the claim if adequate discovery were not given.

However, it may be open to the state to seek the exercise of the court's discretion to dispense with discovery of the documents, on the grounds that to give discovery would be injurious to the public interest of the forum state.²⁵ This argument was successfully applied in Buttes Oil Co v Hammer (No3) [1981] 1 QB 223. There the state documents were in the hands of a third party who himself sought to claim the state's privilege from discovery. The application succeeded before the English Court of Appeal. Brightman LJ held (265):

"It is in the public interest of the United Kingdom that the contents of confidential documents addressed to, or emanating from sovereign states, or concerning the interests of sovereign states, arising in connection with an international territorial dispute between sovereign states, shall not be ordered by the courts of this country to be disclosed by a private litigant without the consent of the sovereign state concerned."

It is still unclear the extent to which the state itself as a litigant could invoke the court's discretion on such grounds.²⁶

V. WHAT RIGHTS MAY BE ENFORCED?

The most troublesome question confronting the courts where the plaintiff is a foreign state is that of what rights may be enforced. This poses but little problem in the case of the private litigant, who must found his claim on some cause of action in the private law of the forum state. Where the foreign state is in effect acting as a private person in bringing a claim jure gestionis it would be wrong to place any additional fetter on its right to enforce such a claim in a

foreign court. If states are to be exposed to such claims under a restrictive doctrine of sovereign immunity, they ought to enjoy the benefit of being able to bring them as well. Thus states have successfully sued for the recovery of goods due under a contract, for a contractual debt, and for damages for negligent damage to its property.²⁷

Difficulties however arise where the state seeks to enforce what is in substance a public right jure imperii. In that case, the state is attempting to call in aid a foreign court to carry out its own public policies. The rule has been explained on the basis of sovereignty:²⁸

".... an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties."

Dicey & Morris put the rule as follows²⁹:

"English courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state."

This exclusionary rule applies even where the proceedings are "in the shape of a civil suit"³⁰. The issue which has vexed Commonwealth courts in particular in recent years has been drawing the line between private and public laws, particularly in areas where there is no well settled authority.

The attempt to enforce directly penalties imposed under foreign law presents little difficulty as coming within the category of law unenforceable by foreign courts. A recent attempt to achieve indirect enforcement of a penal claim was rejected by the English Court of Appeal in United States of America v Inkley [1988] 3 All ER 144 where the United States had sought to enforce a civil judgment obtained for the amount of an appearance bond given by the Defendant, who had failed to return to the United States under the terms on which he was

given bail. The Court held that "the fact that in the foreign jurisdiction recourse may be had in a civil forum to enforce the right will not necessarily affect the true nature of the right being enforced"³¹. The United States judgment was accordingly unenforceable in England.

The unenforceability of revenue claims is equally well established. Thus, in Government of India v Taylor the House of Lords held that the Government of India was not entitled to prove in the liquidation of an English company for the recovery of Indian income tax. The House approved Peter Buchanan Ltd v McVey [1955] AC 516 in which the Irish High Court had declined to allow an action by a liquidator of a Scottish company to recover debts due to the company on the grounds that the sole debtor was the Scottish revenue, the liquidator being merely the nominee of the revenue and the claim being thus in substance one for the enforcement of a foreign revenue law.

That case has, however, been distinguished by the Australian Federal Court of Appeal in Ayres v Evans [1980-4] LRC (Comm) 809. In that case, the New Zealand official assignee in bankruptcy sought to recover some of the bankrupt's property in Australia. The Australian court held that he was entitled to do so. Though the decision turned partly on the effect of Australian bankruptcy provisions, which the Court considered overrode the common law rule in cases to which they applied, the court was also influenced by the fact that the New Zealand revenue was only one of many creditors to the bankrupt's estate. Fox J was concerned at the implications of any other result (812-3):

"In most cases of a deceased's estate there would be some amount owing to revenue authorities, and to prevent participation by beneficiaries raises public policy considerations quite different from that which treats revenue enforcement as confined to the place of enactment. doubtless, if it were a bankruptcy administration here, the Official Receiver or trustee would quite properly refuse to pay a claim by the New Zealand revenue authority, but I do not see how the local executor can refuse to transfer the appellant's interest

to the official assignee overseas, once he is shown to be the person having title to it. It is to be remembered, too, as a general consideration, that Australian individuals and companies may be creditors or beneficiaries in an overseas estate. If the rule were as contended for by the appellant, public policy would rebound."

Outside the comparatively well settled categories of penal and revenue laws, there remains the much debated residual category of "public laws". The significance of this additional category was explored and approved by Lord Denning MR in Attorney-General of New Zealand v Ortiz, a case on protection of cultural property legislation, a context which highlights the dilemma of the foreign court.

(a) Cultural Property

Most states seek to protect their cultural heritage by controlling the export of cultural property. However this objective is frustrated if items, once illegally exported, can be freely sold elsewhere. In 1918, the Italian Government had sought to obtain an injunction in England to prevent Christie's from selling the Medici papers.³² Half of these papers were the property of the Italian Government, and the other half were private property but prohibited from export. An interlocutory injunction was granted relating to the state papers, but declined in relation to the other papers, since the Italian Government had no proprietary claim in relation to them.

The failure to establish a proprietary claim was ultimately fatal to the New Zealand Government's attempt to recover a valuable Maori carving which had been illegally exported from New Zealand in the Ortiz case. The contrasting approaches taken by the Court of Appeal and the House of Lords in that case suggest that, while a foreign state may be precluded from enforcing its export control law as such, it may be possible for a state to recover an item, to which it had obtained title while it was within its own jurisdiction. Seen in this light,

it is submitted that Lord Denning's judgment, which is based on the general proposition that the Court will not enforce a foreign public law, is unhelpful. The House of Lords forebore from expressing any opinion on the "public law" point, preferring to decide the case solely on the question of whether the relevant New Zealand legislation was effective to vest title in the goods in the Crown automatically upon illegal export. Having found the legislation did not have that effect, it was unnecessary to go on to decide the further question of whether enforcement was in any event precluded on public law grounds.

Many states now have legislation which does purport to vest title in the Crown automatically on illegal export³³. This may be effective to give the foreign state an enforceable claim, despite the public law rule, unless it is further required that the Crown's ownership be reduced to possession, which a mere vesting by operation of statute does not achieve.³⁴

The Ortiz case was the catalyst for a proposed Commonwealth scheme, under which Commonwealth states inter se would have undertaken to return cultural objects illegally exported from other Commonwealth countries. The scheme encountered significant policy as well as technical difficulties, and has not so far been adopted by Law Ministers.

Two more recent cases have, however, shown that Ortiz may not present an intractable impasse. In Kingdom of Spain v Christie Manson & Woods Ltd [1986] 1 WLR 1120, the Kingdom of Spain brought proceedings for declarations that a Goya painting had been illegally exported from Spain and that the export documents were forgeries. An application by the Defendants to strike out failed, even though it was clear that the Kingdom of Spain did not have title to the painting. The Vice-Chancellor found that the plaintiff had an arguable case that there was an equitable right to restrain the doing of deliberate acts in England which would cause damage to the

property of the Kingdom of Spain, by debasing the credibility of genuine export documents issued by the Government. (Applying Emperor of Austria v Day (1861) 3 de GF&J 217, discussed below).

A more remarkable case is Union of India et al v Bumper Development Corporation Ltd (Unrep, 17 February 1988, English High Court, Kennedy J). A 12th Century bronze statue of the Hindu god Siva, known as 'Nataraja', had come to light in London when the Bumper Development Corporation (a Canadian company which had a large collection of antiquities) delivered it to the British Museum for valuation. The statue had been seized by the Metropolitan Police and the Union of India then intervened claiming a superior title. The matter came on for trial as a special issue before Kennedy J. There were five plaintiffs in the issue: the Union of India itself, the State of Tamil Nadu, the custodian of the temple in which it was alleged the statue had originally resided, the temple itself and the idol said to be incarnate in the statue.

There were two main issues in the case. Firstly the Court had to determine whether the statue, the subject of the litigation, was in fact the same statue alleged to have been removed from the temple in Tamil Nadu. Once that factual link had been established, it was then necessary to establish which of the plaintiffs (if any) had a superior title to that obtained on purchase by Bumper. It appears to have been accepted that the statue had been originally removed illegally from the temple.

The Union of India had no claim to title, despite being the effective litigant in the proceedings. The State of Tamil Nadu likewise had no claim based on cultural property legislation or otherwise. The local statute recognised the locus standi of the trustee of the temple to assert claims on the temple's behalf. Thus it was that, in applying Indian law, Kennedy J came to recognise a valid claim by the trustee of the temple. Had he been wrong in this, Kennedy J

would have been prepared to find that the idol itself was a juristic entity capable of recognition in English law, which could claim title. Thus the Plaintiffs succeeded in reclaiming an important item of cultural property and establishing an important precedent in the overall objective of the Government of India which, as the Judge observed "wants to stop, and if possible, reverse the outward flow of a precious part of the nation's cultural heritage."

(b) A Patrimonial Claim?

Does a state have a right to protect a wider class of property than a private litigant? In Government of India v Taylor, Lord Keith distinguished between assertions of sovereign authority, which were unenforceable, and a "patrimonial" claim which was enforceable. Doubtless this expression includes claims for title to goods, but Emperor of Austria v Day raises the prospect of further types of patrimonial claim. In that case, a Hungarian refugee had printed in London a quantity of bonds, purporting to be official bills of Kingdom of Hungary. The Emperor of Austria successfully obtained an order for delivery up of the bills and an injunction against further production on the ground that it would have been an invasion of the property rights of the Emperor of Austria in his representative capacity to allow the creation of spurious circulation of these false notes.

The Emperor of Austria was, as has been seen, relied upon as creating an arguable case in relation to forged export licenses in the Kingdom of Spain v Christie. More recently, in Attorney-General of Tuvalu & anor v Philatelic Distribution Corporation Ltd et al, the Government of Tuvalu sought to obtain delivery up of stamps bearing the name of Tuvalu and purporting to be genuine Tuvalu stamps, which had been produced without the Government's authority and which in some cases bore deliberate flaws, which were marketed to the public as if they were accidental flaws at inflated prices. The action was based principally on the rights vouchsafed to

the Government by their contract with the First Defendant, but in addition the Plaintiffs sought to allege the infringement of their property rights by the creation of the spurious circulation in Tuvalu stamps. In the event, the Defendants consented to summary judgment for delivery up and a perpetual injunction against further production. A finding of contempt against the Managing Director of PDC for breach by the company of its undertaking by producing further stamps was upheld by the Court of Appeal.³⁵

(c) Confidential Information

The third and most celebrated recent rehearsal of the public law exclusionary rule has been in the British Government's attempts to enforce a duty of confidence.

The facts of "Spycatcher" are now notorious but a short summary is merited here. Peter Wright had been a member of the British security service from 1955 until 1976. From 1964 he had been with the counter-espionage branch. On commencing his employment with the service, and on his retirement he had signed declarations under the Official Secrets Act 1911, in which he acknowledged a duty of confidentiality with respect to information obtained by him while he was with the service. On his retirement, Mr Wright went to Australia, became an Australian citizen, and settled in Tasmania. Whilst there, he wrote "Spycatcher", which was accepted for publication by Heinemann Publishers (Australia) Pty Ltd. The book recorded details of the operation of the service as observed by Mr Wright during his employment, and also made a number of allegations about the services intervention in political affairs in the United Kingdom and on the degree of infiltration by Soviet spies.

The British Government thereupon began a series of proceedings in Australia, England, Hong Kong and New Zealand in an attempt to stop the publication of the book and of extracts from it. The proceedings went to the House of Lords twice, to the High

Court of Australia and to the New Zealand and Hong Kong Courts of Appeal. In substance, however, the British Government failed to enforce the duty of confidentiality, because the Australian High Court held that it had no jurisdiction to entertain the British Government's action, and widespread publication of the book in Australia and the United States of America ultimately rendered injunctions against newspapers in Britain futile.

At the heart of the case was the question of whether the British Government was seeking to enforce a public or a private right. Mr Wright and Heinemann Publishers were both Australian nationals, and the writing of the book and its publication were both to take place outside England. The criminal law was thus of little avail to the British Government, which sought instead, both in England and elsewhere to establish a duty of confidence in the civil law, and to enforce that with private law remedies. It was thus argued that Mr Wright owed a duty of confidence, either flowing from his contract of employment or in equity. While establishment of the contractual duty stood little chance of success, given the peculiar status of the Crown's servants,³⁶ it was accepted in all jurisdictions that there was a duty of confidence in equity, and that such a duty could be enforced by the Crown to prevent disclosure of documents injurious to the public interest: Attorney-General v Jonathon Cape Ltd [1976] QB 752; Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39. However, the proceedings partook of strong public law character. Wright's duty of confidentiality flowed from the two declarations he had made pursuant to the Official Secrets Act 1911. The confidential information related to state secrets as to the operation of the security service. The case thus raised squarely the issue of whether the Courts would refuse to enforce a claim on the ground of the public law exclusion in circumstances where, were the Plaintiff not a state, there would exist a clear right of action in private law.

In Australia, the action came for trial before Powell J in the High Court of New South Wales. Powell J included in his judgment a very full discussion of the nature of Mr Wright's disclosures against the background of existing published material about the MI5 during the same period. He found that Wright was under a duty of confidentiality to the Government. However, detriment was an essential ingredient in the cause of action, and the Attorney-General failed because much of the information in "Spycatcher" was readily available already, or else factually stale, and therefore there was no prejudice to the national security of the United Kingdom. He found however that the Court's jurisdiction was not excluded by the public or penal law defence, since the obligation of confidentiality was one which was open to everyone in the United Kingdom to seek to enforce for his own benefit.

When the case went on appeal to the New South Wales Court of Appeal, the majority (Kirby P and McHugh JA) dismissed the appeal, but a different approach to the fundamental issues was taken in each of the judgments. Kirby P held that in substance the claim was based upon an alleged breach of duty of secrecy in the Official Secrets Act 1911 (UK), which Act was a public penal statute of a foreign state unenforceable in Australia. The Australian Courts thus had no jurisdiction to entertain the claim. McHugh JA found that the duty of confidence was independent of the Official Secrets Act and therefore that its enforcement was not precluded by the public law rule, but that, as a matter of public policy, the Australian Courts should refuse to entertain any action brought by a foreign Government to restrain the publication of confidential Government information. In a careful dissenting judgment, Street CJ found that the claim would have been unenforceable as a foreign penal law but for the evidence in support of the British Government's application given on affidavit by an authorised representative of the Australian Government. Street CJ considered that it lay in the hands of the local sovereign to qualify the basic rule, and that this had been effectively achieved in the present case.

The High Court of Australia found unanimously that the Attorney-General's claim failed. As Mason CJ put it, delivering the judgment of the majority:³⁷

"Thus, to concentrate on the private law character of the causes of action or grounds of relief pleaded by the appellant is to overlook the appellant's central interest in bringing the action. That interest is to ensure the continued secrecy of the operations of the British security service by enjoining disclosure of information relating to those operations and by discouraging revelations by others.

....

Viewed in this light, the action is neither fully nor accurately described as an action to enforce private rights or private interests of a foreign state. It is in truth an action in which the United Kingdom Government seeks to protect the efficiency of its security service as 'part of the defence forces of the country'. The claim for relief made by the appellant in the present proceedings arises out of, and is secured by, an exercise of a prerogative of the Crown, that exercise being the maintenance of the national security. Therefore the right or interest asserted in the proceedings is to be classified as a governmental interest. As such, the action falls within the rule of international law which renders the claim unenforceable."

The High Court's decision thus marks a clear finding in favour of the existence of a broad exclusionary rule against the enforcement of foreign public or prerogative rights (despite some additional unnecessary and inappropriate references to the Act of State doctrine and public policy³⁸). As Lord Griffiths observed in the House of Lords in Attorney-General v Guardian Newspapers Ltd:³⁹

"The High Court of Australia have by their judgment in this litigation made it plain that we cannot look to the law in Australia for any assistance when a member of the security services wishes to betray the secrets of his service."

Between the judgments of the New South Wales Court of Appeal and that of the Australian High Court, the "Dominion" newspaper in New Zealand began serialisation of articles published by the English "Sunday Times" relating to

"Spycatcher". An interim injunction against further publication was obtained in the New Zealand High Court but subsequently set aside by Davison CJ, whose decision was upheld by the New Zealand Court of Appeal. The judgment of Cooke P in the Court of Appeal is however instructive in that it takes a different approach to the public law question. The Court held that it was not a case where an injunction should be granted in New Zealand in relation to the "Spycatcher" material since the book and its contents had already been so widely disseminated that "to try to stop further dissemination in New Zealand would be incongruous and not far short of absurd".⁴⁰ In the Court's reserved judgment, Cooke P held that the claim failed because two relevant defences had been made out. Firstly, the Defendants had established evidence of such widespread prior publication as to destroy the confidential character of the material. Secondly, New Zealand's public interest justified publication since, on the agreed facts before the Court, the book included material about the penetration of and wrong doing by the security service, which it was in the public interest to be disclosed.

However, Cooke P held that the action was not barred by the rule that the local Court will not enforce a foreign penal or other public law. He held that the duty of confidentiality subsisted apart from the Official Secrets Act, and the action was not therefore merely an attempt to enforce a penal statute. Whether the Court was barred by some wider exclusion of public laws was found by him to be an open question. He preferred an approach which allowed a foreign friendly state to assert a private law duty of confidentiality. The task of determining which actions should be so entertained could be dealt with by executive certificate.

The "Spycatcher" judgments reflect differing approaches to the balance to be struck between freedom of the press on the one hand, and the importance of the duty of confidence on the other. This is a matter on which very different approaches have been taken in Commonwealth countries. For example, the

Official Secrets Act model has been comprehensively reformed in New Zealand by the Official Information Act 1982, which replaces the presumption of secrecy of official information with a presumption of openness. However, few would dissent from the proposition that certain Governmental information may be legitimately restricted, and that defence and security interests are an important relevant class of information entitled to protection. Whether the material contained in Mr Wright's book was such as to justify lifelong secrecy or whether the public interest required disclosure is a matter on which opinions may differ. However an equally significant feature of the "Spycatcher" litigation was the powerlessness of the Courts to prevent disclosure given the ease with which Mr Wright and his publishers could resort to a multiplicity of jurisdictions for publication.

In this respect, "Spycatcher" is simply symptomatic of a much wider problem of the limited efficacy of domestic laws in dealing with transnational situations. As Cooke P put it⁴¹:

"For the world is shrinking, with nuclear hazards, terrorism, ideologies and the power of the media transcending national boundaries and at times making them almost irrelevant. The rule expounded by Lord Watson and Lord Denning was not designed to meet this sort of problem."

These considerations also troubled Street CJ⁴²:

"As the world community becomes increasingly inter-dependant, there comes also an increasing need for flexibility which will enable nations to mould their relations in ways suited to promote their common interests without finding themselves fettered by unduly inward looking notions of sovereignty."

Having found that the origin of the rule against the enforcement of foreign public laws related to the infringement of local sovereignty, Street CJ held that the local sovereign might, provided it operated within the constraints of local law, open the doors of the Court to a foreign sovereign. This might be validly done by executive certificate. This approach

was endorsed by Cooke P in the New Zealand Court of Appeal. However it cannot be regarded as being the law in Australia, since the High Court expressly rejected it in the following terms⁴³:

"First, the notion that effective access to the courts should depend on a decision of the executive is as unacceptable as the related notion that the enforceability of the claim should depend on an executive decision that the claim should be able to succeed. Secondly, the possibility of detriment to Australia's national security interests cannot transmogrify the character of the claims. So far as friendly states are concerned, the remedy, if one is thought to be desirable, is to be found in the introduction of legislation."

The exclusionary rule does of course avoid the necessity for adjudication upon claims of a "political" character, but it is doubted whether the Australian High Courts objections are compelling. A foreign state still needs to be able to establish a cause of action genuinely founded upon a private law right. The Courts are well accustomed to accepting official certificates in matters of foreign relations.⁴⁴ If the approach proposed by Street CJ and Cooke P were followed, the certificate would have to invoke the national interest of the forum state as justifying an exception to the normal exclusionary rule. Finally, it would still be for the local Court to evaluate, based on local law, whether the case was made out. In the case of a duty of confidence, this would include consideration of the defence of public interest.

VI. CONCLUSION

The "Spycatcher" cases were on any view extraordinary litigation. No doubt there will continue to be many cases in which the state appears as plaintiff in a purely private and commercial capacity. In such cases, the state will be treated in almost an identical fashion to any private litigant. However, in the conduct of litigation as in other respects, a state is performing public duties, a fact which

gives such litigation an added dimension in practice. It may also affect the nature of the rights asserted.

Recent cases on the rule excluding the enforcement of foreign public law have shown that the rule does have a broad basis in the exclusion of claims which are in substance jure imperii, or an exercise of the sovereign power of a foreign state. In the application of this rule, Commonwealth states inter se are in no different position to states generally. The incidents of sovereignty are the same.

However, Street CJ's reflections on the increasing interdependence of the world and the need to avoid "unduly inward looking notions of sovereignty" do give cause for thought. As the revenue and cultural property cases reviewed above show, it may be possible in some individual cases to adopt a flexible approach within existing private law categories. The certification procedure may also offer the prospect of enlarged co-operation on an ad hoc basis. However, perhaps the greatest chance of effective solutions lies in international agreement in particular subject areas. These are not matters which, with respect to the High Court of Australia, can be dealt with by domestic legislation alone. The remarkable achievement of the Commonwealth in the Scheme for Mutual Assistance in Criminal Matters shows how the effectiveness of the local judicial process in dealing with transnational problems may be substantially improved by international co-operation. As the proposed scheme for the protection of the cultural heritage in the Commonwealth illustrates, such co-operation offers the prospect of remedies to global problems, for which Commonwealth Governments must presently seek redress in the civil courts.

FOOTNOTES

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1. See: Redfern & Hunter Law and Practice of International Commercial Arbitration (1986); Hague Academy of International Law: Centre for Studies & Research in International Law and International Relations Transnational Arbitration and State Contracts (1988).
 2. Established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States (1985) 575 UNTS 159.
 3. See the recent decision of the New Zealand High Court in: Government of New Zealand v Mobil Oil New Zealand Ltd et al (1988) 13 Yearbook Commercial Arbitration 638, where the Court referred to the reasons in principle for referring an international investment dispute to ICSID arbitration, and upheld a contractual clause to that effect.
 4. Recent Commonwealth legislation includes:
State Immunity Act 1978 (United Kingdom)
Foreign State Immunities Act 1985 (Australia)
State Immunity Act 1982 (Canada)
State Immunity Act 1979 (Singapore)
State Immunity Act 1982 (Pakistan)
 5. Meeting of Commonwealth Law Ministers and Senior Officials (1986) Memoranda, pp 443-488.
 6. McLay 'Protection of Cultural Property' Meeting of Commonwealth Law Ministers 1983; O'Keefe & Prott 'Protection of the Cultural Heritage within the Commonwealth Consultative Document' (1985); Meeting of Commonwealth Law Ministers and Senior Offices (1986) Minutes pp 68-75.
 7. The Spycatcher litigation in England, Australia, Hong Kong and New Zealand has been reported in a single volume of the Fleet Street Reports, [1989] 2 RSR, to which reference will be made here.
 8. Crown Proceedings Act 1947
Hogg Liability of the Crown in Australia, New Zealand and the United Kingdom (1971).
 9. Court of Appeal (England) (Woolf & Bingham LJ and Sir Roualeyn Cumming-Bruce), 20 October 1989, 1989-T-No 568, The Times 24 October 1989.
 10. See: Edwards The Law Officers of the Crown (1964), Edwards The Attorney-General: Politics and the Public Interest (1984).

11. [1989] 2 FSR 726.
12. Fawcett The British Commonwealth in International Law (1963) Chapter 4.
13. [1984] AC 1, 20.
14. [1989] 2 FSR 631, 645 per Brennan J.
15. [1989] 2 FSR 732, 740.
16. See the discussions in the context of the Hague Convention of the Service of Process Abroad in the Hague Conference Practical Handbook (1983).
17. See the discussions in the context of the Hague Convention on the Taking of Evidence Abroad in the Hague Conference Practical Handbook (1984) and in McClean & McLachlan Explanatory Documentation (Commonwealth Secretariat, 1985).
18. The system of parallel legislation is fully dealt with in Patchett Recognition of Commercial Judgments and Awards in the Commonwealth (1984).
19. See the Evidence (Colonial Statutes) Act 1907 (UK) and the British Law Ascertainment Act 1859 (UK).
20. South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provinciën" NV [1986] 1 QB 348, 358 (CA).
21. See e.g. State Immunity Act 1978 (UK) s.13. The question of enforcement against the property of a State is discussed in Crawford "Execution of Judgments and Foreign Sovereign Immunity" (1981) 75 AJIL 820.
22. See e.g. State Immunity Act 1987 (UK) s.2(6).
23. Crown Proceedings Act 1947 s.28; Conway v Rimmer [1968] AC 910; see: Style & Hollander Documentary Evidence 2 ed (1987) 132-143.
24. Section 13(1).
25. Style & Hollander supra n.23, 140.
26. See Mann Foreign Affairs in English Courts (1986) 160-2, which suggests that Buttes may have unexpected and unacceptable results where the State is itself a litigant.
27. Attorney-General for Tuvalu & anor v Philatelic Distribution Corporation Ltd et al supra n.9 (recovery of Tuvalu postage stamps); Haile Selassie v Cable and Wireless [1938] Ch 545, 839 (recovery of a debt); The Ardennes [1950] 2 All ER 517 (damages for damage caused to a State's ship in a collision).

28. Government of India v Taylor [1955] AC 491, 511 per Lord Keith of Avonholm.
29. Dicey & Morris on the Conflict of Laws (11 ed, 1987) Rule 3(1), p 100. The basis of the rule is discussed in Mann 'Prerogative Rights of Foreign States and the Conflict of Laws' in Studies in International Law (1973) 492 and Mann 'The International Enforcement of Public Rights' (1987) 19 NYUJILP 603.
30. Huntingdon v Attrill [1893] AC 150, 156 per Lord Watson.
31. [1988] 3 All ER 144, 150.
32. King of Italy v Marquis Cosimo de Medici Tornaquinci (1918) 34 TLR 623.
33. See e.g. Protection of Movable Cultural Heritage Act 1986 (Australia) s.9(1).
34. Dicey & Morris supra n.29 suggest, at page 109, that the foreign state must reduce the property into its possession while it is within its jurisdiction to have a valid and enforceable title in a foreign Court.
35. See reference supra n.27.
36. Discussed fully by Powell J in the New South Wales High Court [1989] 2 FSR 349, 478-487.
37. [1989] 2 FSR 631, 643.
38. [1989] 2 FSR 631, 638-9; criticised by Mann (1988) 104 LQR 497.
39. [1989] 2 FSR 304, 328.
40. [1989] 2 FSR 726, 730 (interim judgment of the Court of Appeal).
41. [1989] 2 FSR 732, 739.
42. [1989] 2 FSR 511, 542.
43. [1989] 2 FSR 631, 644.
44. Mann Foreign Affairs in English Courts (1986) Chapter 3 'The Effect of Certification'.

PROTECTION OF CULTURAL HERITAGE WITHIN THE COMMONWEALTH

Memorandum by the Commonwealth Secretariat

This record reflects the outcome of the Meeting of the Group of Government Representatives held at Marlborough House from 15 to 17 November 1989 to give further consideration to the proposed draft Scheme for the Protection of Cultural Heritage Within the Commonwealth. The Group comprised representatives from seven countries: Britain, Canada, Cyprus, India, Malaysia, New Zealand and Nigeria.

At the last Law Ministers' Meeting in Harare in 1986 no meaningful consensus could be reached on the proposed Scheme on the Cultural Heritage. However, Law Ministers reaffirmed the "need to remedy the situation" to protect items of cultural heritage from illegal exportation and therefore asked the Commonwealth Secretary General "to invite a small number of representative countries to form a group to examine further all aspects of the problem and report in time for the next meeting of Senior Officials, and Ministers looked forward to examining the matter further when next they meet."

The Group met under the chairmanship of Mr Justice Loizou of Cyprus; and following the expression of general remarks by way of "country perspectives" proceeded to examine in detail the draft Scheme that was presented to Law Ministers in 1986. It was clear from the ensuing discussions that there remained a divergence in points of view over basic issues. The reasons for this have been expressed in previous discussions, and are as outlined in the opening remarks of the respective delegations and in the attached report by the Chairman of the Group.

However, the Group was able to produce the revised text which is attached as part of this record, with amendments to the proposed Scheme recommended by the Group. This text aims to remove the alternative formulations contained in the draft Scheme and otherwise differs from the arrangement and proposals of the draft Scheme placed before Law Ministers in 1986. The changes recommended are denoted and explained in the Chairman's report. As made clear in the report, the recommended text does not represent agreement among representatives in the Group. The reasons are identified in the report.

Legal Division
Commonwealth Secretariat
February 1990

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AGENDA

1. Opening
2. Election of Chairman
3. Country perspectives
4. Consideration of proposed Scheme
5. Report to Law Ministers
6. Record of the meeting
7. Any other business

LIST OF PARTICIPANTS

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- The Hon Mr Justice Andreas Loizou
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OPENING REMARKS

Wednesday, 15 November 1989

Mr Unwin (Deputy Commonwealth Secretary-General) opening the meeting extended a warm welcome to all participants, noting that this was an important meeting to discuss further the problems relating to the protection of cultural heritage.

He said that in reading his background material to this fascinating subject he had been particularly struck by three points mentioned in his brief, namely, that illicit trade in items of cultural heritage was the biggest international crime after drug trafficking; that up to five hundred artworks disappeared each day; and that the problem was thought to be getting even worse. In respect of the last point he thought it would need to be assumed that the greater freedoms we all looked forward to were likely to exacerbate the problem. Freedom of travel, in carriage and of tourism and freedom of capital movements especially with 1992. He said he had noticed that the British Minister of Arts, Mr Richard Luce, had earlier in the week drawn attention to the problems likely to occur with reduced frontier controls, including the disappearance of artworks which might inevitably increase.

On a personal note he mentioned that he had lived in Hungary in 1984 and remembered the occasion when international art thieves broke into the Fine Arts Museum in Budapest and stole the Esterhazy Madonna, got it out of the country in hours and to the Greek millionaire, who had placed the contract for the theft in a week; and when that happened he knew that probably the Iron Curtain was either a thing of the past or was rapidly to become a thing of the past, and so it had.

This growth in the scale of the problem increased the need for the Commonwealth to find a solution, whether through an intra-Commonwealth scheme or otherwise, but it did not make it easier to find that solution and he knew that Law Ministries had been wrestling with the problem for some years. The difficulties which the Law Ministers meeting in 1983 identified showed how intractable the problem was.

It seemed there were essential questions to be resolved:

- (a) were the existing international arrangements satisfactory?
- (b) if not, did the proposed Commonwealth Scheme offer a way forward?
- (c) did self-regulation provide an efficient and sufficient basis for tackling the minority that will not keep the rules?
- (d) how could the problems of retrospection and competence of jurisdiction be solved?

He said these were problems for the Group, and that the Secretariat would do what was needed to help. Secretariat facilities were available all week with back-up services as necessary. He hoped that the special chemistry of Marlborough House which had helped to solve a lot of intractable problems in

its time may extend by contingency through to the Group's meeting at Carlton Gardens; and if that kind of contingency were not enough he proposed to fortify the participants with drinks at a reception later that evening.

Before calling for nominations for someone to preside over the meeting, he wished the participants fruitful deliberations and an enjoyable stay in London.

Ms Haunton (Canada) proposed the Hon Mr Justice Loizou, President of the Supreme Court of Cyprus, for election as Chairman.

Ms McDonald (New Zealand) said she was happy to give support to the proposal from the delegation of Canada.

There being no other nomination the Hon Loizou was elected Chairman by acclamation.

The Chairman (Hon Mr Justice Loizou of Cyprus) thanked the meeting for the honour bestowed by his election as Chairman and expressed the hope that he would be able with the assistance of all to bring to an acceptable conclusion the deliberations of the Group of Government Representatives. He also thanked the Commonwealth Deputy Secretary-General, Mr Peter Unwin, and expressed appreciation of the meeting for his finding time in a very busy schedule to share his thoughts with the Group and for his good wishes and kind words of encouragement.

He said the setting and significance of Marlborough House in the tradition and the achievements of the Commonwealth as so rightly recalled by the Deputy Secretary-General could not be lost on the Group. Fundamental to that tradition was a commitment to the spirit of accommodation that sought to achieve by flexibility and consensus. In that spirit one could not look at the task before the Group as other than the natural progression of the important work that was begun with the Commonwealth Scheme for the Rendition of Fugitive Offenders concluded for over twenty years in 1966; and now given serious and determined momentum with the adoption in 1986 of two other Schemes of major importance. All Schemes represented a clear declaration of will to providing effective solutions to serious legal and social problems.

He recalled that this small Group had been invited to come together at the specific request of Law Ministers who in Harare in 1986 (to paraphrase from the meeting communique) had reaffirmed the need to find effective remedy for the protection of national cultural heritage and therefore called for the formation of this Group to examine further all aspects of the problem. It was expected of the Group to determine how further progress could be assured and for that purpose to make appropriate recommendations for consideration by Law Ministers at their forthcoming meeting in New Zealand in April 1990.

There was a general understanding felt in Harare that lawyers and senior officials at their level had done what they could and that Governments now needed to reach policy decisions on very basic issues. In that respect he thought the Commonwealth Secretary-General in his letter of invitation to the seven countries represented in the Group had stated succinctly the objective of the meeting and the task before the Group, namely, to further examine the proposed Scheme not so much to go over old ground but rather to determine the way forward and to agree on a set of recommendations to be put to Law

Ministers by the Governments represented in the Group. As the Secretary-General had pointed out in his letter it would be open to the Group to recommend an approach other than that contained in the proposed Scheme. It would therefore be of great help if representatives in the Group were in a position to have the support of their respective Governments on the issues that would need to be examined and hopefully to be agreed on in the course of the meeting.

He noted that the Group was a small one entrusted with a very special and rather delicate task. Clearly its membership had been carefully drawn from countries having rich cultural traditions and with the experience to make important contributions to Commonwealth solutions being sought and so urgently needed in this area. The size of the Group allowed naturally for intimacy and informality, and with flexibility that characterised Commonwealth meetings it was hoped that these would be the guiding principles for the Group.

Before considering the agenda it was necessary to refer briefly to a few other matters. It was customary to establish a committee to prepare a draft for consideration by the meeting. Given the size of the Group it was proposed that the drafting committee comprise all seven representatives. The drafting committee could meet at the end of each day.

It would be appreciated if any prepared statements or memoranda were made available to the Secretariat. The Secretariat would prepare a summary record of the proceedings to be circulated for correction and comment before it was finalised and distributed to the Governments.

A report of the outcome of the Group's discussions and any recommendations to Law Ministers would also need to be prepared.

As the Deputy Secretary-General had already mentioned there would be a reception at the close of the day's session in honour of the participants to which all were invited.

A draft agenda was on the table, and he wished to observe that because of the nature of the task before the Group it had been felt appropriate to commence as suggested in the draft agenda by inviting each delegation to present the perspective of its own country to see how each viewed the present and what proposals might be considered in support of the proposed Scheme or in support of some other approach. He thought the meeting could then move to examine further the proposed Scheme, as no doubt it must, or some of the elements of the Scheme that remained outstanding and perhaps needing further attention. The meeting would then need to give consideration to its report and recommendations to Law Ministers.

As there did not seem to be any amendments to the draft agenda he commended it for adoption. The agenda was so adopted.

The meeting was reminded of the briefing paper prepared by Professor Patrick O'Keefe one of the consultants responsible for the ideas and drafts now featured in the proposed Scheme, which paper was amongst the documentation circulated. The paper reviewed the current situation with respect to the Scheme and referred to recent developments on cultural heritage matters affecting Commonwealth countries. The paper also offered viewpoints on several related aspects which the Group would need to address and in a manner which

was hoped would be of assistance to the Group of Representatives. No doubt delegates wished to reflect on some of the points raised by Professor OKeefe in their discussions.

He then invited the representative of Britain, doing so in alphabetical order, to open the discussion under item 3 of the agenda with a presentation of his country's perspective.

Mr Stone (Britain) thanked the Chairman for his remarks. He said it was very helpful to have an exchange of views. This was a subject in which the British position was clear as will be known from previous meetings on the subject. It did not mean that they were not interested in hearing other views and seeing if it were possible to get closer to an understanding of each others positions.

He noted with regret that this working Group had come rather late in the day. It was proposed after the meeting in Zimbabwe and they had assumed that there would be a number of other opportunities for discussion rather than a meeting at this late stage. This was particularly so in the case of the paper by Professor OKeefe because the paper had been received only two days previously and there really had not been an opportunity to look at the paper in any depth and to ask one or two questions. For instance it would be very interesting to find out the basis of the figure which had been quoted of the extent of trade in stolen works of art. Five hundred works a day was mentioned and it would be very interesting to know the evidence for that figure.

However, his delegation was pleased to participate and to look at the problem again. They certainly shared the worries of other Commonwealth countries about the problems of restitution of works of art. That did not mean, however, that the Commonwealth Scheme as understood in the 1986 version provided the answer to the problem from his delegation's point of view. He would try and clarify a little further what the objections were, as they may be helpful to colleagues present.

Firstly, the 1986 Scheme essentially rested on a system in which each country would be expected to honour the export laws of another country, and certainly in a number of respects Britain had gone down that road. But in this particular field they still saw difficulties in that concept. It also required another step which would create problems in the United Kingdom and that was bringing in new legislation to introduce something on the lines of the Commonwealth Scheme would affect existing rights of title which may be acquired in this country, and that again was a difficult proposition to accept. So there were some legal problems in that respect. There were also considerable practical problems that would certainly require new legislation in this country involving powers of seizure, probably powers of entry, and probably changes to existing import and export regulations. They were prepared to explain how the system worked at the moment and indeed they were currently having to consider possible changes in the context of the move towards the single market within the European Community, but it would be difficult to, as it were, take on board at the same time changes which were related to the draft Commonwealth Scheme.

The Commonwealth Scheme also introduced a concept of interest to the United Kingdom in the requirement for some sort of validation certificate. That was a new administrative problem for which they saw the argument for validation in

appropriate cases which could be obtained through the normal commercial channels but they were not convinced that it was necessary to impose as a part of a central government scheme. However it was an aspect that they would certainly be willing to discuss further.

There were also aspects of the Scheme itself about which they were concerned in previous discussions and which still needed clarification. There was the whole question of retrospection which was a difficult one. There was the provision in the Scheme to allow countries to more or less demand a blanket prohibition on the import of items which would meet appropriate criteria. In their view that would really be asking the United Kingdom to police the export problem which would be essentially arising at the country of source. It would be much more realistic in their view for the Scheme to make clear that any such prohibition should be limited to specific items accompanied by accurate descriptions and details of location.

There were a number of other problems about the Scheme which he did not wish to go into in detail at the moment, such as compensation and the difficulty of pursuing cases overseas and problems of identification, but he had to say that taking all those points together that when weighed the costs of benefits of bringing in a Scheme on the lines of the present one, it did appear to his delegation that the cost implications for the United Kingdom appeared substantial and the likely benefits seemed relatively small.

While putting that forward may appear to be a fairly negative view at the beginning of discussions, it did not mean to say that his delegation was unresponsive to the underlined problems. But first of all they had always started from the premise that the prevention was better than cure, and that the first and most fundamental step was to have satisfactory controls over exports in the country of source, the country of origin, rather than a response in the country of import. Secondly, they took the view that where things got through the net and inevitably they did, it was actually possible to do a great deal on a voluntary basis rather than a statutory one. It was far less expensive, it was far less consuming of resources and in their view was often more effective. This was the thinking behind the views put forward by Sir Patrick Mayhew recorded on page 72 of the 1986 Law Ministers record. More use should be made of diplomatic channels in processing restitution cases and they should be very happy to discuss that aspect further and to take on board any experience that other countries may have had to see whether or not that had been a useful mechanism. Thirdly, his delegation believed that very considerable controls could be exercised in the United Kingdom on the trade through codes of practice, and those codes of practice both for public institutions and the art trade had been in operation for a good many years and had been used on a number of occasions to call people to account and they had worked satisfactorily. His delegation was therefore not convinced that there was need to strengthen the existing arrangements which were already implemented in the United Kingdom.

He said he hoped he had given the view that they were prepared to look at issues and that he had also made clear that they saw genuine difficulties about the existing Scheme because of the need for new legislation; the belief that the proper way to control things were with the country of origin; the view they took that much can be done through the existing systems already in operation; the use of voluntary codes; the use of diplomatic channels and their concern that the Scheme as it stood still had built into it a lot of

problems about retrospection and policing and compensation and so on which were very far from being solved. So that the position his delegation had to take at the opening of the discussions was that they would like to continue with the arrangements now in place and were quite ready to look at proposals to improve them. His delegation was also willing to discuss further the pros and cons of the Commonwealth Scheme but would do so without any kind of commitment that it was practicable to bring a Scheme of that kind in the United Kingdom in present circumstances and they had to reserve the right to look at their problems in the context of the single market development which would come in Europe in any case.

The Chairman thanked the representative of Britain and invited the representative of Canada to give their statement.

Ms Haunton (Canada) said that as with Britain they were not able to make extensive preparations for the meeting having not received the materials a great deal ahead of time so their speech was going to be considerably shorter.

She wished to say first of all that Canada supported in principle all attempts to safeguard cultural property. In Canada it was regarded as a very significant part of the national heritage and they wanted to become involved with all attempts. In principle they agreed with the large part of the Scheme though there were a number of places where Canada had considerable difficulty with it. They preferred not to get locked into stating perspectives at this stage as they felt there was going to be progress made over the next few days and they would like simply to discuss it and then perhaps to reconsider their perspective as necessary. Also they were not in a position to commit the Government of Canada, and were at the meeting to discuss the Scheme to try and find ways in which it could be improved to tally more with the legal tradition in Canada and then to take it back for discussion by Canadian senior officials and Government members.

Primarily they had difficulty, as with Britain, in the prospect of the Scheme becoming retrospective in nature. It tended to go against their legal tradition and this aspect was worth a great deal of further discussion. Their biggest problem was where actions concerning cultural property should be heard. The idea of consfication which was what it amounted to if somebody had to go to a foreign jurisdiction in order to assert their rights was foreign to their legal tradition and they had considerable reservations about that aspect. It was their understanding that the limitation period on actions was also to be discussed. This seemed to have been a contentious issue right the way through. Canada's position on the notion of criminal sanctions against illegal import, whether or not they should be mandatory, was fairly clear but again preferred to wait and hear what others had to say in the interest of general discussion before they felt able to come down firmly on one side or the other. In the background of Canada's dealings with cultural heritage they had a Cultural Property Export and Import Act, copies of which had been passed to other delegations and in respect of which her colleague Mr Warden was to give some background relating to the Canadian experiences.

Mr Warden (Canada) reaffirming what Ms Haunton had said noted they had come to represent both the position of Canada and, more realistically, to offer the benefit of their experience in enforcement of cultural property legislation, some of the practical problems encountered and how some of these problems might pertain to the development of the Commonwealth protection Scheme. He

noted when, following the 1986 meeting for example, while there were thirty-three Commonwealth countries with cultural property protection arrangements only seven were signatories to an international instrument. That situation made the enforcement of Canadian legislation somewhat difficult in the sense that under their Cultural Property Export and Import Act, it was necessary for another country to be a signatory to an international agreement, and at this current juncture the only such instrument that Canada was a signatory to was the 1970 UNESCO Convention. Therefore there were some twenty-six or twenty-seven Commonwealth countries for which currently they had no reciprocity in the event that cultural property which was illegally exported from one of those countries should show up in Canada. So obviously in order to honour the legislation and recognise what had been done in those countries to date, it would be necessary for some sort of reciprocal arrangement to be brought into force. In terms of practicalities, however, the biggest problem consistently experienced with illegal exports from the country of origin and the subsequent illegal importation into Canada, was establishing the date of export from the country of origin. He felt that this should be borne in mind by the Group during its deliberations in terms of putting any sort of scheme into place that in establishing the date of an illegal export from that country it required documentation, perhaps not in the form of a validation certificate, but certainly there had to be some mechanism so there was a requirement for export documentation of some sort in order to establish that that item had left the country illegally. There was also the requirement for co-operation from the country of origin when it came to proceedings in the courts in such matters in as much as it was very difficult to prosecute a matter if there were no co-operation, if experts in law or experts in the material culture of that country were not available to testify and if there were not the willingness to provide those experts by the country of origin, and this obviously involved some expense in terms of travelling and in identifying the right people.

Finally, there was the requirement to make that legislation in the other countries known. UNESCO had published a number of documents trying to disseminate the information about what involved an illegal export from another country but if the text of that legislation were not really available for officials in other countries, both law enforcement and customs, again it was extremely difficult to establish whether or not an item of cultural heritage had left the country. He said he wished to put these matters on the table for consideration by the Group because if any sort of Commonwealth Scheme were to be concluded some of the real practicalities like those mentioned would have to be addressed to make the Scheme successful.

The Chairman thanked the Canadian delegation and called on the representative of India to present his country's approach to the subject.

Dr Joshi (India) wished to refer briefly to the laws relating to the antiquities in India before commenting on the Scheme.

There were two Acts which were implemented in India. The Ancient Monuments Archaeological Sites and Remains Act dealt mostly with the movable heritage, and in respect of the movable heritage the Antiquities in Art Treasures Act 1972 which was enforced in 1976 had been implemented. So far as the providence relating to the movable heritage was concerned the Act regulated the export, trade in antiquities and art treasures to provide for the prevention of smuggling and fraudulent dealings in antiquities, to provide for

compulsory acquisition of antiquities in art treasures for preservation in public places and to provide for certain other ancillary matters. In this Act the word antiquity had been defined to include: any coins, sculpture, painting, figures and other works of art or craftsmanship; any article, object or thing detached from a building or a cave; any article, object or thing illustrative of science, art, craft, literature, religion, customs, morals or politics in bygone ages; any article, object or thing of historical interest; and any article, object or thing declared by the Central Government by notification in the official gazette to be an antiquity for the purpose of the Act which had been in existence for not less than one hundred years. This was very important. Anything under this category which was more than one hundred years old was declared an antiquity and not allowed under this Act to go out of the country. No antiquities could be exported except in certain cases in which permission by licence had been obtained from the Director General of the Archaeological Survey of India. Under the Act there were certain articles less than a hundred years old which could be declared as art treasures or in other words any human work of art not being an antiquity declared by the Central Government in the official gazette to be an art treasure for the purpose of this Act and having regard to artistic or aesthetic value. He said that this Act had helped considerably in checking exporting of antiques out of India.

So far as the Scheme was concerned India was in agreement with it by and large and he believed it would be a very valuable contribution if the Scheme were adopted so that many of the art treasures which were being smuggled out could be stopped.

He said his colleague Dr Agarwal would react further on the provisions of the Scheme.

Dr Agarwal (India) referring to the question of improving the export laws agreed that prevention was definitely better than cure. No doubt every country should make maximum effort to prevent the export of such high items of cultural heritage. Nevertheless the problem arose when these items were illegally exported or unlawfully exported from the country for no matter the state of the law the possibility of some unlawful export of these items could never be avoided. So the making of the laws more strict in preventing the export just could not help in the solution of the problem, and the past experience of some of the countries represented at the meeting showed that diplomatic channels alone were not sufficient to solve this problem. Leaving aside diplomatic channels even the legal channels had not proved effective or sufficient to solve the problem of restoring the properties of cultural heritage back to the countries or nations from where they had been taken. It was quite possible that today the countries sitting on this side of the table were now facing this problem but this could be a problem for any country any day and it was therefore necessary that a Scheme which should really be workable should be adopted by the countries of the Commonwealth.

He said that everyone would agree that it was the moral and legal duty of every country to protect the cultural heritage of other countries flowing without authority in the respective countries. He said India was willing to do whatever it can do on its part, but felt that some measure was necessary, whatever that may be, in the form of the proposed Scheme or as modified or amended. But some measure was necessary between the Commonwealth countries

to prevent the inflow of these kinds of items in certain countries and outflow from others.

The Chairman thanked Dr Joshi and Dr Agarwal and invited the representative of Malaysia to give her statement.

Ms Hussein (Malaysia) stated that Malaysia agreed in principle with the Scheme. There was no doubt that there may be problems, perhaps extensive problems relating to questions of retroactive operation of the Scheme and questions of compensation, but the fact remained that the present situation was unsatisfactory. Malaysia was willing to hear and consider various views on these matters.

On the question of compensation, which seemed to be a sticky problem, she found very interesting the comments of Professor OKeefe in his latest paper on the concept of theft and passing of title in relation to the question of compensation, and would welcome further discussion on this aspect. On the question of judicial proceedings, she wished to refer to some matters of principle. There were at least two options which do not require an exhaustive understanding of the export legislations of other countries but she could not see why it was difficult for some countries to honour the export laws of other countries. She appreciated the fact that new legislations were necessary to implement the Scheme, but felt that if countries were keen enough to improve the present situation any difficulty in passing new legislation could be overcome.

The Chairman thanked Ms Hussein then called on the delegate from New Zealand.

Ms McDonald (New Zealand) believed it was helpful to review the background as well as look at more recent developments in New Zealand. She recalled that it was New Zealand which raised the issue of protection of cultural property at the 1983 meeting of Commonwealth Law Ministers, and referred to the communique of that meeting and also of the 1986 meeting of Commonwealth Law Ministers which acknowledged the central importance of cultural heritage to the life and identity of each nation, and agreed that protection of such property was a legitimate concern of the State. The flourishing illicit market that existed in antiquities meant, in her Government's view, that it was desirable for the Commonwealth to take steps to facilitate the protection of cultural property and to facilitate the return of illegally exported cultural objects.

New Zealand had taken a particular interest in this issue in part because of unsuccessful litigation for recovery of an exported Maori artifact in the Ortiz case, but also more recently because of their experience with the Cook Instruction. The document known as the Cook Instruction, was a letter written by Captain James Cook on 10 July 1776 to his second in command. The Department of Internal Affairs was alerted in April 1988 that the Poverty Bay Club of Gisborne in New Zealand had sent this document to Sotheby's for sale. The Club disputed that the letter was an antiquity and refused to return the document to New Zealand. The Club was charged with contravening the Antiquities Act and the case was heard in the Gisborne District Court in February and March 1989. The Judge ruled that the document was an antiquity under the Antiquities Act. The Club was convicted of the charge of removing the document from New Zealand without reasonable excuse and without the necessary certificate of permission of the Secretary of Internal Affairs.

What did Sotheby's do? In July 1989 Sotheby's sold that document. Legal action was not taken in the English Courts to have the letter returned to New Zealand. She said that previous experience with the Ortiz case suggested that once again the principle that English Courts would not uphold the penal or public laws of another country would have applied. Both the Ortiz case and the Cook Instruction examples illustrated that further steps needed to be taken to cover such cases under a Commonwealth scheme. That was why the New Zealand Government attached high priority to the initiative for discussion at the meeting.

As to the existing legal position within New Zealand she said that the current legislation for the protection of antiquities and artifacts was the Antiquities Act 1975 which replaced the Historic Articles Acts 1962. The title to the Act stated that it was an Act to provide for the better protection of antiquities, to establish and record the ownership of Maori artifacts and to control the sale of artifacts within New Zealand. The emphasis in the Act was upon Maori artifacts. The protection of New Zealand's cultural heritage, in the context of illicit trafficking involved a prohibition on export of antiquities without a written certificate from the Secretary for Internal Affairs or person appointed by the Secretary and the forfeiture provisions in section 10 of the Act. The Act was currently under review.

She explained that the proposed new Bill was modelled largely on Canadian and Australian legislation and was going to be a little wider in scope than the existing Act. The proposed Bill was to address three particular issues of concern; the growing concern in New Zealand that the protection of cultural property afforded by the Antiquities Act was inadequate as shown by the Ortiz case; secondly, the concern that the legislation dealing with Maori artifacts needed to take greater account of Treaty of Waitangi; and thirdly there had been since the Ortiz case a growing interest in New Zealand being able to accede to the 1970 UNESCO Convention and the regime of the Antiquities Act was not adequate for New Zealand to do that. The proposed Bill was likely to provide for recognition of the principles of the Treaty of Waitangi by vesting legal ownership of newly- found Maori objects in the Maori people rather than the Crown, and it was proposed that the decision making processes concerning both ownership and export of Maori artifacts would involve the tribal authorities. The Bill also proposed cultural heritage lists that would provide objective criteria for defining protected categories of all cultural property. Any person wishing to export an object which fell under the criteria in the list would need to seek permission of the Secretary of Internal Affairs.

As mentioned it was intended that the proposed Bill would enable New Zealand to accede to the UNESCO Convention and if they became a party to the Convention there would be an obligation on New Zealand to seize and return any cultural objects which had been illegally exported from another state party to that Convention. The proposed cultural heritage control list would satisfy the requirement to establish and maintain a national inventory of cultural property.

New Zealand's experience without doubt lead to the conclusion that the problems of removal and non-return of illegally exported items of cultural heritage did require some international legal action and control. Her

delegation believed that the Group should aim to endorse an acceptable draft scheme to place before the meeting of Law Ministers in Christchurch in 1990.

The Chairman thanked Ms McDonald then invited the representative of Nigeria to give the perspective of her country.

Mrs Didigu (Nigeria) said that she felt honoured and privileged at having been invited to participate at this working session of the Commonwealth representatives with the sole aim of examining further the revised text of proposals for the protection of the cultural heritage within the Commonwealth previously considered by Law Ministers in Zimbabwe in 1986.

Nigeria, having been described as a country possessing the richest art tradition among the black community, had a sculptural history which dated back over 2,000 years. There were Nok terracottas with origins in Jos, Northern Nigeria; the Igbo-Ukwu bronzes with origins in the eastern part of the country; Ife terracottas and bronzes and Owo terracottas all from the west; and the Ikom monoliths to name but a few.

Nigeria during its colonial era and like most other third world nations had lost a large quantity of its cultural treasures to its colonial masters. She referred in particular to the sacking of Benin (a city in mid-Western Nigeria) in 1897 by the British Expedition Soldiers who looted and carted away over 2,000 works of Benin art in bronze, ivory, terracotta, wood and beads. All attempts to recover these lost treasures post-independence had met with no success.

A more recent instance which came to mind was the case of Heller in 1983, a Canadian decision in which the Judge held that there was no evidence that the Nok sculpture concerned had been exported since the date of the imposition of export control by Nigeria, even though export control had existed in 1924 and the remains of the Nok sculpture had not been discovered till 1943.

As a result of the strong views Nigeria held about its cultural property being representative of its cultural history and heritage, Nigeria had had to purchase a number of its cultural treasures at the international market at very exorbitant prices.

Over the years and post-independence, the Nigerian legislations relating to all cultural treasures and antiquities comprised the Antiquities Ordinance of 1968, the Antiquities (Amendment) Decrees 1969 and 1978, the Antiquities (Prohibition Transfer) Decree 1974 and the National Commission for Museums and Monuments Decree No 771979. Nigeria was a party to the 1970 UNESCO Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Nigeria had also taken part in the inter-Governmental Committee set up under UNESCO for promoting the return of cultural property to countries of origin or their restitution in cases of illicit appropriation.

In 1960 when the Nigerian Museum opened, the Nigerian Government made entreaties to other countries and private individuals through the International Council of Museums (a non-Governmental organisation founded in 1946) to freely donate some of these works of art including those of Benin origin. This yielded no result.

With this background, Nigeria's commitment and support of the proposed Scheme was total. It was their view that the proposed arrangements between Commonwealth countries provided a more realistic approach to the problem of the protection of cultural heritage.

She said her delegation was aware of aspects of the proposals on which there was no consensus and which no doubt would be further discussed by the Group including issues relating to retroactivity or non-retroactivity of the Scheme, whether judicial proceedings pertaining to title and compensation should be held in the country of location or the country of export, the quantum of compensation and whether institution of proceedings for recovery should be subject to any limitation period.

However, it was their hope that this working Group being representatives of their countries and possessing their countries' mandate to agree on the way forward, would find firm and lasting solutions to these problems.

The Chairman thanked the representative of Nigeria.

Speaking as the representative of Cyprus he said that he hardly needed to explain his country's strong support for the promotion of any kind of international instrument or scheme aiming at the effective protection of the cultural heritage of every country including the Commonwealth countries represented at the meeting. As was well known the cultural heritage of Cyprus had been subjected to plundering and illicit export of antiquities throughout the centuries, and items taken could be found in collections in practically every museum in the world. Nor did he believe he needed to elaborate on the destruction of monuments, churches and other structures and items of the cultural heritage of Cyprus in the area occupied by the Turkish troops since 1974.

He referred to the case before the Indiana district Court which had already been mentioned in the course of this meeting and which demonstrated the problems and the concerns of his country. The issues were well known and he did not wish to develop them further at this stage.

Cyprus had manifested its interest in the preparation of a Commonwealth scheme at the Law Ministers conference in Colombo in 1983 and they had stressed the utmost importance in these times when such criminal behaviour was no longer a matter for a few individuals but usually by well organised criminal groups both in times of peace and during war activities. They had consistently supported every effort in Commonwealth meetings of Law Ministers and senior officials, and they hoped substantial progress would be made at this meeting and that there would be a constructive outcome of the Group's deliberations. It would be gratifying if a draft scheme that would facilitate, at least within the Commonwealth, the repatriation of stolen items could be agreed upon. They hoped that such a scheme would be a model for other regions and possibly also for the United Nations to follow. In that connection he reminded the meeting that the General Assembly of the United Nations had only a few days previously, on 7 November 1989, adopted a resolution in favour of the return of the cultural heritage to their place of origin confirming by it the view that such return supports international co-operation and the preservation and blooming of universal cultural values.

delegation was ready to discuss any aspect of it at this or any other meeting. The proposed Scheme which formed the basis of the deliberations at Harare, still had some outstanding issues. They would like to go into the matter of retroactivity, not as concerning the historic past which as they said in Harare could perhaps be left to bilateral discussions or diplomatic or other solutions, but in order to try and discover effective ways of recovering stolen articles taken out of Cyprus in the recent past.

The Chairman then invited the meeting to proceed, in accordance with item 4 of the Agenda, to discuss the provisions of the proposed Scheme. He suggested that this be dealt with paragraph by paragraph.

The attached report by the Chairman provides a summary of the Group's consideration of the proposed Scheme and its recommendations.

PROPOSED SCHEME FOR THE PROTECTION OF CULTURAL HERITAGE
WITHIN THE COMMONWEALTH

A Report by the Hon Mr Justice A Loizou, President, Supreme Court of Cyprus, as Chairman of the Meeting of the Group of Government Representatives held at Marlborough House from 15 to 17 November 1989 to consider further the proposed draft Scheme.

INTRODUCTION

1. The Group of representatives drawn from Britain, Canada, Cyprus, India, Malaysia, New Zealand and Nigeria met in Marlborough House from 15 to 17 November 1989 at the invitation of the Commonwealth Secretary-General. Law Ministers at their last meeting in Harare in 1986 had requested the formation of the Group to undertake the task and with the mandate set out in their communique, the relevant paragraphs of which read:

Protection of the Cultural Heritage

- 27 Ministers acknowledged the central importance of the cultural heritage to the life and identity of each nation. It was thus the duty of each government to protect items of its cultural heritage from illegal exportation. A flourishing illicit market existed in antiquities, cultural artefacts and religious treasures which threatened to impoverish further the national heritage.
 - 28 Officials had considered a possible Scheme intended to facilitate the return of illegally exported items while establishing a validation system to protect bona fide purchasers, but a meaningful consensus had not yet been achieved.
 - 29 Ministers reaffirmed the need to remedy the situation and therefore asked the Secretary-General to invite a small number of representative countries to form a group to examine further all aspects of the problem and report in time for the next meeting of Senior Officials, and Ministers looked forward to examining the matter further when next they meet.
2. The meeting opened with a presentation of 'country perspectives' by all seven representatives from which it was apparent that there had been no significant change in the position taken by the respective countries on the proposed Scheme; and it seemed unlikely that the position of other Commonwealth countries not represented in the Group had altered materially. It was equally clear that there remained a divergence in points of views over basic issues, as expressed in past discussions.
 3. All representatives shared the concern about the serious and seemingly non-abating illicit trade in cultural heritage material, and the need for effective Commonwealth action. While the majority felt that the proposed Scheme held prospects for the type of protection that was needed, it was acknowledged that for some members of the Group the Scheme posed fundamental difficulties. Retroactivity remained a particular problem for some countries. The introduction of new legislation required in the operation and enforcement of the Scheme, and its effect on individual and property rights would cause policy if

not constitutional difficulties for some jurisdictions. Practical difficulties with the classification and listing of cultural heritage items, the creation of new offences in connection with their export and importation, and problems associated with their movement across international borders especially within the European Community in the near future were referred to. A number of representatives also stressed problems not adequately reflected in the proposed Scheme concerning the appropriate court for determining questions of title, ownership and the vexed question of compensation.

4. A number of representatives referred to continuing losses of highly significant items, and recalled their particular difficulties with efforts to locate or to have precious items returned, and the frustrations of unsuccessful and costly legal proceedings or recovery endeavours in other jurisdictions. At least four countries represented in the Group had been involved in expensive and major litigation over the return of cultural heritage items over the past few years. More than one country had been forced to purchase at exorbitant prices in the open market to ensure the return of important items of national culture. Strong support for the proposed Scheme was voiced by countries in this situation.
5. A briefing paper from the consultant, Professor Patrick J O'Keefe was before the meeting. It surveyed recent developments internationally and in the Commonwealth, and made comparative observations on the merits and operations of voluntary codes of practice and conduct for auctioneers and dealers, and of the 1970 UNESCO Convention of which ten Commonwealth countries were parties. The paper argued the case for intra-Commonwealth arrangements, and suggested that an import prohibition Scheme (such as already operating in Australia and Canada), as the proposed Scheme is, seemed the most suitable. It stated that on balance the proposed Scheme should have retroactive effect.
6. Against this background the Group turned to examine the draft Scheme paragraph by paragraph. Attached to this report is the text of the Scheme examined further by the Group. The Group's commentaries on each paragraph are as set out hereafter.

PROPOSED SCHEME

7. One member of the Group cannot accept the Scheme for some of the reasons indicated above and as set out in paragraph 22 of this report. The remaining members, while not agreeing entirely with particular provisions are prepared to seek common ground towards the conclusion of a Scheme for the Commonwealth.
8. After lengthy discussion members of the Group agreed to submit to Law Ministers the text attached to this report. This text differed from that submitted to Law Ministers in 1986, the changes being denoted (as relevant) by commentary or underlining. The paragraph numbering that follows refers to the new numbering as appearing in the attached text. Reservations made are recorded in this report.

Scheme: Paragraph 1(1)

9. No change.

Paragraph 1(2)

10. No change.

11. As to the words formerly appearing in brackets, it is the recommendation of the Group that these be omitted. Initially, there were varying degrees of support and opposition to the Scheme having retroactive effect. Some members found the retroactive aspects totally unacceptable; another considered that the Scheme should apply retroactively to items exported unlawfully and remaining so after the Scheme had been adopted; others supported some retroactivity at least for the recent past, or if it were possible to overcome the practical problems of proving the dates when the item was unlawfully exported; one representative felt that insistence on retroactive application may limit acceptability of the wider objectives of Scheme among member countries; and another while preferring a Scheme with retroactive effect was prepared to compromise to achieve consensus. After careful consideration, and noting also the provision in the second sentence of paragraph 1(2), the Group arrived at a consensus to omit the words in brackets.

Paragraph 1(3)

12. No change.

Paragraph 2

13. No change.

Paragraph 3(1)

14. The Group accepted the suggestion by one of its members that all items subject to export control under national legislation should be covered under this provision, and not simply those subject to export permit, and accordingly recommends the substitution of the word "control" in the manner indicated.

Paragraph 3(2)

15. The Group agreed with the suggestion of one of its members that items classified under this provision should be those of national importance by virtue of one or more of the criteria specified, and recommends the change indicated in the attached text.

16. Another member of the Group had suggested that the definitions used in this context in the UNESCO Convention should be adopted in the Scheme for reasons of uniformity and ease of implementation.

Paragraph 4

17. The Group considered it logical and appropriate within the framework of the Scheme to move the provisions dealing with the Validation System from its present numbering (paragraph 13) to become paragraph 4. There would be consequential re-numbering. It so recommends.

Paragraph 4(1)

18. No change.

Paragraph 4(2)

19. No change.

Paragraph 4(3)

20. The Group considered it necessary to clarify that the application for a validation certificate should be determined, by grant or refusal, within a specific period of six months from receipt of the application. Members felt that the four month period was inadequate. The changes indicated, are recommended.

Paragraphs 5(1) & (2)

21. The Group recommends recasting this provision to set out more clearly its two essential components.
22. One member of the Group has fundamental difficulty in accepting this provision.

Paragraphs 6(1) & (2)

23. No changes.

Paragraph 7(1)

24. The Group recommends the deletion of the words "in the country of location" (as appearing in the proposed Scheme), as being superfluous.

Paragraph 7(2)

25. The insertion of the words "of export", for greater clarification, is recommended.
26. One member of the Group suggested that the country of location should proceed with the request of the first country which made a request; and another suggested that "first" or "originally" be substituted for the word "last".

Paragraph 7(3)

27. The change indicated is recommended to provide greater clarity and precision.

Paragraph 7(4)

28. No change.

Paragraph 8

29. The change indicated is recommended not only to strengthen the security and care of the item, but also to provide for the position of those Commonwealth countries under whose law it was not possible to process a request unless and until court proceedings had been commenced.

Paragraph 9

30. This provision was previously stated in three alternatives. After long discussion the Group arrived at a consensus which enabled it to recommend that alternatives 8(2)(A) and 8(2)(C) be discarded.

Paragraph 9(1)

31. the changes recommended make clear the two choices available to the authorities of the country of location of either giving notice to the holder of the item about the possibility of the item being returned to the country of export unless relevant court proceedings were commenced, or the authorities instituting the relevant proceedings.

Paragraph 9(2)

32. The change to this provision (previously 8(2)(B)) is recommended as following necessarily by way of clarification from the recommended change to paragraph 9(1).
33. A number of representatives in the Group would have preferred alternative 8(2)(A) but having regard to the need for consensus were prepared to support the Group's main recommendation.

Paragraph 9(3)

34. The changes indicated are recommended as necessary for clarity.

Paragraph 9(4)

35. This provision was the last sentence of what was previously 8(2)(B)II. Its separation is recommended for greater clarity. It was suggested that the use of "may" rather than "shall" reflects more accurately the position under the law and practice of some Commonwealth countries.

Paragraph 10

36. No change.
37. A member of the Group wished to record its reservation about the right given to "any person" to take the proceedings referred to.

Paragraph 11

38. No change.

Paragraph 12

39. No change.

Paragraph 13

40. This provision was previously numbered paragraph 10, and recommended for relocation, without change, as more suitable to the general layout of the Scheme.

Paragraph 14

41. This provision was consequential re-numbered following the change in order of two other provisions. The first change recommended makes clear that the claim referred to is one made under the Scheme; and the second change recommended reflects the consensus of the Group that five years (and not one of the other alternatives previously discussed) is sufficient and the most appropriate limitation period.

Paragraph 15(a)

42. The Group recommends the insertion of "unlawfully" to correct and to bring this provision in line with other similar provisions in the Scheme.

Paragraph 15(b)

43. After discussion it was agreed that "may" is the more appropriate alternative allowing to each country the necessary flexibility to decide the legislative form according to its laws and practices.

Paragraph 16(1)

44. Words previously appearing after "heritage" (i.e. "including the expenses of seizure, custody, conservation, transportation and insurance") have been omitted. The Group agreed with the suggestion that the provision as previously worded does not add materially to its meaning; and that it fails to deal with the important question of the costs of litigation, which costs would normally fall within the ambit of "expenses necessarily incurred".

Paragraph 16(2)

45. No change.

Paragraph 17

46. Like other provisions moved, in the interests of better organisation, this provision is suggested for relocation to the end of the Scheme. The recommended change is for the required consultation to be made through the Commonwealth Secretariat.

CONCLUSION

47. The Group was conscious of the limited effectiveness of a Scheme of this nature to which not all Commonwealth countries could subscribe. However, subject to the position of one member of the Group which cannot accept the proposed Scheme, the Group believes that its recommendations contained in the attached text may indicate the way forward.
48. There is a pressing need for action on all fronts and by all countries. The Group recommends that where possible countries should implement the Scheme as a matter of priority and that those not in a position to do so forthwith should take additional interim measures to strengthen existing arrangements. In this way maximum progress would be made towards affording greater protection to the cultural heritage.

SCHEME FOR THE PROTECTION OF
CULTURAL HERITAGE WITHIN THE COMMONWEALTH
REVISED BY SENIOR OFFICIALS AND REFERRED TO
LAW MINISTERS FOR COMMENT
(WITH AMENDMENTS RECOMMENDED BY THE GROUP)

OBJECTIVES OF THE SCHEME

1. (1) The provisions of the Scheme govern the return by one Commonwealth country of an item of cultural heritage found within its jurisdiction following export from another Commonwealth country contrary to its laws.
- (2) The provisions of the Scheme shall apply to the export and import of items which take place after the adoption and implementation of the Scheme. The Scheme adds to and in no way derogates from future and existing means of recovery of items of cultural heritage.
- (3) The Scheme is intended to be complementary to, and does not in any way exclude, full participation in other international arrangements such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.

DEFINITIONS

2. For the purposes of the Scheme -
 - (a) "country" means:
 - (i) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates; and
 - (ii) each country within the Commonwealth which, though not sovereign and independent, is not a territory designated for the purposes of the preceding sub-paragraph.
 - (b) "country of export" means the country from which an item covered by the Scheme has been unlawfully exported.
 - (c) "country of location" means the country where an item which has been unlawfully exported is located at the time the provisions of the Scheme are invoked by the country of export for the return of the item.
 - (d) "unlawful export" in relation to any country means an item which was exported from that country in contravention of its law: it includes an item which has been taken out of the country of export under a conditional permit and where there has subsequently been a breach of the conditions of the permit, in which event "unlawful export" shall be deemed to have occurred as of the date of the breach of the condition.

ITEMS COVERED BY THE SCHEME

3. (1) The Scheme covers all items of cultural heritage so classified by, and subject to export control by, the country of export.
- (2) Items classified should be of national importance by virtue of one or more of the following criteria -
 - (a) the close association of the item with the history or life of the country;
 - (b) the aesthetic qualities of the item;
 - (c) the value of the item in the study of the arts or the sciences;
 - (d) the rarity of the item;
 - (e) the spiritual or emotional association of the item with the people of the country or any group or section thereof;
 - (f) the archaeological significance of the item.

VALIDATION SYSTEM

4. (1) As part of the Scheme, a system of validation shall be introduced whereby an intending purchaser of an item of cultural heritage or any other interested person shall be enabled to request of the central authority of the country of export a validation certificate to the effect that the item is not an unlawful export from that country.
- (2) Such a validation certificate shall constitute a complete defence to any claim by the country of export that the item had been unlawfully exported.
- (3) Where an application is made for a validation certificate in respect of any item, the application shall be granted or refused within six months of receipt of the application. If the application is not granted or refused within that period, the country of export shall be precluded from claiming that the item has been unlawfully exported from that country.

OPERATION OF THE SCHEME

5. (1) Each country shall prohibit the export of items covered by the Scheme except in accordance with the terms of an export permit.
- (2) Each country shall prohibit the import of items covered by the Scheme which have been unlawfully exported from another country.
6. (1) Each country shall designate a central authority for the making and the receiving of requests for the return of items covered by the Scheme.
- (2) Each country shall notify the Commonwealth Secretary-General of its central authority.

7. (1) When the country of export learns of the whereabouts of an item covered by the Scheme, it may request the country of location for assistance in the recovery and return of that item.
- (2) Where two countries of export make a request for the return of the same item, the request of the country from which the item was last exported will be proceeded with; but that will not prejudice further requests in respect of the item.
- (3) The request shall give sufficient detail to clearly identify the item and where possible its location and shall be accompanied by a certificate from the country of export to the effect that the item is covered by the Scheme and has been unlawfully exported.
- (4) The certificate shall be prima facie evidence of the matters stated therein.
8. Upon receipt of a request, the country of location shall take appropriate steps in accordance with its laws to secure or safeguard the item.
9. (1) The authorities in the country of location may either give notice to the holder of the item that unless court proceedings are commenced within a stipulated period, the item will be returned to the country of export, or may institute proceedings with a view to securing an order for the return of the item to the country of export.
- (2) In any proceedings instituted either by the holder of the item or by the authorities in the country of location, the court shall determine whether the item is covered by -
 - (a) the Scheme;
 - (b) an export permit;
 - (c) a validation certificate.

If the item is covered by the Scheme and such a permit or certificate has been issued, or if the item is not covered by the Scheme, the court may order that the item be returned to the holder. If the item is covered by the Scheme and such a permit or certificate has not been issued, the court shall order that the item be returned to the country of export.

- (3) Prior to ordering the return of the item the court shall determine whether the holder of the item is an innocent purchaser for value having taken all reasonable steps to satisfy himself that the item was not an unlawful export under the Scheme, and, if it is proved that the holder is such an innocent purchaser with valid title to the item, the court may determine what, if any, compensation shall be payable by the country of export to the holder as a condition for the return of the item to the country of export. All other questions of title and compensation shall be determined by proceedings in the country of export.
- (4) In any proceedings in the country of location, the holder of an item may, unless the contrary be proved, be presumed not to be an innocent purchaser for value if he has neglected or failed to utilise the validation system under the Scheme.

10. The central authority in the country of export to which an item is returned shall be required to hold the item for a period of twelve months. During this period it shall be open for any person to take proceedings in the country of export to determine any question of title and compensation.
11. In the event that proceedings to establish title are not commenced within the twelve month period, the central authority shall deal with the item in accordance with the law of the country of export.
12. In any proceedings in a country of location, the court shall have due regard to the relevant laws of the country of export.
13. The person adjudged to have title in the item shall not have any right to remove the item from the country of export otherwise than by the process of applying for and obtaining an export permit.

LIMITATION PERIOD

14. No claim for the return of an item alleged to have been unlawfully exported may be made under the Scheme more than five years after the date the country of export had knowledge of the whereabouts of the item in the country of location.

CRIMINAL PROCEEDINGS

15. Each country -
 - (a) shall make it an offence to unlawfully export an item of cultural heritage covered by the Scheme; and
 - (b) may make it an offence to unlawfully import an item of cultural heritage covered by the Scheme unlawfully exported from another country.

COSTS

16. (1) The country of location in implementing the Scheme may require the country of export to meet the expenses necessarily incurred in implementing the request of the country of export for the return of any item of cultural heritage.
 - (2) If in the opinion of the country of location the expenses required in order to comply with the request are of an extraordinary nature, that country shall consult with the country of export as to the terms and conditions under which compliance with the request may continue, and in the absence of agreement the country of location may refuse to comply further with the request.

STANDARD FORMS

17. In implementing the Scheme, each country shall as far as is practicable use standard forms which shall be settled by consultation through the Commonwealth Secretariat.

SCHEME FOR THE PROTECTION OF CULTURAL HERITAGE WITHIN
THE COMMONWEALTH REVISED BY SENIOR OFFICIALS AND
REFERRED TO LAW MINISTERS FOR COMMENT

OBJECTIVES OF THE SCHEME

1. (1) The provisions of the Scheme govern the return by one Commonwealth country of an item of cultural heritage found within its jurisdiction following export from another Commonwealth country contrary to its laws.
- (2) The provisions of the Scheme shall apply to the export and import of items which take place after the adoption and implementation of the Scheme. The Scheme adds to and in no way derogates from future and existing means of recovery of items of cultural heritage.

[There was strong support at the meeting of Senior Officials for the Scheme to have retroactive effect. Such an effect however would require a recommendation of Law Ministers which should be taken at their forthcoming meeting at Zimbabwe bearing in mind the provisions of paragraph 21 of their 1983 communique in Colombo to the effect that "... whatever the position with regard to matters in the historical past ..." what was now required was a scheme to protect cultural heritage in Commonwealth countries.]

- (3) The Scheme is intended to be complementary to, and does not in any way exclude, full participation in other international arrangements such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.

DEFINITIONS

2. For the purposes of the Scheme -

- (a) "country" means:

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

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

- (b) "country of export" means the country from which an item covered by the Scheme has been unlawfully exported.

- (c) "country of location" means the country where an item which has been unlawfully exported is located at the time the provisions of the Scheme are invoked by the country of export for the return of the item.
- (d) "unlawful export" in relation to any country means an item which was exported from that country in contravention of its law: it includes an item which has been taken out of the country of export under a conditional permit and where there has subsequently been a breach of the conditions of the permit, in which even "unlawful export" shall be deemed to have occurred as the date of the breach of the condition.

ITEMS COVERED BY THE SCHEME

- 3. (1) The Scheme covers all items of cultural heritage so classified by, and subject to export permit by, the country of export.
- (2) In making the classification the country of export may apply the following criteria -
 - (a) the close association of the item with the history or life of the country;
 - (b) the aesthetic qualities of the item;
 - (c) the value of the item in the study of the arts or the sciences;
 - (d) the rarity of the item;
 - (e) the spiritual or emotional association of the item with the people of the country or any group or section thereof;
 - (f) the archaeological significance of the item.

OPERATION OF THE SCHEME

- 4. Each country shall prohibit the import of items covered by the Scheme which have been unlawfully exported from another country.
- 5. (1) Each country shall designate a central authority for the making and the receiving of requests for the return of items covered by the Scheme.
- (2) Each country shall notify the Commonwealth Secretary-General of its central authority.
- 6. (1) When the country of export learns of the whereabouts of an item covered by the Scheme in the country of location, it may request the country of location for assistance in the recovery and return of that item.

- (2) Where two countries make a request for the return of the same item, the request of the country from which the item was last exported will be proceeded with; but that will not prejudice further requests in respect of the item.
 - (3) The request shall give such details as are available and shall be accompanied by a certificate from the country of export to the effect that the item is covered by the Scheme and has been unlawfully exported.
 - (4) The certificate shall be prima facie evidence of the matters stated therein.
7. Upon receipt of a request, the country of location shall take appropriate steps in accordance with its laws and the request made to secure the item pending consideration being given to its return.
 8. (1) The authorities in the country of location shall give notice to the holder of the item that unless court proceedings contesting the matter are commenced within a stipulated period, the item will be returned to the country of export.

[EITHER

- (2)(A) In any such proceedings the court shall determine whether the item is covered by -
 - (a) the Scheme;
 - (b) an export permit;
 - (c) a validation certificate.

If the item is covered by the Scheme and such a permit or certificate has been issued, or if the item is not covered by the Scheme, the court may order that the item be returned to the holder. If the item is covered by the Scheme and such a permit or certificate has not been issued, the court shall order that the item be returned to the country of export, where any question of title and compensation to the innocent purchaser shall be determined.

OR

- (2)(B)(I) In any such proceedings, the court shall determine whether the item is covered by -
 - (a) the Scheme;
 - (b) an export permit;
 - (c) a validation certificate.

If the item is covered by the Scheme and such a permit or certificate has been issued, or if the item is not covered by the Scheme, the court may order that the item be returned to the holder. If the item is covered by the Scheme and such a permit or certificate has not been issued, the court shall

order that the item be returned forthwith to the country of export.

- (II) Prior to ordering its return the court shall determine whether the holder of the item is an innocent purchaser for value having taken all reasonable steps to satisfy himself that the item was not an unlawful export under the Scheme, and, if it is proved that the holder is such an innocent purchaser, the court may determine what, if any, compensation shall be payable to the holder as a condition for the return of the item to the country of export. In the absence of any such determination, however, all questions of title and compensation shall be determined by proceedings in the country of export. In any proceedings in the country of location, the holder of an item shall, unless the contrary be proved, be presumed not to be an innocent purchaser for value if he has neglected or failed to utilise the validation system under the Scheme.

OR

(2)(C)(I) In any such proceedings the court shall determine whether -

- (a) the item is covered by the Scheme;
- (b) the item is covered by an export permit or a validation certificate; and
- (c) the holder has established that he is an innocent purchaser of the item, and if so whether he has acquired good title to it under the law of the country of location.

(II) (a) If the item is not covered by the Scheme or if such a permit or certificate has been issued, the court shall order that the item be returned to the holder.

(b) If the item is covered by the Scheme and is not covered by a certificate or permit and the holder has failed to establish that he is an innocent purchaser with good title, the court shall order that the item be returned forthwith to the country of export.

(c) If the item is covered by the Scheme and is not covered by a permit or a certificate but the holder established that he is an innocent purchaser and has acquired good title under the law of the country of location -

(i) the court shall order that the item be returned forthwith to the country of export notwithstanding the existence of an innocent purchaser; and

(ii) the country of export shall recognise the title of the innocent purchaser; and

(iii) the return of the item to the country of export in such circumstances shall not in itself give rise to any right to re-export it.

(III) Legislation may establish criteria for determining whether or not any person is an innocent purchaser].

9. The central authority in the country of export to which an item is returned shall be required to hold the item for a period of twelve months. During this period it shall be open for any person to take proceedings in the country of export to determine any question of title and compensation.

10. The person adjudged to have title in the item shall not have any right to remove the item from the country of export otherwise than by the process of applying for and obtaining an export permit.

11. In the event that proceedings to establish title are not commenced within the twelve month period, the central authority shall deal with the item in accordance with the law of the country of export.

12. In any proceedings in a country of location, the court shall have due regard to the relevant laws of the country of export.

VALIDATION SYSTEM

13. (1) As part of the Scheme, a system of validation shall be introduced whereby an intending purchaser of an item of cultural heritage or any other interested person shall be enabled to request of the central authority of the country of export a validation certificate to the effect that the item is not an unlawful export from that country.

(2) Such a validation certificate shall constitute a complete defence to any claim by the country of export that the item had been unlawfully exported.

(3) Where an application is made for the grant of a validation certificate in respect of any item the application shall be granted or refused. If the application is not granted or refused within the period of [four months] the country of export shall be precluded from making any subsequent claim, in proceedings for the recovery of the item, that the item has been unlawfully exported from that country.

STANDARD FORMS

14. In implementing the Scheme, each country shall as far as is practicable use standard forms which shall be settled by consultation in terms of the Scheme.

LIMITATION PERIOD

15. No claim for the return of an item alleged to have been unlawfully exported may be made more than [five] [...] years after the date the country of export had knowledge of the whereabouts of the item in the country of location.

CRIMINAL PROCEEDINGS

16. Each country -

- (a) shall make it an offence to export an item of cultural heritage covered by the Scheme; and
- (b) [shall] [may] make it an offence to unlawfully import an item of cultural heritage covered by the Scheme unlawfully exported from another country.

COSTS

17. (1) The country of location in implementing the Scheme may require the country of export to meet the expenses necessarily incurred in implementing the request of the country of export for the return of any item of cultural heritage including the expenses of seizure, custody, conservation, transportation and insurance.
- (2) If in the opinion of the country of location the expenses required in order to comply with the request are of an extraordinary nature, that country shall consult with the country of export as to the terms and conditions under which compliance with the request may continue, and in the absence of agreement the country of location may refuse to comply further with the request.

MEETING OF SENIOR OFFICIALS OF LAW MINISTRIES

LONDON, 19 - 21 JUNE 1989

MINUTES

Monday 19 June 1989

MR WILLIAM MONTGOMERY (Assistant Secretary-General) called the Meeting to order and made the following opening remarks:

"Ladies and Gentlemen - It gives me very great pleasure to welcome you on behalf of the Commonwealth Secretary-General, to this meeting of Senior Officials from Commonwealth Law Ministries. It is always a happy occasion for Commonwealth lawyers to meet at Marlborough House, or here at Lancaster House, as both venues have witnessed historic Commonwealth achievements to which we as lawyers have been able fully to contribute. This is, then, a setting to which imagination, flair and enterprise are no strangers. It will be for you to continue in the established Commonwealth legal tradition, establishing standards for those who will follow.

Your meeting is a very special occasion and testimony to the growth of legal co-operation between Commonwealth jurisdictions. It is perhaps worth recalling that the modern Commonwealth inherited a web of mutual assistance arrangements. Many, principally in the area of private law, survived the process of independence and continue to serve private litigants in Commonwealth courts.

It was in the area of mutual assistance in criminal matters, touching as it does on delicate matters of sovereignty, that arrangements such as extradition and the removal of prisoners were placed in position on the emergence of a Commonwealth of 48 independent nations.

Thus it was to extradition (or, if you prefer, to the rendition of fugitive offenders) that the Commonwealth Secretariat first directed its attention. Just one year after the Secretariat itself was founded in 1965, Commonwealth extradition arrangements were agreed here in London, embodied in what was in its time the most wide-ranging of all international arrangements. Time has since taken its toll on our collective claim to having the most efficient of all multi-lateral extradition arrangements, and a proposal by our Canadian colleagues is before you this week. I hope that I may be allowed to voice the view that this suggested streamlining of the prima facie case requirement deserves your most careful consideration.

From extradition, the focus of Commonwealth endeavour in the legal field has moved to mutual legal assistance in criminal matters. But whereas in extradition, countries have been able to draw on the accumulated experience of centuries of state practice, in mutual legal assistance our conceptual thinking has had to be informed not by the practices of the past, but by the needs of the present. For lawyers, conditioned as we are to working within conceptual frameworks which broaden but slowly, this area of endeavour has been especially challenging. Confronted with a spectacular growth in international crime, much of it related to trafficking in illicit drugs, and constrained by traditional thinking in which one country does not in general enforce the criminal laws of another, it was plain that attitudes would have to change. And change they have.

The Scheme Relating to Mutual Assistance in Criminal Matters as between Commonwealth Jurisdictions, which Senior Officials prepared and which was adopted by Law Ministers in Harare in 1986 was in itself a major achievement. It is, as you know, fully supported by Commonwealth Heads of Government, and it paved the way for the wider international community to agree on last December's United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The UN Convention focuses in particular on mutual legal assistance, and does so in ways which accord fully with the Commonwealth Scheme. This is important, as if they are to work effectively, mutual legal assistance arrangements need to be as direct and complementary as possible. A welter of conflicting arrangements can only operate to the benefit of the international criminal, whose activities now pose such a threat to us all as individuals, to our societies and to the very processes of government.

But Schemes and Conventions are only a beginning. They must be translated into effective domestic legislation and then into daily practice. It is in recognition of this that your Law Ministers also decided at Harare that Senior Officials should meet from time to time to review progress with implementation, to exchange experience in overcoming points of difficulty and, where necessary, to recommend any necessary changes to existing Schemes for their consideration. This week you will have before you all three existing Commonwealth Schemes - on extradition, on mutual legal assistance in criminal matters and on the transfer of convicted offenders.

It is not enough however that our legal systems provide maximum assistance to each other. A shared heritage renders intra-Commonwealth co-operation readily achievable, but all of us have non-Commonwealth neighbours and none of us can ignore the world beyond our association. For this reason the Commonwealth has studiously avoided any attempt to duplicate arrangements which have been achieved in other fora, such as the Hague Conference on Private International Law. Indeed, when international child abduction was discussed by Law Ministers at their meeting in Barbados in 1980 they decided not to pursue a Commonwealth approach to the problem but that the Commonwealth should actively join in the Hague Conference's quest for a solution. This we did, and that is why the topic may well arise at a convenient point in your discussion this week. It is one of the reasons why we welcome the representative of the Hague Conference to our deliberations this week. The Hague Conference has borne much of the load in providing an international framework for judicial procedures in civil matters, such as the service of process, the taking of evidence abroad, and legislation. We also are delighted to welcome the representative of ICPO-Interpol, and to record our very great indebtedness to Interpol for the help and support we have received from headquarters in St Cloud.

The Commonwealth initiatives in recent times will take time and effort to translate into reality. But the need is compelling, and this is why in the course of 1988 the Secretariat organised three well-attended regional workshops on the new arrangements - in Sydney, Lusaka and Bermuda. This is why the Secretariat has also published four volumes of materials to assist you in your work. This is why, too, we are gathered here today looking forward to a week of hard work and of fruitful deliberation, and in the expectation that when Commonwealth Law Ministers gather in New Zealand in April of next year each Minister will be able to report substantial progress to his or her colleagues.

Ladies and gentlemen, I will not detain you further. I wish you the very best of good fortune and a happy, harmonious and profitable week's work. Commonwealth legal gatherings invariably have a very special quality. I am sure this meeting will be no exception."

MR MONTGOMERY called for nominations for Chairman and declared the Hon TAN BOON TEIK (Attorney-General of Singapore) elected unanimously on the nomination of TRINIDAD & TOBAGO, seconded by ZIMBABWE.

THE CHAIRMAN thanked the delegates for the honour they had conferred upon him in electing him to chair their deliberations. He said that he proposed to follow the practice established at earlier ad hoc meetings of Senior Officials from Law Ministries, and invite other delegates to chair certain aspects of the proceedings. He also suggested that the meeting might wish to establish a small drafting group, with the membership of Australia, Britain, Canada, Jamaica, Zambia, Zimbabwe and the Chairman (ex officio) and invited volunteers to join the group. India and New Zealand both offered to join the group, and these offers were accepted.

The draft agenda was adopted. Heads of delegations introduced their delegations to the Meeting.

AGENDA ITEM 5

THE CHAIRMAN invited delegations in turn to report progress with implementation of the "London Scheme".

THE DELEGATE FOR AUSTRALIA advised that Australia had implemented the London Scheme in 1966. It had, to the best of its ability, incorporated in Acts enacted since then the 1983 and 1986 amendments. There had been some minor variations to account for local conditions. Australia's legislation applied to all Commonwealth countries.

THE DELEGATE FOR THE BAHAMAS reported that his country had not yet taken any formal steps to implement the London Scheme but still operated under the UK legislation of 1870 and 1967. The enactment of legislation along the lines of the London Scheme was expected shortly, but this was to be preceded by discussions with non-Commonwealth neighbours which were expected to conclude by about September of this year.

THE DELEGATE FOR BANGLADESH said that his country's 1974 enactment covered most of the matters contained in the London Scheme. This provided for treaties with any country, including a Commonwealth country, for the rendition of fugitive offenders. Where there was no treaty, Bangladesh could, on receipt of a request from any country, consider the return of a fugitive to the requesting country subject to certain conditions. Offences were scheduled, and discussions were taking place with view to possible abolition of the enumeration of offences which could be subject of extradition proceedings.

THE DELEGATE FOR BARBADOS said that the London Scheme had been adopted by his country in 1979. It had been tested in his country's courts on only a few occasions, and no serious difficulties had been accounted.

THE DELEGATE FOR BERMUDA reported that, as a dependent territory, his country of necessity proceeded under the 1967 Fugitive Offenders Act of the U.K. He assumed that if and when the UK implemented the amendments to the London Scheme, these would be extended to Bermuda.

THE DELEGATE FOR BOTSWANA advised that his country had extradition legislation applying to the whole of the Commonwealth, although in practical terms they had run into problems with some of their neighbours to the extent that, in terms of their own Acts, the reciprocity which Botswana considered was basic to extradition did not appear to be present.

THE DELEGATE FOR BRITAIN was glad to be able to report that their extradition arrangements had been reformed by the Criminal Justice Act 1988. That Act had two purposes. First, it was intended to improve substantially extradition arrangement with non-Commonwealth countries where the old arrangements were not satisfactory. Second, it was intended to take account of many of the amendments for Commonwealth extradition which were adopted at

the meetings of Law Ministers in 1983 and 1986. The next step would be to consolidate all of the UK's law on extradition into a single Act. At present they had the Extradition Act of 1870 and a series of amending Acts, which was somewhat confusing. They hoped by the end of the year to have brought all the measures together in a single new Act (incorporating the changes in the 1988 Criminal Justice Act). Thus from 1 January 1990 they hoped to have a single and effective Extradition Act.

THE DELEGATE FOR BRUNEI noted that extradition was still dealt with under the Imperial legislation.

THE DELEGATE FOR CANADA advised that Canada afforded rendition to countries which recognised the Queen as Head of State, providing assistance under the Imperial 1881 statute. They had attempted in 1978 to implement the 1966 scheme, but had not been successful in doing so. There was also an Extradition Act for non-Commonwealth countries under which treaties could be negotiated. Like the UK, they were attempting to rationalise their two pieces of legislation, and modernise the procedures. They had faced additional challenges with their Charter of Rights and Freedoms, but had won a number of court battles when fugitives had attempted to invoke the Charter.

THE DELEGATE FOR CYPRUS said that the Fugitive Offenders Law 1970 governed extradition to and from Cyprus, under which most Commonwealth countries had been designated as "designated Commonwealth countries". Cyprus had also ratified the European Convention on Extradition in 1970, but had not yet implemented the amendments to the London scheme of 1983 and 1986.

THE DELEGATE FOR DOMINICA reported that his country now operated under its 1981 legislation which to a large extent implemented the London Scheme. This applied to non-Commonwealth countries as well as to Commonwealth countries. They found the "list of offences" approach unsatisfactory, and were examining the possibility of applying the sentence criteria rather than the list criteria.

THE DELEGATE FOR GHANA advised that his country's extradition laws applied to all countries, both Commonwealth and non-Commonwealth. Recently there had been efforts to modify the arrangements, including a move to provide for the return of convicted offenders to serve their sentences. They had recently concluded an arrangement with Nigeria and the Republic of Benin to this end. This arrangement was working quite successfully.

THE DELEGATE FOR GUYANA said that his country had adopted the London Scheme by its Fugitive Offenders Act 1988. This only came into force in August, 1988 and it was too early to judge how well it was going to work. It applied to all Commonwealth territories as well as foreign territories.

THE DELEGATE FOR HONG KONG advised that the legislation in his jurisdiction was to be found in the Fugitive Offenders (Hong Kong) Order 1967. This Order extended the UK's Fugitive Offenders Act 1967 to Hong Kong with certain necessary modifications. The 1983 and 1986 amendments had not been incorporated in UK legislation as applied to Hong Kong to date. Nor could the extension of this legislation to Hong Kong survive 1997, so that Hong Kong would, under suitable authority, have to conclude its own arrangements in a form which could survive beyond 1997. Hong Kong would be examining its legislation to see what, if any, amendments were desirable. In recent years they had had a very active extradition traffic both with Commonwealth and non-Commonwealth countries, but they had encountered very few problems. They had not yet reached the stage of negotiating with other countries.

THE DELEGATE FOR INDIA explained that in his country the Extradition Act 1962 governed the subject. It was based mainly on the UK model. It treated Commonwealth countries separately from non-Commonwealth countries, insisting on treaties with the latter. The

main problem in implementing the London Scheme was the definition of "political offence" as there had been terrorist offences committed abroad which in some places were treated as political acts, and in others as criminal acts. The "no list" approach and the "no prima facie case" approaches both awaited a consensus upon which India would be happy to act.

THE DELEGATE FOR JAMAICA explained that extradition legislation had been introduced into the Jamaican Parliament designed to implement the recent amendments to the London Scheme, and also embracing non-Commonwealth countries. However the Bill had lapsed on the dissolution of Parliament. The incoming government was examining the proposed extradition legislation with a view to its reintroduction into Parliament at an early date.

THE DELEGATE FOR JERSEY noted that the UK Fugitive Offenders Act 1967 applied directly to Jersey. There was a power to modify that Act by Order in Council but it had not proved necessary to do so. In fact no single request had been made for the extradition of any person to or from any Commonwealth country.

THE DELEGATE FOR KENYA said that they had implemented the London Scheme but had not yet made the amendments recommended in 1983 and 1986.

THE DELEGATE FOR KIRIBATI advised that his country had also enacted its own Extradition Act 1981, based on the London Scheme. The Act also repealed the Imperial Extradition Acts of the United Kingdom and the Fugitive Offenders Act 1967 of the UK as applied to Kiribati. Unfortunately the changes recommended in Sri Lanka and Harare had not yet been incorporated, but this was to be looked into. Since 1981 there had been no need to invoke their extradition law, and he suspected that in the South Pacific extradition had a somewhat low focus.

THE DELEGATE FOR LESOTHO reported that they had their own extradition legislation which applied to Commonwealth and to non-Commonwealth countries. Where there were no arrangements with another country, it was sometimes possible to proceed administratively. His country had not yet implemented the 1983 and 1986 amendments.

THE DELEGATE FOR MALAWI reported that his country operated under the UK Act of 1967 and they were looking at the recommendations made at Harare. Being a small jurisdiction, they had only ever received one request under their extradition legislation.

THE DELEGATE FOR MALAYSIA referred to her country's Extradition Ordinance 1958 and Commonwealth Fugitive Criminals Act 1967. The latter had been passed to implement the London Scheme. It did not apply automatically to all Commonwealth countries, but an extradition arrangement was necessary and, further, an Order by the Minister applying the Act to that country. Currently, both enactments were being examined with a view to incorporating the agreed amendments of 1983 and 1986.

THE DELEGATE FOR MALTA noted that their Extradition Act 1977 had substantially implemented the London Scheme, and it had remained largely unchanged since then. It did not apply to all Commonwealth countries automatically, requiring designation. The legislation had remained largely unchanged, and to some extent their 1977 legislation anticipated the certain of the amendments of 1983 and 1986. They still retained the "list" approach and they had not adopted the simplified approach. This was not a question of lack of interest but one of competing priorities.

THE DELEGATE FOR MAURITIUS referred the meeting to his country's Extradition Act 1970 which did not fully implement the London Scheme, but did so to a significant extent. Their legislation insisted on the existence of the treaty between the requested and the requesting state.

THE DELEGATE FOR NEW ZEALAND advised that her country had not yet implemented the London Scheme and its amendments. However the government hoped to introduce a Bill later in 1989 which would be comprehensive. It would implement the London Scheme and its amendments as well as dealing with extradition between New Zealand and foreign countries.

THE DELEGATE FOR NIGERIA recalled that legislation in 1966 had implemented the London scheme. This applied to all Commonwealth countries, on the basis of reciprocity. A decree in 1988 had implemented the amendment in Harare abolishing the enumeration of offences. His country entered into bilateral treaties with non-Commonwealth countries. His country had gone further by entering into separate treaties with countries who were members of the Commonwealth to allow for extradition in the drugs area.

THE DELEGATE FOR PAPUA NEW GUINEA explained that his country's legislation was based on reciprocity, and extended to all Commonwealth countries. His government was presently moving to amend the Act to provide for the universal application of the London scheme to all parts of the Commonwealth, without the need for reciprocity. They were also drafting a bill for consideration by Parliament later in the year and providing for the transfer of convicted offenders.

THE DELEGATE FOR SIERRA LEONE said that his country's extradition laws relied upon the usual, reciprocal basis.

THE DELEGATE FOR SINGAPORE explained that his country's 1968 Extradition Act implemented the London Scheme and also provided for extradition to and from non-Commonwealth states. Their legislation had been based on the Australian counterpart.

THE DELEGATE FOR SRI LANKA explained that to date his country had not been able to implement the amendments to the London Scheme as his country looked for reciprocity in extradition matters. He noted that arrangements had been made in his region relating to the terrorist exception, to ensure extradition of terrorists within the region.

THE DELEGATE FOR SWAZILAND said that the position in his country had not changed since the 1986 Meeting of Law Ministers in that his country still treated extradition on a bilateral basis. However, recently the Government had decided to authorise his Ministry to examine possible implementation of the London Scheme.

THE DELEGATE FOR TANZANIA noted that extradition was still dealt with under the Fugitive Offenders Act (UK). However his Government supported both the London Scheme and the Harare recommendations and the matter was under serious study to see if it could be incorporated either in their 1985 Criminal Procedure Act or consolidated into one single piece of legislation.

THE DELEGATE FOR TONGA reported that his country had implemented the London Scheme in its 1973 Extradition Act. In respect of the 1983 and 1986, amendments were currently under study.

THE DELEGATE FOR TRINIDAD & TOBAGO advised that his country had enacted the Extradition (Commonwealth and Foreign Territories) Act 1985, which repealed the relevant UK Acts and implemented the London Scheme and its 1983 amendments. The 1986 amendments to the Scheme were under study.

THE DELEGATE FOR ZAMBIA noted that her country's 1968 Act had implemented the London Scheme, and they were in the process of implementing the 1983 and 1986 amendments.

THE DELEGATE FOR ZIMBABWE reported that their 1982 Extradition Act had implemented the London Scheme. They were in the process of preparing the necessary amendments to implement the 1983 and 1986 changes to the Scheme.

THE CHAIRMAN invited the meeting to focus on the discussion paper prepared for the meeting by the Delegation of Canada. He recalled that in Harare in 1986 a proposal for the outright abolition of the prima facie case had been made, but no consensus was reached and the proposed amendments were not adopted. A compromise had been reached, following a proposal by the Canadian Delegation for the matter to be given further study and a paper produced for further consideration. This had been distributed as Extradition Working Paper 2. He invited the Canadian Delegation to open the discussion.

THE DELEGATE FOR CANADA said that his country favoured a rule which required a prior demonstration by the requesting country to the requested country of a sufficient evidentiary basis to establish a case for trial. This was in a fact a two fold process - a scrutiny of the request for rendition by the judiciary of the requested country and its being satisfied that there was sufficient foundation for the matter to be put to trial. It had been Canada's concern that extradition was too complex, too expensive and too time consuming to meet the modern day demands of law and reinforcement. The essential concern was that systems were not effective in dealing, particularly, with transnational crimes. However, the proposal presented by Canada retained the requirement for a prior demonstration that there was a case for trial but sought to redefine what was called "evidence for the purposes of extradition." At present this had to be put together in the form of numerous affidavits and depositions, excluding all hearsay and establishing all the essential ingredients of the offence. These must also show that statements were taken voluntarily and that such evidence was obtained in accordance with law. Judges were placed in a difficult position in having to determine for themselves whether the proper procedures in the requesting country had been followed. Canada had found that some countries, and particularly its European partners to treaties, had abandoned requests for extradition, to the detriment of international law enforcement.

To overcome this, the proposal suggests that a comprehensive "record of the case" be put together. The exclusionary rules under the law of the requested state would, in a fact, be suspended. The record of the case would be narrative in form, and would be accepted, although there would be reliability factor built in. A balance would be struck between the need to give the defendant the protection of law to which he was entitled and ensuring appropriate cooperation in international law enforcement. An independent judiciary would continue to make an assessment in the requested country.

The record of the case would be received by the court in the requested country as the evidence on which it would base its decision. The record of the case would contain essential information to identify the person concerned, a description of the conduct which was alleged to be the basis of the offence and the law that applied to the charges, the warrants for arrest issued by the judicial authority and an enumeration of the evidence (which would include as exhibits documents and other physical evidence which would assist the court in making its decision). This record would be received in the court of the requested country with a different kind of authentication than hitherto. It would have the affirmation of the person who had prepared the record (e.g. the senior investigating policeman in charge), who would provide an assurance as to the contents of the record. To give further integrity, a certificate of the Attorney-General of the requesting country would be necessary (he being an officer with judicial responsibilities). The Attorney-General would certify two things; that the evidence was sufficient for him to put case to trial in the court of his own country, and that the evidence set out existed and had been preserved for trial. This certificate, and the record of the case, would then be admitted without further proof of authentication or certification in the courts of the requested country. Evidence gathered anywhere in the world could be incorporated into the

record of the case, and this was especially important as increasingly transnational crimes involve evidence from a number of jurisdictions.

Such a document would enhance the preparation of a case and would overcome preliminary objections as to admissibility.

The next step in the recommendation was an assessment of the record of the case by a judge in the requested country. Under the prima facie test, the question the judge would ask was whether the evidence submitted by the requested part was admissible in the courts of the requested state, according to its law, and then whether it was sufficient to warrant a trial of the charges had the conduct occurred in the requested country.

The proposal suggested three options to back away from the prima facie case, and commended option B (2) to the meeting. Thus the suggestion was that not only should the Scheme be amended to provide for a "record of the case", but the judges in the requested country should be directed as to the test which was to be applied to that record. He noted that option B (1) was not far removed from the prima facie case requirement (as it retained an admissibility test). It also preserved the domestic standard of committal. Option B (2) was a further step away, as the authenticated evidence in the record of the case was required to be admitted, with the judge then enforcing a test of sufficiency for committal. The judge could not reject parts of that case, even if inadmissible in his own courts. There was an element of trust in that the requested country would trust the requesting country to afford a fair trial in accordance with its own laws and procedures.

Option B (3) went further still. The judge would be required to order rendition if satisfied that the record was complete and prepared in accordance with the requirements of the Scheme. Under this option the examination would be one of formal and not of substance. The judge would not be examining the question of sufficiency. It was suggested that Option B (3) would be taking too much away from the judges in the requested country, and indeed would cause difficulties for Canada under its constitutional arrangements. Canada's extradition laws applied to its own nationals, and it was thought that the constitutional position was that before such a step could be taken, the sufficiency of the evidence would have to be established to the satisfaction of a Canadian judge.

The thrust of the three options was the "record of the case".

The recommended Option B (2) would mean that the individual would go back to face trial in the requesting part only after having seen, and been tested for committal against, the evidence from the requested part. It was in effect a relaxation in the rules of admissibility of foreign evidence, and a relaxation of the traditional standards for extradition. But it did provide the fugitive with a measure of protection in that he was able to argue against the sufficiency of evidence in his own court, in his own language, and in front of his own judge, before a determination was made that there was a case for him to go to trial.

The paperwork at the end of the proposal demonstrated how the system could work. This related to evidence concerning an extradition from the USA for extradition of an American who had murdered a Canadian policeman and fled across the border into the USA. Thanks to mutual legal assistance, a brief incorporating evidence on both sides of the border had been put together. This included a summary affidavit, an affidavit of the autopsy report (which had not been available at the time that the summary affidavit was prepared, or its evidence could have been included in the summary affidavit) and a third affidavit concerning matters of law which the investigating officer was not competent to make. This exhibited the arrest warrants, the charges and the law. The three affidavits collectively were sufficient in Canada's extradition arrangements for the USA, with diplomatic officers authenticating the documents which were thereafter admissible in the USA court, who

applied the tests of "probable cause to believe" that the person had committed the offence as charged. Canada had been able to obtain rendition very quickly, despite challenges in the appeal courts; the person had been extradited, tried, convicted of first degree murder and the conviction was now under appeal.

The "record of the case" approach was commended as being more expeditious, as reducing the length of time of pre-trial custody for a person whose extradition was being sought, and so as a proposal which warranted serious consideration.

THE CHAIRMAN invited comment.

THE DELEGATE FOR BERMUDA congratulated the Canadian delegates in dealing with a difficult matter in such a thorough manner. He expressed agreement with the Canadian proposal, preferring Option B (2), which gave the necessary protection to the accused person whilst allowing the requested country a means of dealing with the matter expeditiously and without spending a lot of time and money on useless exercises. He had always been puzzled as to why evidence was examined in detail where an application for extradition was being made, and on all manner of technical points, whilst where a person had already been convicted in that country, of the same offence and on the same evidence, there was no problem at all in returning him.

THE CHAIRMAN suggested that option B (2) was likely to be the most attractive to the meeting.

THE DELEGATE FOR JAMAICA congratulated the Canadian delegation for a thought-provoking paper. He suggested that extradition involved the taking of an extraordinary measure in the state which was surrendering from its own jurisdiction someone for the purpose of being tried in another jurisdiction, on the basis that he had committed, or there was reasonable cause to believe that person had committed, a criminal offence. This carried with it a responsibility on the part of the requested country to be assured that certain minimum standards of fairness had been observed. This in turn could involve legal and foreign policy considerations, which was why the ultimate decision to surrender might be properly characterised as a political decision.

He recalled that this was not the first time that the question of the prima facie had been discussed, and recalled that they had not to date been able to arrive at a consensus on the issue, doubtless because of its sensitivity and the Commonwealth shared tradition of ensuring that manifest fairness prevailed.

On the question of differences between legal systems, while he appreciated difficulties with non-Commonwealth countries he was not aware of difficulties deriving from lack of familiarity arising within the Commonwealth. Certainly prima facie did exact a higher burden, but that did not arise as a result of unfamiliarity in a situation of shared legal tradition. It might be appropriate in bilateral arrangements to abandon the prima facie rule to overcome particular problems.

As to efficiency and experience, any departure from the prima facie rule, or any relaxation of the exclusionary rules of evidence, would indeed facilitate the effectiveness of extradition. The question as he saw it was to what extent and how far did one go in abandoning, in diluting, fundamental rules in relation to the need to establish a prima facie case? It could be difficult to put such a case together, but if everyone was required to surrender from one's jurisdiction someone within one's borders for the purpose of standing trial in another country, was it justifiable to depart from the rules that one would apply within one's own jurisdiction for the purposes of determining whether that person should stand trial within one's own jurisdiction? To him, that was the question. It was a delicate question, and one which did not admit of an easy

answer but he suggested that it was a question which required very careful thought. It was a difficult jurisprudential question and it was a difficult political question.

The proposal that one should submit a "record of the case" which might not comply with the formal requirements required for the prima facie rule was based on the premise that a certain degree of trust existed between Commonwealth countries to ensure a degree of reliability as to the contents of that record. However, in addition to that, the question arose of the sufficiency of the evidence necessary for the purpose of establishing whether it was right for a person to be sent abroad to stand trial. He suggested that it was somewhat difficult to separate out the question of the admissibility of evidence from the question of the reliability of the evidence itself; as in a sense they were intertwined.

He offered these observations merely to indicate that, although the proposals submitted in the Canadian paper deserved careful and exhaustive examination, and although they would assist as a matter of expedience in providing a more effective framework for dealing with extradition, it was necessary that the proposal receive the most careful and exhaustive examination. Particularly was this so bearing in mind that insofar as Commonwealth countries were concerned, it did not appear to him that the differences in legal systems (advanced as a basis for the justification for the departure) existed to any degree or extent.

If the case for change were made out, the question would then arise as to whether the change should be a mandatory rule or an option.

THE CHAIRMAN said that he was sure that all delegates would appreciate the seriousness of the problem and the ramifications of the proposal. He suggested that although there was no guarantee that standards of admissibility and quality of evidence would be uniform throughout the Commonwealth, there was a certain measure - he liked to think - of trust, which could be relied upon. If that were felt to be present, perhaps the way forward suggested in the discussion paper might commend itself to the meeting.

THE DELEGATE FOR THE BAHAMAS agreed that the Canadian paper was a thought-provoking one. The delegate for Jamaica had highlighted the seriousness of the proposal before the Meeting. His country was concerned about any proposal to move away from the prima facie rule. His country had had quite some experience. In the bulk of these cases the greater part of the evidence would be considered hearsay in the Bahamas. What was of even greater concern was that countries sought extradition of persons who had never been in their country. Requests were based upon the fact that the laws of the requesting country considered that the person sought was subject to their jurisdiction. The act complained of might have never been committed within territory of the requesting country and in some instances the act had never been committed within the territory of the requested country. But even if the act had been committed within the Bahamas, and even if the laws of the Bahamas considered such activities to constitute an offence, they would still find it very difficult to proceed on the basis of the evidence being put forward by the requesting country, because of its hearsay nature. He suggested that the sufficiency of the evidence as well the nature of the evidence was important. It was a fact that many extradition requests were based on allegations which were wholly unreliable, and he suggested that these should be resisted.

The Bahamas was anxious to have a single law covering its extradition arrangements with both Commonwealth countries and with foreign countries, applicable across the board. If some Commonwealth countries were to do away with the prima facie case requirement and also with the hearsay exclusion, and some did not, those who did not were likely to be told in negotiations with other countries that they were out of line with other Commonwealth countries and so Commonwealth countries should align their laws accordingly.

He urged the meeting to treat the proposal as one of most considerable importance.

THE DELEGATE FOR SRI LANKA expressed certain concerns. In his country, a statement made to a police officer was not of itself admissible evidence. He also asked whether a certification by an executive arm of government would be accepted as being binding upon the judicial arm, as a constitutional matter, on the question of the presence of a sufficiency of evidence. The Attorney-General in making a certification would be acting in his executive capacity, and a court would wish to be satisfied that there was a counterpart judicial body which would certify as to the sufficiency of the evidence.

With regard to the options presented, he suggested that option B (1) could be looked at to see what could be worked to meet the requirements of delegates.

On another matter, he asked whether moving to the "no list" approach assisted with dealing with the political offences prohibition. He asked too whether it might be possible to work into the Scheme a discretion not to return a person to a country where the court believed there was a likelihood that torture might be practised, along the lines of discretions conferred by some United Nations Conventions.

THE CHAIRMAN suggested that in the first instance the meeting should focus contributions on the specific proposal before the meeting dealing with prima facie.

THE DELEGATE FOR HONG KONG hoped that the authorities in his jurisdiction had a reputation for being both cooperative and successful in extradition matters. He was not aware of any problems which had arisen as a result of application of the prima facie rule, with all its ramifications, of a kind which would warrant a substantial inroad into an important point of principle. Hong Kong would prefer to retain the safeguards and the system with which its courts and community were familiar, both for that reason and because no particular difficulties had been experienced.

The paper presented by Canada was an interesting one, and he asked how a person faced with such evidence would test the evidence place before the courts of the requested jurisdiction, e.g. a case in which identification was a cardinal point in issue. In the Canadian example, the investigating officer had made an affidavit saying that he had been "informed" by a certain person that he had seen someone whom he believed to be the person sought doing something. That evidence would not be admissible in the courts of the requesting country, and he asked how it could be tested and challenged by an accused person. Second, he would be interested to know how real a problem the prima facie rule was creating within the Commonwealth. He suggested that before inroads of the kind contemplated should be considered, the parameters of the problem should be made plain.

THE CHAIRMAN said that he believed that the problem itself had been understated in the discussion at Harare.

THE DELEGATE FOR AUSTRALIA said that as the mover of the proposal discussed in Harare, he would like to make some observations. Australia had been prompted to put forward the proposal because whilst Commonwealth countries constituted one-third of the international population, the rest of the world had no prima facie rule. The problem was at its greatest as between Commonwealth and non-Commonwealth countries, where it had presented enormous difficulties. He believed it would be fair to say that European countries regarded common law countries as extremely difficult countries from which to obtain the surrender of fugitives. In the case of one European country, some 70 requests had been made of a certain common law country and these had been rejected on every single occasion with the result that the particular European country terminated its extradition treaty with that common law country.

Insofar as extradition as between common law (and in particular Commonwealth) countries was concerned, the prima facie rule had been used to great advantage by criminals with large resources at their disposal with which to resist extradition.

He recalled that when fugitive offenders legislation was being considered in the UK at the end of the 19th century, one of the parliamentary committees had recommended that prima facie be not included in the UK legislation. He was not sure that those who advocated that the prima facie rule was entrenched in history as a matter of common law principle were on solid ground, as the record suggested that prima facie only came in on the basis of a marginal decision.

Further because of its attendant technicality, often debate over the admissibility of evidence in the requested country disguised the nature of the process. The true nature of the process was not to determine whether a person should be placed on trial in a requested country. It was to determine whether a person should be returned to a requesting country, to stand trial in that country. To allow the process to be obscured and complicated by questions of admissibility of evidence in the requested country, he suggested, over-complicated the situation and actively prejudiced law enforcement.

He suggested that the world was getting smaller and smaller, and criminals were becoming increasingly mobile. He suggested that all countries find common denominators, whether they be common law countries or non-Commonwealth countries, on which to base effective extradition relationships. It was for these reasons that Australia had proposed at Harare in 1986 to relax the prima facie requirement. He felt Canada was to be congratulated for the discussion paper which they had placed before the meeting. Australia was very attracted to the middle ground in that paper (option B (2)) because this represented a substantial improvement on the present situation, whilst not going as far as the Australian proposal at Harare.

There were some matters of detail in the proposal which could be examined, but on the matter of principle, Australia was in favour.

THE DELEGATE FOR BERMUDA observed that the problem with the prima facie case arose primarily with non-Commonwealth countries. This would mean that Commonwealth countries increasingly would do away with the prima facie case to the point where they were treating non-Commonwealth countries in a different, and easier, way than they were Commonwealth countries. It would be more difficult to return a fugitive to a Commonwealth country than to a foreign country. A second observation was that under the present system an accused person could not test an affidavit by a person as to identification where the maker of the affidavit stated that he had first hand knowledge of identification. He asked what real difference it made whether that statement was made at first or second hand.

THE DELEGATE FOR BOTSWANA suggested that the proposal was not a very radical departure, and he supported Option B (3). In his country, statements were placed before a magistrate in extradition proceedings, and proceeded on that basis. Domestically, they had moved away from the preliminary examination to the point where the Attorney-General could direct the prosecution of a person based on a summary statement of the evidence against him. He saw no reason why the same form of summary by the requesting state should not be accepted, particularly where the Attorney-General, the person responsible for prosecuting a fugitive, entered a formal certification. He suggested that the proposal was definitely a step forward.

THE DELEGATE FOR NEW ZEALAND said that in her country's new Extradition Bill, New Zealand proposed to abandon the prima facie requirement. There had been two reasons for this. The first was a failure to secure the extradition of certain alleged offenders, particularly to the United States, which suggested that the law was simply not working. Second, New

Zealand wanted a uniform extradition law covering both Commonwealth and foreign countries. They saw no logic in applying different standards. Her country welcomed the proposal, particularly Option B (2) which it saw as a possible middle way through the divergence of views which had become apparent during the discussions in Harare in 1986. The question of fairness had been mentioned by delegates. However, she asked whether it would be unfair to send a person back for trial under rules which would apply had that person been arrested in the requesting state. Conversely, she posed the question whether it would be fair for a person to escape trial completely in the country which had jurisdiction to try the matter simply because of the operation of technical rules in the requested state. Were the compromise approach rejected, it would leave the Commonwealth in a very difficult position as regards the prima facie case. She would like to think that the Meeting could resolve the matter in a way acceptable to most countries.

THE DELEGATE FOR BRITAIN observed that the Meeting was dealing with issues which were both complex and sensitive. He suggested that a consensus covering the countries represented at the Meeting was not going to be easy. The position of the UK in this matter was, in a sense, an odd one. They had experienced, perhaps as much as any country, the difficulties which the prima facie rule posed to countries which did not have a common law system. Because the UK was geographically on the edge of Europe, and most extradition requests came from Europe, this had been a problem for the UK to the point where they would abandon the prima facie rule for most European countries. The prima facie rule would remain for non-European countries (including Commonwealth countries). The logic was that where one had a group of countries with the same legal traditions, the prima facie rule (though not without problems) was not the obstacle which it was between common law and non-common law countries. He suggested that it would be a little odd for the Commonwealth, with its shared legal traditions, to move away from the prima facie requirement. It would mean that change would be made where it was needed least rather than where it was needed most. He was not suggesting that there were no intellectual arguments in favour of relaxation and of having the same rules for everyone, but although this might be an ideal, in practice countries varied and when it came to legislating the proposition that all countries be treated exactly alike would encounter some difficulty. The political impetus for reform in this area within the Commonwealth was likely to run up against the argument that the primary need was for reform with arrangements outside the Commonwealth. If it came to a question of legislative priorities in dealing with major criminals, his impression was that his own ministers would wish to focus on arrangements for mutual assistance and the confiscation of the assets of convicted drug traffickers.

THE DELEGATE FOR INDIA noted that two divergent views had been expressed on the proposal. He suggested that a balancing of three divergent interests was required. First, the expedition of extradition. The laws should not be so cumbersome as to impede effective extradition. Second, the liberty of the subject should be protected in that arrangements should ensure that any person was only sent to a country where he would receive a fair trial. The third factor was that national laws could not be completely ignored, for example domestic laws on hearsay. He suggested that option B(3) provided a recently good balance between these three competing interests, and he would support it.

THE DELEGATE FOR ZIMBABWE said that the matter was a difficult one, but he considered that the argument in favour of change was a convincing one. Where smaller countries were the requesting party, he asked whether the burden required of them under prima facie was not too much. He asked whether it was fair that simply because a fugitive had left the country and was in another Commonwealth country, a whole new dimension should arise. Had the person been intercepted before he left the country, he would simply have been dealt with under the law of the requesting country, without the requested country having any role whatsoever. Basic principles had to develop in the light of experience and over time. He suggested that the time had now come for modification of the prima facie rule, although before his country's final position could be decided they would need to reflect on the

matter further. The Canadian paper was an excellent one and indicated ways forward, and perhaps because there were options in the paper it meant that the matter required further consideration. He suggested that the meeting might be minded to agree that some way of relaxing the rule should be found, and to recommend to ministers that some route along the lines of the proposals made by Canada be examined. He suggested that the meeting need not at this stage agree on any particular option.

THE CHAIRMAN said that there was certainly need for close consideration to be given to the discussion paper, and the suggestion of more time was, he thought, a proper one and one which he would commend to the meeting. The divergence of opinion had been such that he doubted whether the meeting, as things presently stood, would be able to come to a consensus one way or the other. He suggested that the meeting might at this stage wish to conclude discussion of the agenda item on the basis that the matter could be the subject of further study.

THE DELEGATE FOR AUSTRALIA suggested that one of the problems experienced in Harare had been the fact that the Australian proposal had been received very late. Now that delegates had the benefits of the present meeting, he asked whether the matter might not be further considered on the eve of the forthcoming Law Ministers Meeting in New Zealand in 1990.

THE DELEGATE FOR SINGAPORE suggested that the Canadian proposal should be seriously considered. There was a difficulty with Option B (2) which was that courts had to assess the sufficiency of the evidence based on records produced by the requesting country, which might in certain circumstances be insufficient for such a determination. Perhaps an additional provision might be included to permit the courts of the requested country to request further information where the documentation provided was inadequate for a proper assessment. The Chairman, after asking whether it was the wish of the meeting for the proposal to be the subject of further discussion prior to the next Law Ministers Meeting, adjourned consideration of the paper on that basis.

AGENDA ITEM 6

THE CHAIRMAN invited Mr Tom Sherman (to Australia) to assume the Chair for consideration of agenda item 6.

THE CHAIRMAN (Mr Tom Sherman) suggested that the meeting receive country reports before dealing with the substantive matters under the agenda item. He suggested that they consider the recent UN Convention separately. He invited brief country reports of developments to date so far as agenda item 6 (a) and (c).

THE DELEGATE FOR AUSTRALIA recalled that their 1987 Mutual Legal Assistance Act had come into force in August 1988. Their legislation did not apply automatically to all the Commonwealth countries, and had to date only been applied to one country, Switzerland. They were in the process of applying it to Japan and noted that a treaty on mutual legal assistance in relation to drugs had been concluded with the UK. This treaty would come into force once the necessary subordinate legislation had been made in both countries.

Their experience with the legislation had been interesting. As they negotiate treaties with both Commonwealth and non-Commonwealth countries, they were finding it necessary to amend their mutual assistance legislation. Indeed, they had been minor amendments made at every parliamentary sitting since their initial legislation had been enacted. Sometimes these related to very simple matters, for example whether one should be able to take evidence in Australia for Hong Kong to use in an extradition proceeding from Singapore. This had not been envisaged originally, but there had been a country with a need for

evidence relating to criminal matter, and the fact that the immediate proceedings for which the proceedings were necessary were not in their own country was something which, Australia had had decided, should not be allowed to obstruct the provision of such assistance. Thus, legislative amendment had been necessary. Other amendments related to experience with the forfeiture of the proceeds of crime, and the need for adequate protection for the rights of bona fide third parties now the holders of property which at some stage had been derived from crime. She suggested that Australia should continue to keep other Commonwealth countries abreast of their experience in this matter either bilaterally or through the Commonwealth Secretariat.

Their experience under the scheme had been in that 2½ years the case work in relation to mutual legal assistance (including the taking of evidence) had increased by a factor of 950 per cent. This needed the setting up of an efficient central office system, with attendant expenses. This would increase as schemes were accepted more widely. It was also essential that matters not be left entirely to lawyers. They had found it necessary to teach the police how to use the new systems, and to familiarise their prosecutors with the developing arrangements.

THE DELEGATE FOR THE BAHAMAS reported that his country had enacted a criminal Mutual Legal Assistance Act in 1988, substantially in accordance with the Canadian provisions. It only applied where there was a bilateral or multilateral mutual legal assistance agreement which was then designated under the Act. The only problems to arise related to the disclosure of banking transactions, but notwithstanding his country had been able to discharge the requests it had received to date.

THE DELEGATE FOR BANGLADESH advised that his country had not as yet introduced legislation to implement the Harare Scheme. This was presently being discussed and considered. There were some specific provisions for mutual assistance scattered through his country's statute book, but these were the usual, traditional forms of assistance. They were also taking keen interest in developments in other Commonwealth countries in order to benefit from experience to date.

THE DELEGATE FOR BARBADOS said that his country was very interested in all areas of mutual legal assistance, especially in criminal matters, although no legislation had as yet reached their statute book.

THE DELEGATE FOR BERMUDA recalled that his jurisdiction was subject to Imperial legislation in matters of external relations. He expected that the UK legislation would be extended to Bermuda. Presently they were acting ad hoc by doing all they could in the absence of formal arrangements. They had a taxation information agreement with the USA (even though Bermuda had no income taxes!), but that was the only specific arrangement at present.

THE DELEGATE FOR BOTSWANA said that his country cooperated especially with its immediate neighbours, in matters of mutual legal assistance but presently did so on an informal basis. The informal arrangements had been working very well, but there were areas where legislation would be required. They did not yet have the Harare scheme in place.

THE DELEGATE FOR BRITAIN said that his country regarded the issue as an important one, where legislation was necessary. There were 3 key stages in dealing with criminals, the first of which was intelligence. Intelligence arrangements with Commonwealth police forces and others were excellent. The final stage was extradition, which had been discussed that morning. In between lay the stage of turning police intelligence into the evidence without which a trial was not possible. The UK's non-Commonwealth neighbours had suggested that arrangements in this area with the UK were not satisfactory. The UK was in the position of only providing evidence when a case was "pending", but they were only able to reach

that point with the evidence they required. He appreciated the frustration of civil law countries with that proposition. They had not experienced such complaints from fellow Commonwealth members, but legislation was needed. He hoped it would be introduced in the near future. The legislation would be in a form which would apply to requests from all countries. It would not require reciprocity or bilateral agreements (unless other countries particularly needed bilateral agreements). Without further ado the UK would be able to assist with reasonable requests to turn intelligence into evidence.

THE DELEGATE FOR BRUNEI indicated that his jurisdiction had yet to act on the matter.

THE DELEGATE FOR CANADA noted that legislation had been enacted to provide comprehensively for mutual criminal legal assistance, including the international enforcement of fines in appropriate cases. They were particularly pleased with their proceeds of crime legislation, which complemented mutual legal assistance in criminal matters and provided for the identification, location, seizure and confiscation of the proceeds of crime, no matter how those proceeds had been obtained. In negotiating bilateral arrangements for mutual assistance, Canada had concluded a treaty with the United Kingdom (so far limited to drug trafficking offences) and a mutual legal assistance treaty with Australia was awaiting signature. Canada intended to ratify both quickly. Canada was also working with The Bahamas to finalise arrangements. They had been working closely with the United States, and were working with France, the Netherlands and the Swiss to finalise further arrangements. They had therefore been very happy with the progress they had made in implementing the Harare Scheme and looked forward to working with countries in and beyond the Commonwealth to make appropriate arrangements with countries wishing to work with them.

THE DELEGATE FOR CYPRUS noted that his country had not yet implemented the Harare Scheme but relevant draft legislation was under study and he hoped that in the very near future such legislation would be enacted.

THE DELEGATE FOR DOMINICA observed that his country had not yet introduced comprehensive legislation but was working on background information for consideration by Cabinet for implementation of the Scheme. In the meantime they had enacted tax information exchange legislation, and they had an agreement with the United States on that. Dominica also had legislation for the taking of evidence for both criminal and civil proceedings in other jurisdictions and were considering bilateral agreements, in due course, with both Venezuela and Taiwan on mutual legal assistance and extradition. He hoped that by the end of the year comprehensive legislation would be enacted to implement the Harare Scheme.

THE DELEGATE FOR GHANA reported that his country had not yet enacted comprehensive legislation to implement the Harare Scheme, but they did have legislation which enabled other countries to apply to its courts to take evidence which then would be transferred through diplomatic channels. Ghana was currently having discussions with other countries in the region to develop regional arrangements along the lines of the Harare Scheme.

THE DELEGATE FOR HONG KONG noted that his jurisdiction provided some of the forms of assistance provided for under the Harare Scheme, but had not provided comprehensive legislation for it. Applications for assistance were no longer confined to cases where criminal proceedings had actually been implemented, but could also be applied for in cases where criminal proceedings were likely to be instituted if the evidence sought in Hong Kong was made available. Hong Kong's needs in the area of mutual assistance were being considered against the background of the changes to its position in 1997, and they had in mind moving towards the situation whereby they would be able to provide mutual legal assistance by way of legislation and a network of agreements. They also now had a Bill proposing legislation for the tracing, freezing and forfeiture of the proceeds of drug trafficking. The Bill included provisions for the enforcement of forfeiture orders outside the country.

THE DELEGATE FOR INDIA reported that his country did not yet have a single enactment dealing with all the matters in the Harare Scheme, but these were some provisions in India's domestic law to provide for mutual legal assistance in criminal matters - but this was based upon the principles of double criminality and reciprocity. They were also in process of amending their legislation relating to the taking of evidence to provide for applications at the investigative stage.

On the question of dual criminality, difficulties were being established as some countries did not have exchange control laws and many of the offences his country would like to pursue involved exchange control violations.

THE DELEGATE FOR JAMAICA reported that his country had not yet implemented the Harare Scheme but was presently considering the format of such legislation and had been active in the area of negotiating bilateral legal assistance treaties and agreements, particularly with the United States (on general assistance) and with the United Kingdom (concerning drug trafficking and forfeiture of the proceeds of drug trafficking). Those agreements would necessitate the introduction of legislation, which would be enacted within the framework of the Harare Scheme.

THE DELEGATE FOR JERSEY observed that as a dependency of the Crown, it would be able in due course either to extend the United Kingdom's Act, which was currently being drafted, or for Jersey to enact its own legislation. As a "constitutional peculiar" of the Crown it had these two different means of legislating. Jersey's 1988 drug trafficking offences law was very similar to the UK Act, but included a new concept which was styled a "saisie judiciaire", which combined the legal effects of restraint orders and charging orders, which they found more easily in their own jurisdiction. Since the law came into force they had been able to use orders under that law to provide assistance to compel banks to give information in a number of cases, and they could by regulation specify countries and territories whose legislation could be enforced in Jersey. The legislation for the taking of evidence in criminal matters for use in other jurisdictions had been working well and were much used. They had, however, struck difficulties with continental neighbours, particularly in determining whether a request emanated from a court or tribunal. They had had a recent case in which the request came from an examining magistrate and after analysis it had become quite clear that the request was made not in his capacity as an officer of the court but as an investigating officer. Accordingly the provisions of the Act did not apply.

THE DELEGATE FOR KENYA reported that a draft Bill had been prepared and was now the subject of discussions with relevant government departments, which would implement the Harare Scheme. It was hoped that this would be enacted by the end of this year.

THE DELEGATE FOR KIRIBATI said that his country had no legislation yet, but was very much interested in the topic.

THE DELEGATE FOR LESOTHO observed that the subject was close to their hearts in Lesotho, but as yet no legislation had been prepared.

THE DELEGATE FOR MALAWI reported that in the circumstances of his country there did not seem to be any real need for mutual legal assistance arrangements. His was a small jurisdiction, trapped in the middle of Central Africa and the existing laws had proved satisfactory. However, they were monitoring the position closely and at an opportune time they would certainly legislate to implement the Harare Scheme.

THE DELEGATE FOR MALAYSIA reported that her jurisdiction was currently studying the Harare Scheme was in view to early implementation. They had received a request from Australia which they had not been able to meet simply because they had not yet enacted legislation

to implement the scheme. However, with the conclusion of the recent UN Convention against Trafficking in Narcotic Drugs and Psychotropic Substances they had to evaluate whether they needed a broad mutual legal assistance act or one restricted to drug trafficking. She envisaged that the central authority, when established, would be the Attorney General's department.

THE DELEGATE FOR MALTA said that his jurisdiction had no comprehensive legislation dealing with mutual legal assistance matters, but had to date been able to accede to most requests which had made and no particular problems had arisen. The only difficulty experienced was that referred to by the delegate of Jersey, relating to whether a request had emanated from a judicial authority.

THE DELEGATE FOR MAURITIUS said that his country had not yet given legislative effect to the Harare Scheme, but in a limited way some of the provisions had been incorporated into its domestic legislation, in particular the provision relating to the gathering of evidence from witnesses in Mauritius. He was optimistic that at least some provisions in the Harare Scheme would find their way to his country's statute book, especially given the aspirations of Mauritius to become a leading financial centre in the region and the establishment of off-shore banking and a stock exchange. This necessitated a degree of co-operation being established between Mauritius and other states. He personally, in prosecuting cases, had frequently found that evidence on a foreign component would have been most helpful in particular cases.

THE DELEGATE FOR NEW ZEALAND reported that her country proposed to introduce mutual legal assistance legislation into its Parliament towards the end of the year. It had similar taking of evidence provisions similar to those mentioned by other delegates. In other respects there was heavy reliance on informal assistance being given when requests were made.

THE DELEGATE FOR PAPUA NEW GUINEA expressed his country's support for the scheme, and advised that they had been supplied, on request, by Australia with copies its legislation. This was currently under close study.

THE DELEGATE FOR SINGAPORE advised that his jurisdiction was currently studying the Harare Scheme and he expected the Scheme to find favour with his country's Parliament. His country recognised the necessity for such legislation.

THE DELEGATE FOR SRI LANKA observed that his country had no specific mutual legal assistance legislation over and above the provisions commonly found in Commonwealth countries for the taking of evidence. They had experienced difficulties with their own courts in getting orders for the taking evidence abroad, and so saw the Harare Scheme as means for getting over these problems.

THE DELEGATE FOR SWAZILAND reported that the Harare Scheme was still under consideration by his government. In the intervening period, his country had been co-operating administratively and that in common with other countries in the region was making maximum use of informal arrangements.

THE DELEGATE FOR TANZANIA said that the Economic and Organised Crime Control Act 1984 provided for the seizure of the proceeds of serious crime. This anticipated the provision in the Harare Scheme. He assured his neighbours of his country's continuing wish to co-operate to the maximum.

THE DELEGATE FOR TONGA reported that his government was considering the possibilities of legislating to cover most of the provisions in the Harare Scheme.

THE DELEGATE FOR TRINIDAD AND TOBAGO advised that legislation for mutual legal assistance in criminal matters was presently being prepared. The first draft was being examined and he hoped that legislation would be in place by the end of the year. They also had an information exchange agreement with the United States, similar to those of Bermuda and Dominica. Also before the Parliament was a comprehensive Drugs Bill, which was approved by the lower house and was now going to the Senate. That Act created the new offence of dealing with property derived from drugs trafficking as provided for in the UN Convention. There were also wide provisions for the seizure and forfeiture of the proceeds of drug trafficking. It would also confer upon the Director of Public Prosecutions the ability to seize property the subject of foreign orders.

THE DELEGATE FOR SIERRA LEONE advised that there was as yet no specific legislation in his country adopting the Scheme, but that their participation in the workshops and other meetings and in the preparation of the Scheme was an indication of his country's interest in the matter. Sierra Leone was seriously contemplating the adoption of the Harare Scheme by legislation even if in a modified form. However, to date they had not requested nor had they received any requests which were prejudiced by the absence of any such legislation.

THE DELEGATE FOR ZAMBIA reported that her country was considering the implementation of the Scheme. They had also entered into a mutual legal assistance agreement with Zaire and with the GDR. They had enacted the Drugs (Forfeiture of Property) Act 1989 which dealt with money laundering, trafficking, etc. This provided for assistance to foreign countries for the service of process and for taking of evidence.

THE DELEGATE FOR ZIMBABWE advised that his country had established a special committee to examine methods of implementing the Harare Scheme. They had reached the stage where the committee had produced draft legislation for consideration by government. He hoped that it would not be long before these proposals were enacted.

THE CHAIRMAN commented that Commonwealth schemes did take some time to implement across the board. Legislative priorities varied from country to country, and these problems had already been adverted to. A few things needed to be borne in mind, he suggested. Traditional legal assistance had severe limitations as it did not provide an effective mechanism for dealing with matters that involved crime. Further, often legislation of this nature was by way of insurance. There may have been no demonstrated historical need for legislation, but when the need arose, its priority came to a head very quickly.

Agenda Item 6(b)

THE CHAIRMAN, in introducing Professor David McClean to the meeting, stressed his essential role and the high level of intellectual input he had made to the achievement of the Harare Scheme. He invited Professor McClean to speak on item 6(b).

PROFESSOR McCLEAN observed that a draft model bill prepared by Mr W J Menary was before the meeting which would provide some help to governments in the preparation of legislation to implement the Harare Scheme.

The UN Convention was certain to have high political priority in the coming years which would cause governments to look at the possibility of legislation. He drew attention to the fact that governments could either legislate specifically for the drug problem or they could place drug provisions in a more general piece of legislation, covering confiscation of the proceeds of crime and mutual assistance in criminal matters in general. He expressed the hope that the work that had already been done in Commonwealth meetings might encourage a commonwealth law ministry to take the opportunity represented by the UN Convention to adopt the second strategy - to get a comprehensive code of legislation

enacted all at one time. The alternative was a whole series of Acts as had been demonstrated by Britain's experience with proceeds of crime. First there had been drug trafficking legislation; then it had to be applied to other offences; then a third element was to apply the approach to terrorist offences.

Looking at the Convention, article 5 dealt with the confiscation of proceeds. This was on the agenda and would be reached later. It provided for parties to the UN Convention to have in their law provisions for the freezing of proceeds, the tracing of proceeds and also for their forfeiture, either by proceedings in their courts or in response to orders made overseas which could then be enforced.

Article 5(4)(c) of the UN text provided that actions to provide the assistance specified would be taken in accordance with and subject to the domestic law of the requested country or subject to any international arrangements to which it might be party. It was doubtful whether the Harare Scheme met this later stipulation, as the Harare Scheme was not strictly speaking "binding" but nevertheless the provisions did match up.

The key provision was article 7 as far as the Harare Scheme was concerned. This dealt specifically with mutual legal assistance in such matters as the taking of evidence, effecting service, executing search and seizure, inspecting sites, providing information, providing relevant documents, identifying and tracing the proceeds of crime and instrumentalities, and so on. This really was the heart and soul of the contents of the Harare Scheme. The article provided in paragraph 7 that treaties would take priority, and the Harare Scheme was, of course, not a treaty. However in almost all respects the Harare Scheme provisions and the UN Conventions provisions matched up totally, and the only particular differences he had detected were at such a minor level as the UN Convention referring to the provision of details of nationality when a request was made (a consideration irrelevant in the Commonwealth context) and the grounds on which assistance might be refused. These latter were rather more limited, at least at a first reading. In the UN Convention text, however, the final ground was that it would be contrary to the legal system of the requested party relating to mutual legal assistance for the request to be granted. He suggested that the general terms of this would enable contracting states to bring in many of the specific grounds for refusal which were contained, often only as options, within the Harare Scheme.

Finally he pointed to the concluding paragraph of article 7 of the UN Convention which referred to consideration of bilateral and multilateral arrangements to give practical effect to the objects of article 7. This, he suggested, was a very real encouragement towards the arrangements contained in the Harare Scheme being put into effect.

He was happy to say that he could see in these particular articles no major conflict between the obligations which the UN Convention would impose upon contracting states and the moral obligations of the Harare Scheme on Commonwealth members. He hoped that the two would cross-fertilize each other and that the political imperatives in play to implement the UN Convention could be taken advantage of to get more general provision on the statute book for Commonwealth countries.

THE CHAIRMAN invited comments on the Vienna Convention.

THE DELEGATE FOR AUSTRALIA said that her country had signed the Convention in February and hoped to have the Convention ratified by the middle of 1990. She suggested that clause 19 (3) (p) of the model legislation might need to be modified where extra-territorial jurisdiction was claimed on the basis of a multilateral convention, at least where both the requesting and the requested state were parties to that convention. She simply raised the matter to draw to the attention of delegates.

PROFESSOR McCLEAN agreed that there was no provision in the Harare Scheme which dealt with the extra-territoriality point, although it was in the suggested model legislation - largely because it had been in the Australian legislation. He recognised that there issues to explore, and arguably these would also relate the question of extradition.

THE CHAIRMAN asked whether there were any other delegates who wish to speak to the matter of extra-territoriality or to the Convention. He invited those working on the model law to give consideration to changes that might be needed arising out of the convention.

In response to an invitation by the Chairman, Australia, Britain, Canada, The Bahamas, Malaysia and Zambia indicated that their countries had already signed the UN Convention. Those who expected to be signing the Convention within the next six months were Botswana, Dominica, Ghana, Malawi, New Zealand and Trinidad and Tobago.

Agenda Item 6(d)

THE CHAIRMAN invited Professor McClean to open the discussion.

PROFESSOR McCLEAN referred to Criminal Working Paper No.1. This suggested certain adjustments to the text of the Harare Scheme. The only important suggested changes related to the seizure of the proceeds of crime provisions, which would be dealt with under a later agenda item. What was now for discussion were minor textual amendments which might not have been worthy of consideration were it not for the substantive discussions to come.

The first point was to correct a typographical error in paragraph 1 (3) (f). In the second paragraph of the scheme the definition of "country" was inserted in Harare to replace the ungainly expression "part of the Commonwealth" as used in the extradition arrangements; the working paper suggested a more felicitous wording.

THE DELEGATE FOR NEW ZEALAND commented that paragraph 2 posed a problem for New Zealand in the sense that the Cook Islands and Niue do not regard themselves as either fully sovereign or as dependent territories of New Zealand. They were self-governing states in a voluntary, free association with New Zealand. She asked that this point be taken into account.

THE CHAIRMAN referred the matter to the drafting committee.

PROFESSOR McCLEAN accepted that some amendment was needed.

Paragraph 3 of the Scheme raised two points. The first was addressed in the paper - the need to provide for states such as Malaysia which chose to use a civil form of proceedings for the forfeiture of proceeds or instrumentalities of crime in lieu of the more usual criminal proceedings. He suggested that mutual legal assistance should be available in that context and that the changes suggested would accomplish this. The second point was one raised by Australia, namely providing mutual assistance to a country which was itself seeking to extradite an offender from a third country. He thought the latter point would be covered by the Harare Scheme as it stood, as there would be reasonable cause to believe that proceedings could be commenced - not immediately, because the accused would not be present, but the presence of the accused would not be a condition precedent to the provision of assistance under the Harare Scheme.

THE DELEGATE FOR AUSTRALIA indicated that she was content with this explanation.

PROFESSOR McCLEAN said that in paragraph 15 there was no proposal for a change, but it related to discussions at the Bermuda workshop where there had been some certainty amongst delegates. Paragraph 15 provided that a request be accompanied by the documents to be

served, and where those documents related to attendance in the requesting country, such notice as the central authority of that country was reasonably able provide about outstanding warrants or judicial orders in criminal matters against the person to be served. What was intended was that a witness summons could be served under the Harare Scheme, and it was thought appropriate to put on notice any person who received such a summons if there warrants out for him in the requesting country. However, some countries, such as The Bahamas, were opposed to serving witness summons. This had featured in discussions between the USA and The Bahamas in relation to their mutual legal assistance treaty. There had been uncertainty in Bermuda as to what the international practice was in this matter. The working paper invited comment on emerging practice in this area. The draft model legislation defined "document" as excluding a witness summons, but this really was a departure from the Harare Scheme.

On the question of "authentication", paragraph 2 of the Harare Scheme had a straight forward provision, but a somewhat more elaborate provision was needed, allowing for the authentication of materials sent either in or out. The normal system of authentication by the witness himself, or an appropriate officer, should be incorporated into the text.

Tuesday 20 June 1989

THE CHAIRMAN (Mr Sherman) called the meeting to order and invited the delegate of Jamaica to open discussion of Professor McClean's paper.

THE DELEGATE FOR JAMAICA congratulated Professor McClean on his paper. He made the general observation that the Scheme had been subject of considerable deliberation. From the reports the Meeting had received the previous day, the overwhelming majority of states were in the process of examining a scheme with a view to introducing implementing legislation. In many cases they had already drafted legislation, and in others legislation was before their Parliaments. He raised a question of procedure. The meeting was contemplating amendments which could have the effect of prolonging or delaying the course of implementation, rather than enhancing it. He asked whether it was appropriate, at such a stage, for the Meeting to consider changes. It was appropriate to be looking at drafting matters, but insofar as matters of substance were concerned and which had received detailed examination in jurisdictions, he suggested there might be some difficulties. He asked whether it might not be appropriate to postpone consideration until the dust had settled. He was concerned that implementation of the scheme not be delayed.

THE CHAIRMAN suggested that the nature of the amendments proposed by Professor McClean were essentially of a drafting nature, or involved fine-tuning. The point made was one of substance, but he felt the Meeting should be alert to refinements which could enhance the Scheme. He suggested that on balance countries considering legislating would be able to take on board amendments such as these relatively easily.

PROFESSOR McCLEAN concurred with the remarks made. He recalled that a great deal of work had been done at the regional workshops, particularly on the Secretariat's suggested draft legislation. As they had put much effort into this work at these meetings, it was really a matter of matching up the Scheme and the draft legislation. There was also one area of the scheme in which everyone was learning very fast, and that had originally been held over to Harare - namely the confiscation of the proceeds of serious crime. These provisions had not been through the Marlborough House meeting and had not been as fully considered as other provisions in the Scheme. Indeed, the international experience at that stage had been very slight. This was a very important area and one which the UN Convention done at Vienna had covered.

THE DELEGATE FOR JAMAICA had no doubt that the exchange of views at the meeting would be of assistance to governments. His concern lay with the purpose of the meeting. As he understood it, the meeting would make recommendations to next year's Law Ministers Meeting. Therefore any proposal that emanated from the present meeting would require consideration and endorsement by the next Law Ministers Meeting before it could be effective. It was in that context that he expressed his concern. Although they might unilaterally take certain decisions in their own jurisdictions, as far as the procedures were concerned decisions by the meeting would be recommendations and have no greater, or lesser, force than that. He asked what administrations would be expected to do on the basis of these deliberations in advance of the Law Ministers Meeting. He did not think it would be useful for jurisdictions to suspend their internal discussions, awaiting the outcome of the deliberations of ministers. The Chairman said that the point was well taken and that the context in which the proposals were being considered had to be borne in mind.

THE DELEGATE FOR SRI LANKA said that his own questions had been directed towards facilitating implementation in his own country. He asked whether it would serve any useful purpose to raise matters which had been sticking points for further discussion at the meeting.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT wholly concurred in the comments of the Delegate for Jamaica. Certainly the Commonwealth Secretariat had no wish to do anything which would slow down implementation of the Scheme. But at the same time, although appreciating the weight of the argument that while draft legislation was being prepared, the ground should not be shifted under the draftsman's feet. There was also the argument that came later, namely that legislation once enacted was "too new" to allow parliamentary time to amend it. It was something of a "catch 22" situation, which was why the consultant had been careful to steer away from anything such as the matters mentioned by the delegate for Sri Lanka - matters of substance which had proved sticking points. There was no wish to re-open buried controversies, but rather to take advantage of the various points which had been made by delegates at the Regional Meetings which appeared, at least to the Secretariat, to be uncontroversial. He suggested for consideration by the Meeting that if delegates considered the proposed amendments uncontroversial, then they were unlikely to create any controversy in New Zealand. If the Senior Officials saw little problem, then perhaps Ministers were likely to share their view. With respect, he encouraged delegates to look at each of the proposals put forward by the consultant. If they saw any possible controversy, then perhaps the suggestions in question should be put to one side. However, to the extent that they were merely tidying up the draft, then perhaps they could be allowed to go through and regarded as de facto and adopted even if de jure they would have to await the Law Ministers Meeting in New Zealand.

THE DELEGATE FOR MALAYSIA expressed gratitude for the suggestions made by the consultant in his paper, particularly extending forfeiture to cover civil proceedings. There was in Malaysia the unusual position whereby the Public Prosecutor could issue an order whereby the dealings in named property were restrained. These were not "complete proceedings" as such, although such an order could lead to proceedings inter parties. She knew the situation was unique to Malaysia, but wondered whether the definition of "proceedings" could be expanded further to cover this.

She would also ask whether the words "property derived or obtained, or used in connection with" envisaged covering tainted property as opposed to property directly obtained as such.

PROFESSOR McCLEAN said that he understood the Malaysian system as operating in two stages: first, an order issued by the Public Prosecutor which had the effect of a freezing order, as an interim, after which there could be what would clearly be "proceedings". He asked whether at the first stage there would need to be assistance from the state, or whether that order by the Public Prosecutor was one purely of domestic effect - because if it was, it would only be when the second stage was reached that mutual assistance would become relevant. If that were the case, too, the suggested amendments would meet the need.

As far as the second point was concerned, the phrase seemed to be that which was winning approval by draftsman around the Commonwealth. Some added the words "directly or indirectly", which might make the matter even more clear. Certainly, the redraft was intended, as far as possible, to cover tracing of profits in this way and to attach tainted property. The words "directly or indirectly" were used in the draft model legislation. He suggested that the drafting committee could look at the matter.

THE DELEGATE FOR MALTA addressed the definition of "criminal matter". He understood this as intended to cover forfeiture proceedings whether of a criminal or civil nature. Although he supported the extension of the definition, he felt the drafting could be improved in certain respects. He suggested drafting points for consideration by the drafting committee.

THE DELEGATE FOR BERMUDA suggested that, as assets were very often not discovered until long after criminal proceedings had concluded, the provision ought also clearly to cover the situation where proceedings were being commenced for forfeiture quite separately from other criminal proceedings.

PROFESSOR McCLEAN suggested that in most Commonwealth countries, though not Bermuda, such proceedings would have a criminal character.

THE DELEGATE FOR SRI LANKA said that in his jurisdiction the expression "property" only covered corporeal property and not incorporeal property. It would be helpful to his country to ensure that the definition of "property" covered both types of property.

PROFESSOR McCLEAN said that the Scheme did not define "property", leaving this as a matter for implementing legislation. There was a suggestion in the draft model bill in the materials published by the Secretariat also set out a range of definitions enacted in Commonwealth jurisdictions. He cautioned against the meeting going too far with matters of definition in the Scheme.

THE CHAIRMAN commented that in most countries, where legislation had been enacted, a wide definition, covering both types of property, had been used.

THE DELEGATE FOR JAMAICA suggested that they might wish to reflect on the question of treating forfeiture as a civil rather than a criminal matter. The definition in the consultant's paper covered a very wide area. Some of these would not be known to some jurisdictions, and this made relevant article 7 of the Vienna Convention, that for the request to be granted would be contrary to the legal system of the requested country - which he considered was a little wider than the grounds for refusal contained in the Harare Scheme. This was another matter in which they could be constitutional questions of considerable importance. The effectiveness of the Scheme was greatly enhanced by effective forfeiture provisions, but they had to bear in mind not only constitutional matters but also policy determinations which had to be made as to just how far a particular country went in dealing with the forfeiture of assets not directly resulting from particular crimes, but which were obtained from their proceeds.

PROFESSOR McCLEAN agreed that it was necessary to have a wide definition of proceedings because emerging practice was so divergent. Insofar as grounds for refusal were relevant, paragraph 7(3) of the Harare Scheme was useful and explained in some way the approach suggested. The paragraph used the trigger phrase "criminal matters arising", and not "criminal proceedings". The distinction was material and helpful, he suggested.

THE DELEGATE FOR JAMAICA said that the provision in paragraph 7(3) was helpful, although his inclination would have been not to draw the distinction between the two sets of wording. He suggested that the history of the provision would not support such a definition.

THE CHAIRMAN suggested that if the extended definition was agreed by Law Ministers in New Zealand, it would have the effect of a substantial amendment and would therefore meet the objection raised.

THE DELEGATE FOR ZIMBABWE said that his was one of the countries which was experiencing difficulties on account of constitutional provisions which could make it difficult to implement the Harare Scheme as it stood. There would be difficulty under his country's constitution in confiscating property owned by persons within his jurisdiction, but he hoped that a way out of the straight-jacket would be found. A constitutional change was probably unavoidable.

THE CHAIRMAN noted that this point had been raised by a number of countries in the discussions at Harare, and noted that this was the point which had been widely recognised.

PROFESSOR McCLEAN noted that rights to property were immediately raised where property was in the hands of third parties. A provisional answer might lie in the creation, and careful definition, of money laundering offences which involved receiving and laundering (however defined) the proceeds of crime wherever committed. This could then be an offence under the law of requested country, which was therefore committed within that territory and recognisable by the criminal jurisdiction of that country. Penalties and forfeiture could be attached to the commission of that offence, rather than to conduct which had taken place outside the jurisdiction. Thus the desired result could be reached. Relevant material was contained in Volume 3 of the materials published by the Secretariat.

THE DELEGATE FOR SRI LANKA sought clarification on the definition of "criminal matter". He asked whether this was intended to include a statement taken by a police officer in the course of an investigation or whether it was limited to the judicial recording of a statement.

THE CHAIRMAN suggested that the Scheme had been carefully designed to avoid duplicating the Interpol arrangements such as the informal taking of a statement by a police officer. They were all very conscious of the informal arrangements, and these had by and large been left out of the Scheme.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT also stressed the need to keep informal arrangements out of the formal arrangements to avoid Central Authorities from being flooded with unnecessary requests for formal assistance. The Harare Scheme, by providing for formal assistance, complemented the informal arrangements. Informal arrangements needed to be used to the maximum in order to ensure that the formal channels were left free to handle formal requests.

THE DELEGATE FOR SRI LANKA asked why investigatory stages had been mentioned in the preamble to the Scheme.

THE CHAIRMAN recalled that the Scheme added to existing mechanisms. For example, search and seizure was a normal part of an investigation and the advantage of this Scheme was that it would give to the law enforcement authorities in the requesting country the facility to have a search and seizure conducted in the requested country. That was a facility not available under current Interpol arrangements. Thus the Scheme covered investigation where it supplemented and enhanced informal arrangements by providing formal and compulsory mechanisms which were already made available within the requested country to its own law enforcement agencies.

THE DELEGATE FOR SRI LANKA asked whether the Scheme should not specifically deal with statements made in the course of search and seizure to avoid the situation arising thereby there was a search and seizure under the Scheme, but statements made in the course of that search and seizure were not available.

THE CHAIRMAN pointed out that the Scheme covered investigations as well as judicial proceedings. The scheme was not exclusive. The statement would, in practice, be available under the arrangements in train in respect of the particular investigation.

THE DELEGATE FOR BERMUDA reverted to the constitutional problems which had been referred to. Some delegates were fortunate in not having to face the problems of a written constitution. In order to foreshadow a possible constitutional attack in his own jurisdiction, they had adopted the approach suggested by the consultant by making it unlawful to have been in possession of the proceeds of drug trafficking. Secondly, they had moved on to provide that a confiscation order "is not any kind of punishment or penalty for any criminal offence or conduct" and further, "proceedings taken under this act for the confiscation of anything are not criminal proceedings" ... They had tried to make it clear that Parliament did not intend that even the odour of criminal proceedings should attach to forfeiture proceedings. The problem had been identified from the outset they had tried to deal with it. It remained to be seen what the approach of the court would be.

THE CHAIRMAN observed that the drafting committee would take into account various points raised by delegates. There being no further comments on "criminal matters", he suggested they discuss the suggested amendment to the service of documents (para. 15). He suggested that it might be best for each country to determine for itself whether or not documents included subpoenas.

Paragraph 15

THE DELEGATE FOR MALTA asked whether the consultant had had regard to the European Convention on criminal matters in this context, as it had comprehensive provisions dealing with subpoena. The safeguards built into the European Convention might make countries more willing to consider the services of subpoenas.

PROFESSOR McCLEAN said that the Convention had indeed been consulted from the outset. The immunity provisions for persons giving evidence voluntarily were drawn from the European Convention. The Scheme envisaged that the subpoena would be served, but it did not require the requested country to use any measure of compulsion on the individual concerned. The document was no more than an invitation to him to attend.

THE DELEGATE FOR BRITAIN said that they had no objection in principle to the service of a subpoena, and if there was to be any amendment they asked that it provide for the option of service where a country was prepared to do so.

THE DELEGATE FOR BAHAMAS asked whether the delegates would expect subpoenas with sanctions attached to them to be served by a Commonwealth country on persons within their territory. This was a matter of regular concern with their immediate northern neighbour, a non-Commonwealth member.

THE DELEGATE FOR BRITAIN considered that what the UK would do was to make it quite plain at the time of service that they, as the requested country, would not seek to attach any penalty to any failure to appear but would invite the person being served to consider seeking expert legal advice about the possibility that he might be liable to penalties in the requesting country should he elect not to comply with the subpoena.

THE CHAIRMAN said that the issue was really whether subpoenas would be served at all. There was no question under the Scheme of some "international subpoena". It was very clear under the Scheme that any decision to attend in another country to give evidence under a request for assistance would be entirely voluntary. He recalled that his own Attorney-General (of Australia) had envisaged the Scheme giving rise at some future date to the international subpoena when he had been introducing the Scheme for adoption in Harare. However it was clear that the Scheme at the present stage did not contemplate such a system. The only international subpoena he was aware of was provided for in the treaty between the USA and Italy dealing with the Mafia.

THE DELEGATE FOR SRI LANKA suggested that calling the document a "subpoena" was a contradiction in terms if in fact it carried no penalty.

THE DELEGATE FOR BERMUDA suggested that it was a question of what the requesting country called it, rather than what the requested country referred to it as being. If, for example, the United State issued a subpoena, that is precisely what it was, and the question which arose was whether a requested Commonwealth country would be prepared to effect service of it, and if so upon what undertakings, if any. It might be that a Commonwealth country would refuse to serve it at all. Or it might be that the Commonwealth country would be prepared to serve it on the lines outlined by the delegate for Britain.

THE DELEGATE FOR THE BAHAMAS recalled that at the Bermuda Workshop they had drawn attention to the fact that all the flights out of their country (except the one he came on to Bermuda) went to the United States. It was a problem faced by many bank managers within their country who were being requested to divulge confidential information. Unfortunately the UK solution was of no real assistance, as at present those served would have to face the consequences. He asked whether a government administration should lend itself to the service, within its own jurisdiction, of a document which exposed a person to penalty should he or she travel abroad at any time. Some delegations would not have this problem, but The Bahamas wished to conform as much as possible to international practice.

THE DELEGATE FOR JAMAICA echoed the concerns of the delegate from the Bahamas. They had gone as far as to clearly state their reservation on this matter which they had entered to the Harare Scheme.

THE DELEGATE FOR BERMUDA said that his country was in the same geographic region as the last two speakers, but had not experienced the same problem to date. He suggested that the question might be academic, as if service of the subpoena was refused it could just as well be outstanding in the United States and the individual passing through the United States might very well be faced with the problem in any event.

THE DELEGATE FOR HONG KONG said that he would not object to any proposal which enabled countries to opt out of serving a subpoena. He further drew attention to the inconsistency between serving a subpoena on behalf of the requesting jurisdiction as opposed to a notice of hearing, and of telling the person served with the subpoena that a failure to observe its terms carried no sanction, when in fact by its very terms the document did so.

THE CHAIRMAN observed that the part of the problem was the fact that there was no settled international practice in those areas. He suggested that in practice the opting out provision was in the scheme as it stood.

THE DELEGATE FOR MALTA suggested the immunity provisions as presently drafted might not apply where a person made a voluntary appearance under a subpoena which had been served under the scheme.

PROFESSOR McCLEAN agreed that there was a flaw in the draft which needed attention from the Drafting Committee.

THE CHAIRMAN suggested that, in practice, where a person was a material witness his or her presence was likely to be sought formally through mutual legal assistance arrangements rather than simply by sending a subpoena for service. He suggested that the area was one of the considerable difficulty, and one which the meeting could not reasonably hope to conclude deliberations on. There was a shortage of international experience in the area, and countries would need to reflect upon their own individual views until such time as there was sufficient international experience which would enable possible amendments to the Scheme to be considered.

THE DELEGATE FOR JAMAICA said that his delegation was not clear as to the integrity of the Scheme in its several aspects. It was a matter which had been discussed in Harare as to whether there would be a Scheme which was generally binding, and the extent to which Commonwealth countries would be able to make variations from the Scheme. It has been decided there that it would be necessary within a period of three months to enter any reservations, and it was in that context that Jamaica had made its own reservations. They had been under the impression that only to the extent that reservations had been made were there any difficulties in relation to the Scheme. He was increasingly gaining the impression that he ought not to be guided only by the reservations which had been entered to the scheme as it stood, and that other reservations might exist. It had been their understanding that they had agreed in Harare that, subject to reservations, a witness who appeared in another jurisdiction in response to a request for mutual assistance would not be subject to prosecution and would be afforded a period of time in which to depart from the territory. Only thereafter there would be any ability on the part of the requesting state to take any appropriate action against the person.

THE CHAIRMAN said that he saw no difficulty with requests to make available persons to give evidence, and as the delegate of Malta had made clear, immunity would apply in those circumstances. The difficulty was where a subpoena was the document to be served. This was a difficulty which had not been foreseen in Harare but which was starting to emerge as a difficulty. He noted that the Scheme did not attempt to regulate the service of the subpoena under paragraph 15, and that there were options open to countries to decide for themselves what those consequences should be.

THE DELEGATE FOR ZAMBIA asked what the position regarding immunity would be where the offence was of a continuing nature.

PROFESSOR McCLEAN said that the point was left vague in the Scheme but had been clarified in the draft Bill. The model legislation deemed a continuing offence to have been committed when it was first completed, and not "re-committed" on a daily basis. Clearly there had to be a cut off date, as someone who committed a fresh offence could not be allowed to plead immunity.

While he had the floor, he wished to draw attention to the fact that the government of Canada also made a reservation in respect of immunity in the context of the Harare Scheme, although subsequent discussions had resolved much of those difficulties.

THE DELEGATE FOR SRI LANKA suggested that the scheme could provide that any requesting country which wished to have a subpoena served would have to use means other than personal service in order to effect service of it.

THE DELEGATE FOR THE BAHAMAS asked what would happen where a bank official voluntarily responded to a witness summons but was then faced with being required to answer questions which they could not answer under Bahamian law without risking prosecution for a breach of bank secrecy laws. Could such a person be prosecuted for contempt?

PROFESSOR McCLEAN suggested that the difficulty was real, but it was one which existed regardless of the Scheme. Any person who responded to an invitation to give an evidence was voluntarily submitting himself to the regime of the requesting country, and there was nothing in the Scheme which made matters any worse than they already were.

THE CHAIRMAN drew attention to the fact that the consultant was not recommending any change in this particular area. He suggested that the matter might be considered further and a paper prepared in advance of the next Law Ministers Meeting. It was a complex problem and one which was not going to be settled at the meeting.

Paragraph 19 "authentication"

THE DELEGATE FOR SRI LANKA raised the question privilege. He asked how the question the law of evidence in the requesting country was to be dealt with.

PROFESSOR McCLEAN recalled that the provision had much debated in the drafting stages of the Scheme, with the result that paragraph 16(2)(e) went somewhere towards dealing with the point. The requesting country was under a duty to give information as to any rules of its own laws which appeared especially relevant to the matter in hand. This was not a binding or complete certification, but it was an attempt to respond to this area of concern.

THE DELEGATE FOR SRI LANKA wondered whether the matter might be met by an amendment to para. 19(b), and by reducing the room for legal argument in a foreign territory over laws of privilege by providing for a certificate to be conclusive.

THE CHAIRMAN noted that one of the difficulties was determining how far one should go in a scheme of this nature in filling up the detail. He suggested that it was really for each country when developing its own law to work out the most appropriate mechanism, but leave to the Scheme to point in particular general directions. His own country, Australia, dealt with this matter in detail in its own legislation.

THE DELEGATE FOR KENYA asked the drafting committee to consider whether it should be left open to challenge a signature or seal.

THE CHAIRMAN observed that the provision conveyed the notion that nothing more was required to be proved.

PROFESSOR McCLEAN confirmed the point made by the Chairman. Now that the intentions behind the drafting of paragraph 22 had been thought in the context of the draft model legislation the provision was more clearly seen as one relating to admissibility; this had triggered the previous comments.

THE DELEGATE FOR JAMAICA observed that paragraph 22 was dealing with authentication and ensuring that the documents emanated from a reliable source. He had been unaware that the question of admissibility was being addressed in the Scheme, and suggest that it might be illegitimate to pretend under the guise of authenticity to deal with admissibility. It was proper to make the change, but not under the guise of authentication.

THE DELEGATE FOR SIERRA LEONE drew attention to paragraph 4 and the provision for central authorities to be designated for the transmission and receipt of requests under the scheme. This was quite compatible with the provisions for authentication.

THE DELEGATE FOR AUSTRALIA suggested that it might be important on occasions for the request to be admissible in evidence. The scheme was designed to combat crime, and many criminals would seek to have the court stop the taking of any action under mutual legal assistance legislation. If the admissibility of the request into evidence could be facilitated, the scheme should so provide. In her country decisions to grant mutual legal assistance were reviewable by the courts, and there had been instances of the person whose conduct was to be investigated trying to stop those proceedings, and the request had to be proved to prove jurisdiction. Had they not had provisions such as those suggested in para. 22 of the scheme, they would have had difficulty in proving that the request had been properly made and properly received at law.

THE DELEGATE FOR JAMAICA said that issues of admissibility would from time to time arise. He suggested that it was for each country to ensure that requests whether transmitted or received would be admissible under its own law as the *lex fori*. He questioned whether this was a matter for the Scheme.

THE DELEGATE FOR GHANA asked whether authentication would necessarily introduce the question of admissibility. He understood authentication as merely providing that the request be certified for transmission. The question of admissibility of the evidence would be a question to be argued in forum of the requesting country.

PROFESSOR McCLEAN said that he had found the discussion a most interesting one. He referred to the commentary on the paragraph which signalled the point that the Scheme was at that point going into the *lex fori*. It had been at the workshops that the view had been expressed that authentication was related to the reliability of the document for ultimate use. Authentication was for the purpose of rendering the material acceptable.

THE CHAIRMAN suggested that the matter be left for the Drafting Committee to look further at the provision to see it could be made a little clearer.

He suggested that the meeting consider the suggestion from Interpol, suggesting inclusion of a clearer role for Interpol within the Harare scheme.

Role of Interpol within the Harare Scheme

THE DELEGATE FOR INTERPOL recalled that Interpol had been involved in mutual legal assistance since 1923. It was an inter-governmental organisation, not a private organisation. His organisation had liaised closely with the Commonwealth Secretariat from the formation of the Commercial Crime Unit, and his organisation had had the unique distinction of being invited to take part in the meeting to revise the London Extradition Scheme. Their participation had resulted in a formal reference to Interpol being included in the revised scheme.

In 1986, at the meeting which formulated the Harare Scheme, Interpol had suggested that the Commonwealth should follow the example of the European Convention on Mutual Assistance in Criminal Matters by recognising Interpol as one of the authorised channels for the transmission of requests for assistance. Although that suggestion had not been accepted, the Secretary General of Interpol had sent out a circular in January 1987 to all Commonwealth Interpol NCBS to draw attention to the need for them to seek positive involvement in the Scheme.

Interpol had submitted a paper containing suggestions for amendment of the Scheme which were intended to ensure a greater involvement of Interpol in the operation of the Scheme. Furthermore, the delegate for Interpol reminded the meeting that in December 1988 the United Nations Convention against the Illicit Traffic in Narcotic Drugs provided expressly in Article 7 that urgent requests for assistance under the Convention be transmitted, whenever the Parties agreed, through the Interpol channel. In view of these considerations, his Organisation would welcome any Commonwealth initiative to include a provision in the Scheme authorising recourse to the Interpol channel of communications.

THE CHAIRMAN pointed out that the preamble to the Scheme provided that the Harare Scheme in no way derogated from informal arrangements or the arrangements made in other fora. It had always been intended that there be no duplication between the Interpol arrangements, which were extremely effective, and the Harare Scheme. Mutual assistance under the scheme was directed towards measures of compulsion and it was not intended that the Scheme be used where Interpol arrangements were available and could be as or more effective. He hoped that his remarks would place the Interpol proposal in perspective.

THE DELEGATE FOR AUSTRALIA for the reasons explained by the Chairman, expressed difficulties with the proposal. The decision whether or not to grant mutual assistance envisaged, in many cases, that there was a political consideration to be taken into account and it certainly envisaged that the national interests of the requested country be taken into account. It further involved consideration of matters such as the scope of the laws of the requested country, possible costs involved in implementing requests and decisions which were not properly be left only to the police arm of the requested country. There was a role as well for lawyers, politicians and, in Australia at least, consultation between federal and state governments.

THE DELEGATE FOR BERMUDA agreed with the reasons advanced by the representative of Australia for not highlighting Interpol in the matter suggested. The requests were from state to state, requiring legal and quasi-judicial decisions to be made. It was not a police matter, even if in the end the police were frequently involved. There were other organisations as well with an interest in the subject, and if one were to be mentioned should not also others be? He saw the suggestion as essentially cosmetic, and one that would not enhance the Scheme.

THE DELEGATE FOR INTERPOL said that no substantive provision was being sought. He was simply suggesting that the Harare Scheme be in line with the UN Convention. The Interpol channel would simply be a vehicle for communication, and not affect matters of substance.

THE DELEGATE FOR SIERRA LEONE endorsed the views expressed by Australia and Bermuda.

THE DELEGATE FOR ZIMBABWE sought clarification from the Delegate of Interpol as to the problem which was being addressed by the proposed amendment. His own country enjoyed a great deal of support from Interpol and valued its links with the organisation.

THE DELEGATE FOR INTERPOL said that there would be no difficulties as such for his organisation by it not being referred to by name in the Harare Scheme. The argument was really based on logic, and on the reference to Interpol in the Commonwealth extradition arrangements. In earlier stages of the draft there had been references to Interpol, and mutual assistance and extradition were conceptually interlinked. It was also the case that the Interpol channel was specifically mentioned in the UN Convention. His organisation was merely inviting consideration for similar provision to be made in the Commonwealth arrangements.

THE DELEGATE FOR CANADA asked whether the Secretariat's consultant had examined the matter. He asked what the thrust of the proposal was. He noted that it was not that Interpol should actually be the central authority, but only to be one of the competent authorities.

PROFESSOR McCLEAN stressed that the omission of Interpol was not meant to derogate from the considerable value of Interpol, it was just that there was so many other possible candidates for inclusion.

The reference to "competent authorities" in the Scheme was to the authorities who dealt with the working out of requests, whereas the proposal was that the NCBx send and receive requests, a task which he felt belonged properly to the Central Authority, which had also to exercise discretion whether to send and whether to grant assistance.

The third proposal in the paper might actually work a disservice to Interpol as it seemed to suggest that informal channels should not be used directly, but Central Authorities would become involved in handling Interpol requests. He felt sure this was not intended. Certainly the case studies presented by the Australian delegates to the regional workshops had demonstrated the value of developing arrangements as between Central Authorities, who should endeavour to develop the same degree of trust and cooperation as existed as between Interpol NCBx. He urged the meeting not to confuse the separate complementary networks.

THE DELEGATE FOR BANGLADESH suggested that as the Central Authorities liaised directly, the matter not be confused by the involvement of other agencies. He felt that the Scheme should stand as it was.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT recorded the Secretariat's, and the Commonwealth's, indebtedness to Interpol. The Secretariat had worked closely with Interpol from the outset of the exercise, and even earlier. Before the Secretariat had established its Commercial Crime Unit they had had discussions with Interpol to ensure that they were not duplicating existing facilities. Before inviting Professor McClean to try his hand that what had become the Harare Scheme, again there had been consultations with the Secretary-General of Interpol to ascertain that this initiative would have his full support. The Secretariat was grateful for Interpol's encouragement and support, and he hoped that the Representative of Interpol would not take back to his headquarters any negative feelings. Indeed, Interpol's membership had always been seen as the prime beneficiaries - but not the only beneficiaries - of the arrangements. It was the fact that there were other beneficiaries which had, in the end, dictated that no specific reference to be made to Interpol in the final version of the Scheme. He suggested that the Drafting Committee might consider including a paragraph recording the role played by Interpol in helping to develop the arrangements, that the meeting considered that maximum use should be made of the informal arrangements in the interests of efficiency, and the additional points made by Professor McClean.

THE DELEGATE FOR INTERPOL emphasised that the NCBx were not "third parties" to the arrangements, but were agencies of their governments. The UN Convention of 1988 mentioned Interpol.

THE CHAIRMAN suggested that some small states might well wish to designate their NCBx as Central Authorities. As he read the feeling of the Meeting it was that relations with Interpol were harmonious and highly valued, but the delegates did not see any particular purpose being served by especially referring to the organisation in the Scheme.

THE DELEGATE FOR INDIA said that his delegation supported the views expressed by the Chairman. Certainly as far as his country's practice was concerned, maximum use was made of the Interpol channels and these were greatly valued. As the Scheme made it plain that

the arrangements were in addition to, and not in derogation of, existing channels, he could see no useful purpose being served by making any of the amendments suggested.

Co-operating to Combat Fraud in the Financial Markets

THE CHAIRMAN invited the Commonwealth Secretariat to introduce discussion of Criminal Working Paper 6.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT explained that the Commercial Crime Unit had been active in assisting Commonwealth agencies in combatting fraud in the financial markets. This had led the unit to the view that it would be useful to consider - and he emphasised that the proposal was to consider a proposal - to embark on two proposals for Law Ministers. They were raised in the paper both for the information of the Meeting and to enable delegates to comment on them.

The first was to prepare a draft memorandum of understanding regarding mutual assistance as between securities commissions and similar regulatory bodies. There was bilateral experience building up in the area, and there was a feeling that a draft memorandum of understanding was an avenue worth exploring. Hence a paper on the topic was suggested for consideration by Law Ministers in New Zealand. It would be a decision without resource ramifications.

The second proposal was for the Crime Unit to explore the possibility of creating a data base dealing with violators. The Unit had access to considerable information in the course of its daily work, and the proposal would examine the feasibility of drawing this information together into a data base to which the Unit and, most importantly, Commonwealth authorities would have direct, fast, efficient and effective access. Clearly there would be resource implications if that proposal were to be accepted, but at this stage the proposition was that the proposal be developed and the resource implications examined in the light of the study.

In the normal course of events, the Legal Division would simply have proceeded with its two proposals. However the paper recognised that a forum for enhancing Commonwealth cooperation in legal matters had now been established and it was one from which the Secretariat was happy to accept guidance, as indeed it was bound to accept guidance from Law Ministers.

THE DELEGATE FOR CANADA endorsed the proposals and offered assistance in developing them.

THE DELEGATE FOR DOMINICA described the proposals as most interesting, particularly the latter. They welcomed the initiative being taken and wanted to encourage the Secretariat to go ahead with it.

THE DELEGATE FOR BERMUDA recorded his own country's support. The proposals were eminently beneficial to them all and he hoped that Law Ministers would support whatever recommendations came out the studies.

THE DELEGATE FOR SINGAPORE added his country's support to the proposals which represented two very sound ideas.

THE DELEGATE FOR INDIA looked forward to benefiting from the experience of other countries in these matters. They had been late to be touched by such problems, but this had started to happen. Both proposals were likely to benefit his country considerably.

THE DELEGATE FOR AUSTRALIA expressed her country's full support.

THE CHAIRMAN noted that the proposals had more than the requisite degree of support.

AGENDA ITEM 7

THE CHAIRMAN suggested that the same procedure be followed as for Agenda Item 6(A).

THE DELEGATE FOR AUSTRALIA recalled that the Australian Proceeds of Crime Act had now been in operation for 2 years. At this stage it had not been used in relation to any international cases, no requests from foreign countries having been received in relation to overseas orders. In relation to domestic matters, they had a dual scheme as for constitutional reasons the federal legislation could only deal with those crimes which fell within the authority of federal government. Each of the Australian states needed to enact similar legislation for crimes within their jurisdiction. Four of their states and one of their territories had done so, and two states remained who had not at present enacted forfeiture legislation.

They had had interesting experiences. Quite frequently in the course of trial the Taxation Commissioner would become aware that there was some "dirty money" around on which tax had not been paid. It then became a race between Commissioner of Taxation and the prosecuting authorities to see who could be first to freeze the money and get their hands on it. It had been causing some tension between the respective authorities. The Taxation Office tended to take their slice first and leave very little for anyone else. The only figure she had related to federal legislation. In the 18 months to January 1989 there had been only ten confiscation orders, and the amount confiscated was quite small. They had 41 restraining orders in force in respect of uncompleted proceedings, and they were looking at about 12 million dollars should all the property frozen be forfeited.

THE DELEGATE FOR THE BAHAMAS reported that in 1986 his country had passed legislation modelled on the UK legislation for the forfeiture of the proceeds of drug trafficking. In addition they had created the offence of being in possession of property which was considered to be obtained through drug trafficking or providing assistance to drug traffickers. It had been argued against this provision that it was retroactive in nature, as it attached property that had been acquired prior to the enactment of the legislation. This argument had not found favour in the lower courts and was currently being tested on appeal. His country's legislation provided for the enforcement of foreign orders, and had concluded an agreement with the UK for the enforcement of forfeiture orders, although this had not yet come into force.

THE DELEGATES FOR BARBADOS reported no specific legislation as yet, although there were various specific pieces of legislation which provided for forfeiture in specific circumstances, e.g. customs, inland revenue, restitution of property following criminal conviction, etc.

THE DELEGATE FOR BERMUDA advised that the Drug Trafficking Suppression Act of 1988 had been enacted, based on the best of the Australian, Canadian, Hong Kong and UK provisions. He hoped that the resulting legislation would not only work but would meet constitutional challenges, the latter being their greatest problem. One difficulty was how one handled a person who had been charged after the Act had come into force in respect of a drug offence committed prior to this. Another was where a person was convicted after the Act came into force and of an offence committed after the Act came into force but who was in possession of assets acquired before the Act had come into force. Thirdly, what did one do with assets which were acquired prior to the Act coming into force, but which were sold subsequent to the Act coming into force and the proceeds used to acquire additional assets? There were serious problems which all of them would have over the next 4 or 5

years until time and experience caught up with them all. Under their Misuse of Drugs Act 1972 there were two provisions, modelled on Hong Kong, one of which might assist them in overcoming problems with their new legislation; this was a provision that any money or other property possessed as a result of an offence under the Act was forfeited to the Crown. They were hoping that their courts would consider that this Act would enable them to bridge the period, and they would be looking at the jurisprudence on this from Hong Kong, if any. Their legislation also contained provisions for the reciprocal enforcement of forfeiture orders, under a system of designation. His country was keen to designate countries who were able to offer reciprocity.

THE DELEGATE FOR BOTSWANA indicated that his country did not yet have legislation dealing with domestic forfeiture of drugs profits, although it was the intention of the Attorney General that, before the end of the year and in a wish to comply with the UN Convention recently concluded in Vienna, legislation would be enacted.

THE DELEGATE FOR BRITAIN drew attention to three pieces of legislation. They had started with drugs traffickers' assets and enacted the Drug Trafficking Offences Act 1986, which provided for the tracing, seizing and confiscation of assets. All three elements were essential for any system to function. Then these provisions had been extended to the assets of all serious crime in the Criminal Justice Act of 1988. Thirdly, they had adopted similar provisions in relation to assets connected to terrorism in the Prevention of Terrorism Act 1989. The reason for special provisions about terrorism, in addition to all forms of serious crime, was that for terrorism they were not only confiscating assets which were the profits of crime, but also assets which may have been legitimately obtained if there was a reason to believe that those assets might be used to promote a terrorist crime. The lesson they were drawing from their own experience was that, valuable though the criminal law was in deterring criminal conduct and punishing through prison sentences, the approach of forfeiting assets and money was an approach of increasing importance and one which needed to be extended and developed. They were developing the approach quickly. Under the first Act, some £11 million had been ordered to be confiscated, and some £22 million frozen. Those figures needed to be understood not as the product of three years activity (because it took some time for new legislation to actually operate effectively and work its way through the courts; most of these amounts had been seized in very recent times).

British domestic legislation empowered them to designate other countries or territories whose own confiscation orders would be enforced in the UK, on a reciprocal basis. They would shortly be designating Australia, The Bahamas, Canada, the Isle of Man, Guernsey and Bermuda under their legislation and they were engaged in discussions with a number of other Commonwealth countries in the hope of designating and co-operating even more widely. They had taken the view that it was sensible to proceed by way of bilateral arrangements because there was not yet a sufficiently common fund of experience and agreement to justify a multilateral convention which everyone could adhere to. But he did wonder whether, given the speed with which things were moving, the time for such convention might not be approaching. He was not at this stage making any firm proposal, but suggested that the Secretariat keep this possibility in mind and be prepared for a multilateral convention when the time was right.

In reply to a question from THE CHAIRMAN, the DELEGATE FOR BRITAIN stated that designation and enforcement were not confined to drugs alone.

THE REPRESENTATIVE FOR BRUNEI said that they had only the provisions of the Corruption Act 1981 which provided for the tracing and forfeiture of the proceeds of corruption offences after conviction. To date no recourse had been made to this provision. They currently had under consideration enactments of legislation to deal with the enforcement with the forfeiture of the proceeds of drug offences.

THE REPRESENTATIVE FOR CANADA reported that in 1988 they had amended their Criminal Code and a number of drugs Acts to provide a single regime for the forfeiture of assets in drugs trafficking cases. "Enterprise crime" offences were also covered, such as murder, extortion, corruption, fraud, arson and a number of other property-related offences, primarily connected with organised crime. The court also had the power to impose a pecuniary penalty in lieu of forfeiture, where forfeiture would not be appropriate - such as in cases where the property had devalued, or assets had co-mingled with legitimately-owned property. The pecuniary penalty could also be used where the assets were offshore but the accused was in the country. New offences were also created, such as laundering the proceeds of crime. In addition, income tax laws were amended to provide for limited access to income tax returns to assist in asset valuations and the location of assets. Confidential business relationships were also protected from civil or criminal liability where parties reported on persons who might be involved in enterprise crime activities, e.g. bank officers. Forfeiture was, of course, conditional upon conviction except that there were special in rem provisions where an accused absconded before trial, or died before trial. With certain safeguards it was possible to seek forfeiture in rem. Third party rights were also protected, and statutory rights were given to the accused to protect his family and reasonable living and legal expenses. The definition of proceeds was very broad.

Since the legislation came into force on the 1st January 1989, less than six months ago, some \$40 million had been made the subject of restraint orders, and there had been a number of forfeiture orders of lesser amounts. One involved \$13.5 million, and was the result of mutual legal assistance rendered to Canada by the United States. The legislation did not provide for the direct enforcement of foreign forfeiture orders, but procedures were open for normal Canadian orders to be made in such circumstances. Fines and pecuniary penalties, wherever imposed, could be readily enforced in Canada.

THE DELEGATE FOR CYPRUS said that they did not as yet have specific legislation for the confiscation of criminal profits but this was presently being drafted and they hoped to have it enacted shortly. They, too, had forfeiture provisions in a number of specific laws.

THE DELEGATE FOR GHANA noted that his jurisdiction had no specific legislation dealing with the forfeiture of criminal profits, but they, too, had forfeiture provisions in respect of custom offences, other revenue offences and corruption. Unfortunately these were purely territorial, and did not apply to orders made in other jurisdictions.

THE DELEGATE FOR GUYANA reported passage of a Narcotic Drugs Psychotropic Substances Control Act which provided for the tracing, seizing, restraining and forfeiture of assets derived from drug trafficking. There were a number of cases before the court in relation to challenges to restraining orders. These were being challenged not on constitutional grounds, but on claims that the procedures had not been properly followed. The legislation also provided for the reciprocal enforcement of forfeiture orders by means of treaties, and they were presently considering such an arrangement with the UK.

THE DELEGATE FOR HONG KONG reported that presently before their legislature was a Drug Trafficking (Recovery of Proceeds) Bill. It was substantially similar to the 1986 UK Act, and as with that legislation it covered only drugs-related matters. This would introduce new powers for tracing and seizing assets, and create new offences of assisting a person to retain or conceal the proceeds of drug trafficking, and of disclosing information likely to prejudice an investigation into drug trafficking. Their Prevention of Bribery Ordinance also provided for forfeiture of any advantage obtained, and various other statutes provided for forfeiture in specific situations. The Drug Trafficking (Recovery of Proceeds) Bill provided for the enforcement of external orders made in designated countries.

THE DELEGATE FOR INDIA explained that his country has no exhaustive legislation as such providing for the forfeiture of property involved in a crime, but there were, as in other countries, forfeiture provisions in the revenue Acts, etc. Their 1985 Drugs and Psychotropic Substances legislation provided for forfeiture not only of the drugs involved and instrumentalities, but also the proceeds of sale of any drugs.

THE DELEGATE FOR JAMAICA said that under his country's Dangerous Drugs Act there was power to forfeit conveyances and modes of transport used in the commission of offences. Similarly, under the Customs and Excise legislation, goods could be forfeited in certain circumstances. He reported that his country had been preparing legislation providing for the confiscation of drugs-related assets. It was a matter which caused both difficulty and anxiety in his country. On the one hand there was intense eagerness for the legislation, this was matched by the sobering thought of the constitutional implications which arose from such legislation. Fundamental freedoms were guaranteed in the Constitution of Jamaica, and in particular there were guarantees against compulsory acquisition of property, so that the question was inevitably raised as to whether the legislation would be consistent with the Constitution. They also had to consider whether there were any circumstances apart from a conviction in which they could properly provide for the confiscation of drugs-related assets. A further constitutional issue was whether the legislation could provide for the authorities in Jamaica to deal with what amounted to a crime committed abroad, by enforcing orders made abroad. The Constitution specifically provided for extradition, so that precedent was of little assistance. He explained that these issues accounted for the time preparation of legislation was taking, but it was hoped that legislation would be enacted in the not too distant future.

The draft was based largely on the UK 1986 Act, but inspiration was also being gained from other sources. On the bilateral level, they had been involved in negotiating a treaty for the confiscation of drug-related assets so far with one country, and this was proceeding well. His delegation was interested in the fact that some countries were designating other Commonwealth countries on the bases of reciprocity, as the Harare Scheme paralleled the London Scheme and did not call for designation on the bases of reciprocity. Those who had been at the meeting in 1983 would know that the Jamaican delegation had argued then that reciprocity was desirable in such matters, and they noted with interest the movement into those direction. This had the effect of transforming the very informal schemes into something more closely resembling a treaty.

THE DELEGATE FOR KENYA said that they had not yet enacted specific legislation but a draft bill had been prepared and was awaiting approval by the National Assembly. This would make provisions in this area. The draft bill dealt mainly with profits arising out of drug trafficking, and related activities. It was based on the Australian, Bahamian and UK legislation. They, too, had provisions in their revenue and customs excise providing for forfeiture. He hoped that the new bill would be enacted by the end of the year.

THE DELEGATE FOR KIRIBATI said that, in common with other countries, they had specific references to forfeiture scattered across their statute book, but they had no specific legislation dealing with the forfeiture of the proceeds of drug trafficking, although this was under serious consideration.

THE DELEGATE FOR LESOTHO explained that his country was a very small one, without experience of serious crime resulting in huge criminal profits. Some cannabis was grown in the north of his country, but the growers were usually caught before they managed to sell it in South Africa. He anticipated that at some stage such legislation would become necessary.

THE DELEGATE FOR MALAWI said that, like Lesotho, they were a small jurisdiction which had not to date experienced the problems being discussed at present. Accordingly, they had not yet enacted any such legislation, but this might need to be provided for in the future.

THE DELEGATE FOR MALAYSIA reported that her country had enacted the Dangerous Drugs (Forfeiture of Property) Act 1988 relating to the forfeiture of criminal profits derived from drug offences. This also applied to the proceeds of drug offences committed abroad. They had detected a slight imbalance in the Act in the sense that, although they would be able to provide assistance to foreign countries they themselves were not able to request assistance. Accordingly, further study was being undertaken to improve the situation. They had also found that Articles 4, 5 and 17 of the UN Convention of 1988 would have to be given further scrutiny to see what effect these might have on their present legislation.

THE DELEGATE FOR MALTA advised that his country's Criminal Code provided for the forfeiture of the instrumentalities of crime. However these had tended to receive a rather restrictive interpretation and indeed the need been felt for special legislation which was more detailed and comprehensive. In 1986 amendments were introduced to the Dangerous Drugs Ordinance and other legislation, providing for the confiscation of proceeds and instrumentalities in respect of serious drugs offences. Unfortunately these provisions referred only to domestic offences, including the provision for restraining orders. His country in principle supported, with appropriate safeguards, the enforcement of overseas orders, but certain constitutional hurdles would have to be overcome before this course could be adopted. He was optimistic that a solution could be found.

THE DELEGATE FOR MAURITIUS said that they had not dealt with criminal profits in general, but made provision for the forfeiture of the proceeds of drugs trafficking following conviction. There was a three tier type of proceedings - an inquiry before a commission following conviction, after which the DPP commenced proceedings before the Supreme Court and evidence was heard on the forfeiture issue. It was up to the Supreme Court, in the light of evidence, to determine whether the proceeds were in fact the proceeds of dealing in drugs. The legislation had only come into force towards the end of 1986, and all those convicted so far had lodged appeals, which were still pending. The legislation made no provision for the enforcement of orders made abroad, although it could be that if the orders made abroad were treated as civil judgements it might be possible to enforce them under existing reciprocal enforcement of judgements legislation. They also had forfeiture provisions relating to exchange control, customs etc. which in a limited way provided for forfeiture in restricted circumstances.

THE DELEGATE FOR NEW ZEALAND said that her government proposed to introduce a Criminal Forfeiture Bill before the end of 1989 to implement relevant provisions in the mutual assistance scheme. They would also take the opportunity to implement any further matters required by the UN Convention of 1988.

THE DELEGATE FOR SIERRA LEONE reported that his country had no general legislation for the forfeiture of criminal proceeds, but rather the fragmented ad hoc provisions. Emergency economic regulations provided for the tracing and seizing of the profits of certain crimes; there were provisions for the forfeiture of fishing vessels; the forfeiture of bribes received by corrupt public officials, and the like. Under the Drugs Act there were provisions for the forfeiture of drugs and the proceeds of trafficking, if traced.

THE DELEGATE FOR SINGAPORE advised that they did not at present have legislation for the enforcement of forfeiture orders made abroad, but they did have specific legislation providing for the domestic forfeiture of criminal profits, namely the Corruption (Confiscation of Benefits) Act 1989. This gave new powers to trace and freeze the benefits of corruption, and for their confiscation. This struck at the unexplained assets

of corrupt officials. The Act itself was modelled on the UK Drug Trafficking Act of 1986, with reference also to Australian and Malaysian drugs legislation. The full impacts of implementation had not yet been felt, but because of the legislative history of the provisions the legislation was expected to be effective.

THE DELEGATE FOR SRI LANKA said that forfeiture of property in his country could fall under several heads. The first was where the item was banned or prohibited. Second, smuggled goods were liable to forfeiture. Third, property used in the commission of the crime. Further, there was the forfeiture of bail bonds. Most important was the recovery of "stolen property", which encompassed not merely property the subject of theft but any property which had been gained by misappropriation, criminal breach of trust or some other form of unlawful acquisition. It included not only the property itself but the form into which the property had been converted.

THE DELEGATE FOR SWAZILAND advised that his country had not yet enacted legislation providing for the forfeiture of criminal profits in this area. Consequently there were no provisions, as yet, for the forfeiture orders made abroad. They appreciated the need for special legislation in this area, and it was presently under consideration.

THE DELEGATE FOR TANZANIA likened his country's position to that of Ghana and Kenya. Happily, the former members of the East African Community still had the same customs legislation. In addition, his country had relevant legislation concerning wild life, the prevention of corruption, some provisions in the penal code, the regulation of prices and other ad hoc provisions in specific legislation. There was provision for restraining orders under the Prevention of Corruption Act, where orders could be made freezing bank accounts and preventing disposal of property. Such interim freezing orders were issued by the Attorney General and served on the banks.

THE DELEGATE FOR TONGA compared his country's position to that of other small jurisdictions represented at the meeting, in that they had very limited provisions in the area of the confiscation of criminal profits. Insofar as drug trafficking was concerned, this had not proved any problem to them to date and so no legislation had yet been needed. They were, however, interested in developments in these areas but they, too, had potential constitutional problems.

THE DELEGATE FOR TRINIDAD AND TOBAGO advised that a Bill was presently engaging the attention of his Parliament, which provided for the tracing, freezing and seizing ultimate forfeiture of the proceeds of drug trafficking. It is also provided for a new offence of dealing in drug related property. Its provisions were influenced by the UK Act of 1986 and the Malaysian Act of 1988. His country shared the same constitutional problems as those mentioned by the delegate for Jamaica, and some of the provisions under the legislation were inconsistent with their constitution, thus requiring passage of the Bill by a three-fifths majority in the House. The Bill had been passed by the House of Representatives the previous Friday, and it now awaited consideration by the Senate. He expected the necessary three-fifths majority to be obtained in the Senate within the next few weeks.

THE DELEGATE FOR ZAMBIA advised that her country had enacted the Dangerous Drug (Forfeiture of Property) Act 1989 which provided, among other things, for offences relating to property obtained through trafficking in dangerous drugs, as well as for the seizure and forfeiture of property connected with activity related to offences under their Dangerous Drugs Act or any foreign law making corresponding provisions. "Property" was very widely defined and included tangible or intangible property. The Act only applied to offences committed after the commencement of the Act, and was not retrospective. The Act had not yet been tested in their courts but it was drafted carefully, with an eye to constitutional limitations. They, too, had legislation dealing with forfeiture in other areas such as exchange control, corruption etc.

THE DELEGATE FOR ZIMBABWE observed that, like some of their neighbours, they did have some problems in this area. They, too, did not have comprehensive legislation but had specific pieces of legislation in such areas as customs and excise, corruption, and their fines regime could also be used to effect de facto confiscation. They had also had a spate of recent cases relating to the sale, at above controlled prices, of commodities in short supply which were subject to price control. This had necessitated a review of the adequacy of their legislation, and consideration of the need for forfeiture of profits provisions. In the area of mutual assistance, they had a constitutional problem in that private property was protected within their jurisdiction and could not be forfeited without recourse being had to the courts. They had considered the possibility of proceeding by way of reciprocal enforcement of judgements based on the civil law model and would follow the discussion very closely. They were looking forward to the eventual implementation of the Harare Scheme, but until their Constitution had been appropriately amended they would not have the means fully to implement the Scheme so as to forfeit all proceeds unless the acts which had taken place constituted a crime within their own jurisdiction.

THE DELEGATE FOR BANGLADESH said that his country was in a similar position to most of those sitting around the table in that their legislation made provision only for the forfeiture of the proceed of crime in certain limited specific areas. In the area of drugs, provision had been made for the forfeiture of illicit drugs. They were thinking in terms of legislating to provide for the forfeiture of ill-gotten money, and money which could not be accounted for or was the proceeds of crime. They were anxious to make crime not only difficult, but unprofitable.

THE DELEGATE FOR DOMINICA said that his country, too, had no generalised system for the forfeiture of the proceeds of crime. In 1988, however, they had passed the Drugs (Prevention of Misuse) Act which made provision in the case of non-trafficking offences, for optional forfeiture orders, and in respect of trafficking offences, for mandatory forfeiture orders. The forfeiture was limited to the articles, money etc. relating to the offence but extended to any property acquired subsequently, with tracing provisions provided for. They also had the traditional smuggling, tax and other forms of forfeiture. He doubted whether legislative priority would be given for an across-the-board approach to the forfeiture of the proceeds of serious crime. Drugs apart, this was not a large problem in Dominica.

THE CHAIRMAN invited Professor McClean to introduce his paper proposing certain amendments to the provisions in the Harare Scheme relating to the forfeiture of the proceeds of crime.

PROFESSOR McCLEAN referred to Criminal Working Paper No.1, the Canadian proposal concerning the enforcement of foreign orders and volume 4 of the materials relating to mutual legal assistance in criminal matters within the Commonwealth. Criminal Working Paper 1 listed four matters requiring attention under this heading.

First, there was the whole question of the instrumentalities of crime. The discussion at Harare had been in terms of proceeds, but it had become obvious looking at legislative models which now existed that instrumentalities were as much part of the forfeiture exercise as were proceeds. Thus "property used in connection with the commission of an offence" had been incorporated in the amendments.

The second point was the use, in Australian legislation, of "pecuniary penalty orders" - which were not fines but were orders for the payment of a sum of money fixed by reference to the assessed value of the property the convicted person had derived from illegal activities. These types of orders had been extensively discussed in the workshops.

The third, and most complicated, matter related to the type of provision made for dealing with requests originating abroad. The present text dealt with the enforcement of forfeiture orders and the taking of fresh proceedings for interim freezing and the taking of fresh proceedings for the forfeiture of property. However there was no provision for the direct enforcement of an interim freezing or restraining order. He believed that such a provision was needed and that some adjustment in the text was required.

Finally, there was the question of the definition of "proceeds of crime". The Harare definition had not seemed to be as good as it should be. The concept of property acquired "directly or indirectly" was important.

The Canadian delegation had suggested a text which followed very closely the text of article 5 of the UN Convention of 1988, and particularly article 5.4, whereby a country on receiving a request for action could either submit a request with the view of getting a fresh order or submit a request in order to obtain direct enforcement of an existing overseas order. The UN Convention appeared to envisage a single request which invited the requested country to take such steps as it considered fruitful. However, subsequent provisions in the Convention related to different options and it was envisaged, he suggested, that the requesting country would either ask for the enforcement of its order directly, or for some other form of action by the requested country.

He believed that the addition to paragraph 27 of the proposed new amendment in Working Paper No.1 of a reference to "confiscation", would meet the point.

THE CHAIRMAN invited the Canadian delegation to introduce its proposal.

THE DELEGATE FOR CANADA said that their proposal in lieu of Professor McClean's proposed new para.27 arose from their concern that the proposal as presented in Working Paper No.1 only provided for the enforcement of a foreign order directly, and did not provide desirable flexibility for a requested party to determine what might be the most appropriate manner in which to render assistance to a requesting country. The possibility of applying for a fresh order, with the accompanying safeguards that may be applicable in domestic legislation - whether constitutional or under a common law or statutory law - should be provided for. The draft they had submitted was designed to incorporate this flexibility, which was also to be found in the UN Convention. The matter, he suggested was at the discretion of the requested country either to give effect to the foreign order or to take proceedings for a fresh order under its domestic law. They did not read the UN Convention as giving the option to the requesting country, but to the requested country. This had been a matter of some controversy in Vienna, as a requested country might strike a different balance between the rights of the individual and the rights of the state. Accordingly the Convention had been drafted to provide flexibility at the option of the requested country.

The other proposal for change was to eliminate the reference to restraint orders in para. 28. Since restraint orders were by nature an interim proceeding, and since the intention would be to finalise that interim order into a confiscation order, the provision ought more properly to be under para. 27, as an "interim" measure.

He would save his comments concerning "instrumentalities" for subsequent discussion.

THE CHAIRMAN cautioned the meeting against becoming involved in drafting matters. He invited delegates to focus on matters of principle and policy, leaving it to the Drafting Committee to produce a draft for detailed scrutiny by the meeting. He suggested that the four points raised by Professor McClean be dealt with in order, and then the Canadian proposal. As to the question of dealing with "instrumentalities" as a parts of "proceeds", he invited the views of the meeting.

THE DELEGATE FOR CANADA had no objection to the concept of the seizure of and forfeiture of instrumentalities in general, but stressed the need for some definition. The example given in the Working Paper was one easily agreed upon, i.e. the forfeiture of the vehicle in which drugs were being transported. He asked, however, how this might apply to other circumstances - to equipment used in the manufacture of drugs? That was an easy matter. But would it extend to the building in which the drugs were being manufactured? Or the dwelling house in which the accused trafficker stored the drugs in his or her basement before distributing them on the street? The farmland on which the marijuana was cultivated? Clearly in the drugs area itself there was ambiguity as to what was meant by the "instrumentalities used in the commission of the offence". Outside the drugs area the same questions arose - did organised prostitution carry with it liability for forfeiture of the real property on which the activities had been carried out? What about an office building used in a fraudulent stock scam? There was the question, too, of the extent of the "connection" required by the scheme. Was this to be incidental or a connection which was inherent in the commission of the offence?

The questions were (i) whether a broad definition should be left as it was, (ii) whether the meeting should attempt to restrict the definition to a "substantial connection test", (iii) should it be limited only to drugs, and (iv) should it exclude real property or simply leave it to each country to define the extent to which it was prepared to render assistance with respect to instrumentalities? Decisions of policy were required, and possibly the last approach might be the one for which a consensus might be achievable.

THE CHAIRMAN suggested that it was the principle that needed to be provided for in the Scheme, leaving it for each country to decide for itself precisely what the parameters would be. A lot of the issues which arose under the Scheme were for the individual country to determine. Some countries might be prepared to provide for forfeiture of all the items referred to by the Canadian delegate, but others might take a more restrictive approach. It was in the nature of the Scheme to deal with broad principle and leave fine-tuning to individual countries.

THE DELEGATE FOR INDIA recalled that the question of instrumentalities had been discussed at Sydney, and clearly public conveyances were outside the concept of instrumentalities. He asked that this be borne in mind by the drafting committee.

THE CHAIRMAN pointed out that the courts would also have a large say in how these provisions were interpreted.

THE DELEGATE FOR JAMAICA suggested that the meeting had to look at the overall effect of what was under discussion. They had under their own legislation relating to dangerous drugs the ability to forfeit, after conviction, the conveyance in which the particular drug was found. There was a right of appeal by a third party if he could show that it was done without his knowledge, etc. Their general legislation had not yet reached the stage where it would, in a generalised form, give the courts power to forfeit things used in the commission of all offences. The issue of the forfeiture of the proceeds of crime had reached priority on the agendas of most countries, largely because of the activity of drug traffickers. Forfeiture also played a part of some significance in other aspects of international crime, particularly money laundering offences, but he suggested that there had, as yet, been no general acceptance of the proposition that a crime ought to be visited with the forfeiture of the proceeds in all and every circumstance - proceeds obtained not necessarily directly but also indirectly, and not necessarily by the offender, but through the offender. Had that been the initial proposition of the outset, he doubted whether the progress made to date would have been achieved. The lesson from this, he suggested, was that one took a pragmatic approach, dealing with situations on a case by case basis so as not to undermine basic approaches to fundamental questions.

He made this observation because his government had been the victim of acts of forfeiture imposed upon its by other jurisdictions, in spite of the considerable steps which they had taken within their own jurisdiction, to ensure that drugs were not to be found on the aircraft the country owned. They took the view that measures such as those taken against themselves were unconstitutional. These forfeitures were also taking place without any criminal convictions being recorded, under the so-called civil process, and the lesson from that would, in his view, inspire the meeting to proceed warily and with caution. He suggested that the matter needed to be studied in considerable depth. He further suggested that this was why countries had, by and large, elected to follow a bilateral path and in respect of only particular matters.

The Scheme for Mutual Assistance as originally formulated in Harare enabled Commonwealth countries to forfeit the proceeds of criminal activity after conviction (and he would stress the words "after conviction") and enabled the law of the requested state to apply to decide whether forfeiture would apply. Those were the fundamental safeguards, and he expressed uneasiness as to the direction the discussions were taking. His uneasiness did not derive from doubts about the effectiveness of forfeiture in dealing with dangerous crimes, crimes characterised as crimes against humanity, but he would be more cautious about a generalised approach to the issue of forfeiture in respect of criminal activities at large. He urged the meeting to take total view and to keep a broad prospective.

THE DELEGATE FOR INDIA wish to supplement the remarks by the delegate for Jamaica. His country bordered the "Golden Triangle", and, if drugs were found aboard their aircraft in certain jurisdictions - despite the best efforts of the state airline to prevent carriage of drugs on the aircraft - there were threats of confiscation of his country's aircraft.

THE CHAIRMAN drew attention to clause 25(3) of the Harare Scheme, which made it clear that it was the law of the requested country that applied to the circumstances and manner in which an overseas forfeiture order could be recognised or enforced. So far as the Harare arrangements were concerned, the circumstances in which orders would apply to instrumentalities would be those provided for the law of the requested country. There was a gap in the Scheme as it stood, as it did not cover instrumentalities at all, and the question was whether they should recognise instrumentalities whilst leaving it for each country to determine how far such a provision would apply.

PROFESSOR McCLEAN wished to widen the Chairman's point. The whole thrust of the Harare Scheme was that what one did was to make available to the prosecution authorities in other Commonwealth countries the powers which a country conferred upon its own authorities. The real question was whether, once a jurisdiction had made provision for the seizure of instrumentalities in its domestic context, it would be prepared to make that same provision available, upon request, to the authorities of other Commonwealth countries. The question faded away if there was no such provision in the domestic law. The question was whether, having taken the policy decision to provide for the forfeiture of instrumentalities, whether a country might then go on to decide to make that provision available to other Commonwealth countries. The Scheme was not model legislation, and had it been all these points of detail would have had to be covered.

THE DELEGATE FOR ZAMBIA said that their approach had been to exclude lawfully-run aircraft and trains coming into Zambia, but they could proceed against the owner if they were "liable person" under the Act.

THE DELEGATE FOR SRI LANKA observed that if real property were being confiscated, it was one thing for this to be confiscated into the ownership of the requested country and quite another for it to pass into the ownership of another government. He suggested that the wording be left in very general terms.

THE DELEGATE FOR GHANA suggested that where the instrumentality was owned by the person who was under investigation, no problem would arise. The problem loomed where the person who owned the instrumentalities was not aware of the criminal purpose for which the instrumentalities were being used. In such a case, the approach could be to provide protection for the owner of the property who was not aware of the use to which the instrumentalities were going to be put.

THE CHAIRMAN suggested that, as a number of views had been expressed on the question, it might be the wish of the Meeting to leave it now to the Drafting Committee to address the various difficulties which had been highlighted. He invited any delegate who felt that they should be no mention at all of instrumentalities to speak.

THE DELEGATE FOR KIRIBATI asked that the Drafting Committee consider providing alternatives regarding instrumentalities, as it would be a matter for each country to determine the extent to which instrumentalities should be subject to seizure. The guidance of the Drafting Committee, by providing a general as well as a narrow definition, would be particularly appreciated by smaller jurisdictions.

THE CHAIRMAN suggested the meeting move to the second suggested amendment, the coverage of "pecuniary penalty orders". He asked whether there were delegates who had concern with the extension of the Scheme to orders of that kind. There being none, he suggested that the Meeting move to consider the third suggestion, namely to add to the three orders which could be enforced in a requested country, the enforcement of interim seizure orders. He asked whether there was any delegation which had concern in principle with that proposal.

THE DELEGATE FOR BOTSWANA asked whether the request to restrain someone dealing with certain property would concern property which had already been identified as property derived or obtained, as oppose to property "believed" to have been derived or obtained from a criminal offence. A request for interim restraint implied that the proceedings in the requesting country were not yet complete, and if so was it possible to describe the property definitely as being "derived" - as opposed to property which was "believed to be derived" from criminal activity.

PROFESSOR McCLEAN confirmed that the intention was to freeze the proceeds pending the determination of the proceedings, and as the stage was one of allegation rather than of concluded proof of guilt, the point would have to be looked at by the Drafting Committee.

In reply to a question from the delegate of Australia, Professor McClean said that the intention had been to make it clear that the Scheme provided for the possibility, where countries wished to do so, of allowing for an interim seizure order or restraining order in country A to be enforced in country B. Speed would be of the essence in such circumstances as assets would be being got out of the way. It had seemed to the workshops that there would be advantage in some situations, once an order had been made in one country, to be able to export it to another country without putting together the whole case for a fresh order for an restraining order in the second country. This took account of the fact that it was an interim measure only, and awaited the final outcome of further proceedings.

THE DELEGATE FOR GHANA asked for clarification on the question of interim seizure. If an aircraft were placed under interim seizure and it subsequently transpired that there was insufficient evidence to convict the person concerned, would there be compensation provided for the loss of revenue resulting from the interim seizure? Did the loss lie where it fell, or was the requesting country going to provide compensation for the interim seizure? He suggested that provision be made to cater for payment by the requesting country of any damages or compensation that might arise from the Seizure, where the proceedings pending in the requesting country had either been discontinued or terminated

in favour of the suspect/accused whose assets had been seized in the interim by the requested country.

PROFESSOR McCLEAN drew attention to the provisions in many countries' legislation providing either for undertakings to be given by applicants for interim restraining orders, or for ex post facto compensation. In legislation such as the Canadian legislation there was elaborate protection for third party interests even where the property was the subject of interim restraining measures. All these matters were, he thought, to be dealt with in domestic legislation and in this area, as in others, it would be for the local law of the requested jurisdiction to provide the answers to the questions which delegates were raising.

THE DELEGATE FOR JAMAICA noted the consultant's comments that the law of the requested country would determine whether an interim restraining order would be made. This would normally be the case in questions of private international law. However there was a drafting point. In para. 28 it was the law of the requested country which applied insofar as enforcement orders and confirmation orders were concerned. Further, there was the provision in para. 29 that it was the law of the requested country which determined whether or not property was to be released from the effects of seizure. However there was not such provision in relation to interim orders. He asked the question as to whether there might be a conflict of laws situation in which there was a renvoi situation. Obviously the lex situs would apply where real property was involved, but he felt that the lex fori should apply in any event and the drafting should make this plain.

THE CHAIRMAN accepted the point and referred it to the Drafting Committee. He invited the meeting to take the next point.

PROFESSOR McCLEAN referred to the original text of the forfeiture provisions, which had been put together quickly in the run up to the Harare meeting. The definition provided that the "proceeds of criminal activity" related to property held "by the person convicted of an offence". The definition, he suggested was defective in that benefits could be secured for other persons - a shell company, a spouse, etc. Further in para. 29 (b) the notion of a course of conduct had been addressed, to strike at the fact that very often specimen convictions might be obtained whereas in fact there was a whole history or pattern of drug trafficking enterprise which had led to the accumulation of profits. The definition sought to capture the accumulation. He suggested that experience had since shown that there were better ways of approaching this matter. Further, the Scheme had gone too far in trying to provide a definition, which properly belonged in the domestic law of the requested country. For these interlocking reasons a more neutral draft had been prepared and was before the Meeting.

THE CHAIRMAN asked whether any delegates had problems with the proposal, which seemed to him to be unobjectionable. (There were none).

PROFESSOR McCLEAN said that he fully accepted the need for some clarification of the matter raised by Canada. It seemed to him that the natural practical thing would be that the requesting country would endeavour to have its order, as it stood, enforced in the requested country, and there would be a greater need of documentation if the requested country was to make a new application in its court. Was the proposal that in every case a requesting country was to provide a complete set of documentation? He was sure the meeting would not wish to burden the requesting authority with an obligation to provide a full documentation in every case.

THE DELEGATE FOR CANADA said that if one only provided for direct enforcement, and the requested country was unwilling to enforce directly, then the requesting country was left with no remedy whatever. He suggested that such in circumstances it was no real burden to

give the requesting country a second chance to apply for enforcement by way of a fresh application for an original order in the requested country. He saw this position as being for the benefit of the requesting country, if its original request was precluded either by law or by circumstance.

PROFESSOR McCLEAN accepted that there was a need to provide for both types of procedure to be available, particularly as the UN Convention provided for this. The question he was asking was whether one provided for two separate procedures. It was simply, as he saw it, a question of technique.

THE DELEGATE FOR CANADA recalled that the delegate for Botswana had raised the issue with the respect to para. 27, on the standard of belief where property was "believed" to have been obtained from a crime, and which was the subject of an application for a restraining order. This was the reason why the two concepts could not be mixed.

THE CHAIRMAN invited the Drafting Committee to examine the point carefully. He suggested that the meeting focus now on the issue as to whether the additional flexibility should be brought into the scheme, as proposed by Canada, and invited comments from any delegate who felt uneasy about agreeing to this added flexibility, especially given the incorporation of such flexibility in the 1988 UN Convention. There being none, he noted the conclusion of discussion of Agenda Item 6B.

Questionnaire

THE CHAIRMAN invited Mr Anthony Webb, QC (Consultant to the Commonwealth Secretariat) to speak briefly to a summary of the responses to the questionnaire which had been circulated to governments.

Mr Webb explained how the tables had been put together and invited delegates to discuss any particular points with him outside the formal meeting.

Wednesday 21 June 1989

THE CHAIRMAN (The Hon Tan Book Teik) reported to the meeting that that the Drafting Committee had succeeded in meeting at 9 a.m. that morning, despite the London-wide transport strike. They had prepared a detailed report for consideration by the Meeting.

AGENDA ITEM 8

THE CHAIRMAN invited the leader of the Canadian delegation, Mr D C Prefontaine to assume the chair for this agenda item.

THE CHAIRMAN (Mr D C Prefontaine) noted that there was before the Meeting a note on implementation, to date, of the Scheme for the Transfer of Convicted Offenders. This showed that while no country had implemented the Scheme as such, the UK had enacted legislation in 1984 to give effect to the European Convention on the Transfer of Convicted Persons, which had been extended to Cayman Islands, Hong Kong and the Isle of Man. However the Scheme had not been adopted as such by the UK because of difficulties with the acceptance provision not meeting the requirements of its legislation. Kiribati, Malta and Nigeria had all enacted legislation but no reciprocal arrangements had yet been made. His own country had legislation and had arrangements with a number of countries. He invited further comments as to progress with implementation in the Commonwealth context.

THE DELEGATE FOR MALTA explained that occasional ad hoc arrangements had been made for the transfer of convicted offenders. In most instance these had not been with Commonwealth countries.

THE DELEGATE FOR CANADA wished to record the fact that the Canadian Transfer of Offenders Act had been enacted in 1978 which had enabled it to accede to the Council of Europe's Convention, to which 14 countries (including Canada) were now parties. They also had bilateral arrangements with 17 countries. Although they had not implemented the Scheme as such, their legislation was consistent with the Commonwealth Scheme and they were in a very strong position and able to negotiate arrangements expeditiously with any country which was interested. In the past nine years they had brought back to Canada some 225 prisoners and they had returned, or surrendered, principally to the United States, 96 prisoners.

The procedure for bilateral arrangements was expeditious and usually effected through diplomatic missions abroad. He encouraged countries who were interested in working out arrangements with Canada to consider going through diplomatic channels for the purposes of starting talks.

THE DELEGATE FOR NIGERIA noted that his country had enacted legislation to enable the Scheme to be implemented, and they thought they had done all that was required of them. They were of the view that all that remained was for other Commonwealth countries to promulgate similar legislation in which case the Scheme would come into force by way of reciprocity between those countries.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT apologised to the Delegate for Nigeria as it was, of course, wrong to say that no country had implemented the Scheme as such - Nigeria had done so, and it was the Scheme which had not entered into force because a move to do so by a second was still awaited.

THE DELEGATE FOR KIRIBATI indicated that his country was willing to enter into arrangements with countries, both Commonwealth countries and others. They had their legislation in place, and they were waiting, in particular, for their neighbours to catch up. He was hoping to conclude arrangements with Nauru, as they had a number of their citizens working in Nauru, and also with Tuvalu and the Marshall Islands.

THE DELEGATE FOR BRITAIN noted that, like Canada, they subscribed to the European Convention on the Transfer of Sentenced Persons. There had been some practical difficulties where the result of a transfer had led to a substantially reduced sentence, and this had caused some difficulty. The arrangements had started off very slowly, but they would wish to encourage both the European and the Commonwealth arrangements to be used more widely than to date.

THE CHAIRMAN then invited Britain to speak to the proposed amendment to the Commonwealth Scheme for the Transfer of Convicted Offenders.

THE DELEGATE FOR BRITAIN explained that they had had some difficulty. They wished to subscribe to the Commonwealth Scheme and their enabling legislation authorised them to arrange transfers where they were parties to international arrangements providing for transfers. They had had some difficulty over the acceptance provision in article 19. It was unclear as to how countries would know who belonged to the arrangement. They were therefore suggesting an amendment, if other countries were agreeable, so that there would be a requirement for formal notification to the Secretariat of acceptance of the Scheme and a deposit with the Secretariat of their enabling legislation. Such an amendment would enable Britain then to give effect to the scheme.

THE CHAIRMAN read the proposed amendment: "Any country wishing to adopt the Scheme shall formally notify the Commonwealth Secretary-General that the provisions of this Scheme shall govern the transfer of prisoners between that country and any other country that accepts the Scheme, and shall inform him of the proper channels for communication and deposit with him a copy of its primary legislation."

THE DELEGATE FOR BERMUDA asked what the word "formally" meant.

THE CHAIRMAN suggested that this involved a communication with the Secretary-General. He invited the Commonwealth Secretariat to explain its understanding of the position.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT explained that in the case of Nigeria the Ministry of Justice and Attorney General had written to the Secretary-General stating that he wished to advise that his government "had formally adopted the Commonwealth Scheme" and attached a copy of the legislation to his letter. It seemed that Nigeria had anticipated that such a notification was properly called for. He understood that the use of the word "formal" had some advantages insofar as the UK legislation was concerned.

THE DELEGATE FOR JAMAICA asked for clarification. He asked whether the meeting was coming close to something that was near and dear to his own delegation's hearts, namely a formal treaty. He asked why this notification procedure was built into the Scheme for the transfer of convicted offenders, but not into the others.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT recalled that the provision had been inserted in the Scheme because there was a feeling that there should be a central point which could be contacted to ascertain whether there were arrangements in place, and if so what the proper channels of communications were. The position had been asked for as a matter of practicality. He accepted that one could make the same argument in respect of the other Schemes, but perhaps the difference was that mutual legal assistance allowed for a variety of responses whereas the present scheme was really a single issue Scheme.

THE DELEGATE FOR JAMAICA suggested that the draft addressed looked at intention, and he was not clear why.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT said that a suggestion had been received that the opening of the paragraph be reworded.

THE DELEGATE FOR BERMUDA suggested that there were two positions. One was where a country enacted legislation which said that the Scheme would govern the transfer of convicted offenders; the other was where a country enacted its own legislation, which followed the Scheme but did not actually say that "the Scheme shall govern" transfers. What would be the position in the later case? What was needed was a formal words which would meet the British point was ensuring that countries who implemented the scheme notified the Commonwealth Secretary-General so that he could let everyone else know that the arrangements were in force.

THE CHAIRMAN noted that the scheme could be implemented in a number of ways. He asked the Commonwealth Secretariat to comment.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT suggested that the existing text be completely rewritten, and taking up the point made by the Delegate of Bermuda.

THE CHAIRMAN invited further comments.

THE DELEGATE FOR JAMAICA hesitated to take the floor again, but pointed out that they would be making the Commonwealth Secretary-General a depository whereas previously the provision had been trying to make the "consensual link" between the participating countries, and creating the mutual obligations. Under the re-draft the Secretary-General would simply be a depository, and receive certain types of information. However if the intention was simply to have the Commonwealth Secretary-General act as a depository, then the suggested amendments achieve that.

THE DELEGATE FOR BERMUDA said that he had thought this to be the original intention. He noted that in the Mutual Legal Assistance Scheme there was a parallel in para. 32, which similarly provided for notification of central authorities to the Secretary-General so that countries could easily have access to this information. He was happy with the proposed amendment.

THE CHAIRMAN noted the Meeting's agreement to the concept and invited the Secretariat to fine tune the wording for subsequent consideration by the Meeting. As no other amendments had been proposed, he declared the agenda item completed.

AGENDA ITEM 9

THE CHAIRMAN (The Hon. Tan Boon Teik) said that he had resumed the chair only to invite Mrs Shirley Miller QC of Jamaica to assume it.

THE CHAIRMAN (Mrs Shirley Miller, QC) recalled that it had been in Winnipeg in 1977 that the idea was thrown up for arrangements for mutual assistance in criminal matters to be explored. Since then, interest in the matter had grown considerably and had resulted in the Commonwealth Scheme. But the involvement of Commonwealth countries had not ended there, as there were also the questions of bilateral and multilateral relations with non-Commonwealth countries in the area of mutual legal assistance. This could be either the United States, where there had been various developments, or with civil law countries. She suggested that the agenda item would enable the delegates to share experience in negotiating treaties with non-Commonwealth countries. Speaking for Jamaica, they had had limited experience in the field in negotiating with the USA. And those experiences would be shared in due course. In the meantime she invited other delegations to share the experience in this area.

THE DELEGATE FOR AUSTRALIA recalled that most delegates would be familiar with what Australia had been doing, from their attendance at the three regional workshops. There was a paper by Mr Herman Woltring in volume 4 of the materials published by the Commonwealth Secretariat which summarised the negotiating experience of Australia, the source of problems they had encountered in dealing with civil law jurisdictions and in general how these had been overcome. For more specific details on particular problems, the texts of four of their treaties was also reproduced in volume 4. They proposed to continue to provide copies of their mutual assistance treaties to the Commonwealth Secretariat so that these could be made available to any other countries who might be interested. They had signed a treaty with Canada the previous day, and would be signing with Spain and Portugal the following week. They had signed treaties with the Philippines and with the UK (limited to drugs). They had recently concluded their negotiations with France, and had found them very reluctant to put proceeds of crime clauses in their mutual legal assistance treaties notwithstanding their participation in the Commission on Narcotic Drugs meetings in Vienna. Since France were about to sign the UN Convention they would become obliged to provide for a forfeiture law. When anyone found that the French had overcome their present reluctance, Australia would be only too happy to know! Similar difficulties had been experienced with Finland on the question of forfeiture.

THE CHAIRMAN noted that all delegates had been benefiting greatly from the Australian experience and were grateful for the cooperation which Australia had been according and had indicated that they were prepared to continued to accord.

THE DELEGATE FOR CANADA said that they were awaiting the US Senate to ratify their treaty with the USA, which was expected towards the end of this year. They had also negotiated with France, the Netherlands and Switzerland and would hopeful to go to signature soon. They had encountered the same problem as Australia, but hoped they had achieved the best possible package achievable under present conditions.

THE CHAIRMAN noted that with the growth in negotiation, some of these barriers will start break down. Thus keeping in touch with each other was a crucial part to the process.

THE DELEGATE FOR JAMAICA had had some experience in negotiating with the United States of America. The negotiations started in 1983 and there was now a text which had been initialled by both countries for signature and ratification. Volume 4 page 190 set out some of the problems they had encountered and he would not deal with these in any detail. He wished to highlight the question of a material witness. One of the issues concerned US law which empowered the US to detain a person as a "material witness". It was thought that a witness who travelled voluntarily would be a cooperative witness, and that it would be unlikely that such a person would be detained. However the possibility existed, and they had considered inserting a provision in the treaty advising witnesses of that possibility. Eventually it had been ommitted on the basis that administratively the witness would be advised of the position before that witness travelled to the United States to give evidence.

A second issue was privilege. This had proved a problem and the only way in which the matter could be concluded was to have the treaty silent on the subject, leaving it each country to deal with the matter saw fit in its own domestic legislation. This was not an ideal situation that it was the type of action which was, from time to time, unavoidable.

A third issue was minimum criminality. Jamaica had insisted that the treaty not be used as an opportunity to embark on fishing expeditions and that there should be a minimum criminality element in relation to all requests. After some negotiation this had been agreed. Such an insistence was also consistent with the Commonwealth Scheme.

A further issue was the prosecution of persons on the grounds of race, colour, political opinions etc. His government attached much importance to this issue and it proved almost intractable, but they had succeeded in securing a provision to the effect that a request might be refused where compliance with it would facilitate the person's prosecution or punishment on account of race, religion, nationality or political opinions. Again, this was consistent with the Commonwealth Scheme.

THE DELEGATE FOR INDIA reported that his government had recently entered into a Memorandum of Understanding for mutual legal assistance in criminal matters with Switzerland. The main problem they had encountered had been the principle of dual criminality. They were many acts which were offences in India which were not offences in Switzerland, and in such cases Switzerland refused to provide mutual legal assistance. India had elaborate laws in the area of foreign exchange control, and Switzerland had refused access to bank accounts etc. in such cases. This had been overcome by providing that if money were deposited in a Swiss bank by means of fraud, assistance would be available.

THE DELEGATE FOR THE BAHAMAS recalled that they had a treaty with the United States which was also awaiting approval by the US Senate. The main issue which had confronted them related to bank secrecy. It was felt that The Bahamas should endeavour to go as far as possible to keep bank records confidential, but nonetheless ensure as far as possible that

criminals would not abuse the banking system. In their agreement with the US, they had agreed to allow the opening of bank accounts and the waiver of secrecy where it could be shown that the information sought related to someone alleged to have been involved in drug trafficking or certain other operations. In such cases, bank secrecy laws would even be waived in respect of income tax measures. Even though the treaty was not yet in force, The Bahamas had on two occasions in practice allowed this waiver where the US had been able to substantiate that the persons against whom the information was sought could not have been prosecuted other than by the Inland Revenue Service. The Bahamas had allowed these requests as being the lesser of two evils.

THE DELEGATE FOR NIGERIA reported on his country's experience in negotiations with the United States. They had signed an agreement on procedure for assistance in criminal matters. The executive agreement did not need to go to Congress for ratification but dealt mainly with procedure. Matters covered by it were listed in the Commonwealth Scheme.

They had also negotiated a treaty with the United States on mutual assistance in criminal matters. When the treaty had been signed and ratified it would replace the executive agreement. In the meantime, relations between the two countries were governed by the executive agreement. They now had some limited experience, and this accorded with the points which had been raised by other delegates. There were some additional issues, however. They had based their negotiations on the Commonwealth Scheme, but had found that different interpretations had been placed on the limitations on the use for which evidence could be put which had been obtained under mutual legal assistance arrangements. The US had a narrower construction of this terminology in that any evidence or information obtained under the treaty could only be used by the government, or central authority, and only for criminal matters and could not be used in civil cases or by private individuals. On the question of forfeiture, the US accepted in principle but sought a wider scope in attacking instrumentalities as well as proceeds, and including aircraft and other such conveyances. The United States had agreed with them on the question of assets-sharing where forfeiture was achieved as a consequence of mutual legal assistance contributing to the process.

THE DELEGATE FOR BRITAIN expressed the view that as far as general mutual legal assistance arrangements were concerned, they would be able to provide assistance to any country which approached them under legislation which was presently being drafted. They had not been persuaded that there was any particular advantage to the negotiation of bilateral arrangements with countries whether inside or outside the Commonwealth, not as a question of principle but as a perceived need. Obviously they were prepared to do so where a country had a particular need for such an approach. However, whilst there was a clear need for bilateral agreements in relation to confiscation because of the particular complexities of the subject, the only country with which they had so far found it necessary to negotiate a full mutual legal assistance agreement was the United States. Talks had already started with further talks scheduled for later in the year.

THE DELEGATE FOR LESOTHO recalled that his country was completely surrounded by South Africa, a country which had been in the Commonwealth until 1961. South Africa was their only neighbour. Cases did arise for mutual legal assistance and bilateral arrangements existed for these to be dealt with on an ad hoc basis. However he stressed that his government never touched anything that had a political flavour because of the system of apartheid practised in South Africa. It was unfortunate, but it was a geographical fact that they were surrounded by such a neighbour.

THE CHAIRMAN, in summarising the discussion, noted a growing store-house of experience to assist Commonwealth countries as they continued to enter into growing numbers of bilateral relationships with non-Commonwealth countries in the field of mutual legal assistance in criminal matters. The United States of America figured very largely in this process, and

they in Jamaica had found it particularly useful in their negotiations with the USA to look at other treaties which had been negotiated by other Commonwealth countries to see how various problems had been solved. It had been useful at times to point to a solution reached in these negotiations where they were trying to insist on a particular position in relation to the USA. India had mentioned the question of double criminality with Switzerland, which was another problem Jamaica had had to deal with in respect of the USA.

There was a technical problem which had not been mentioned, which was that of language. Jamaica had wisely chosen an English speaking country with which to negotiate!

The fact that the Commonwealth scheme was in the background had also proved very helpful as they tried to negotiate their bilateral arrangements in a manner which was consistent with the Commonwealth scheme even though it was strictly speaking irrelevant.

AGENDA ITEM 10

THE CHAIRMAN (The Hon. Tan Boon Teik) noted that this item afforded an opportunity for delegates to mention how administratively they had carried out the mutual legal assistance arrangements. He asked Australia to commence the discussion.

THE DELEGATE FOR AUSTRALIA said that they had found that the negotiation of treaties had generated a very substantial increase in the case work, such as the number of requests which they had received. Careful planning needed in relation to resources because the handling of requests - whether outgoing or incoming - did have resource complications. There was also a real need to train law enforcement authorities. The development of the arrangements tended to be undertaken by a law ministry, not by a law enforcement agency, and so there was some training required to bring others up-to-date and to ensure that they understand what was involved. It was only after about three years that the utilisation of forfeiture provisions would generate a useful fund of experience.

AGENDA ITEM 11

THE CHAIRMAN invited Mr Adair Dyer of The Hague Conference on Private International Law to make a presentation on mutual legal assistance in civil matters as provided for by the Hague Conventions.

MR DYER expressed his organisation's pleasure at being able to contribute to the proceedings.

For some 35 years the area of mutual assistance in civil matters had been one of increasing activity for The Hague Conference. He expressed particular appreciation for the close relationship which had developed between the Hague Conference and the Commonwealth Secretariat. He paid particular tribute to the contributions which Professor McClean had been able to make at The Hague.

He referred in turn to The Hague Convention on the Service of Process (now in force between 27 countries), The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (now in force between 20 countries) and The Hague Convention Abolishing the Legislation of Foreign Documents (now in force between 36 countries).

He emphasised that it was open to countries who were not members of The Hague Conference to accede to the conventions, and that procedures existed for this. He stressed, too, that the various conventions developed by the Hague Conference had quite deliberately set out to bridge differences in legal systems and it was a fact that all the conventions which

had been concluded had been ratified by both civil and common law countries. It had been true in the early years of the Hague Conferences operations that the civil law countries had been dominant but since the United States, Canada and Australia had joined Britain as common law members of the Conference, the work of the conference had been greatly strengthened by wider participation on the part of common law jurisdictions.

He noted that the Hague Convention on international Child Abduction was next to be discussed by the meeting, and drew attention to the Australian experience as set out in the Child Abduction Working Paper.

One of the advantages of the various Hague Conventions was that they gave access through a single instrument to a substantial number of countries. Thus it was highly economical to join a multilateral convention which created appropriate types of cooperation in civil matters as opposed to negotiating these on a bilateral basis. This was particularly so when going beyond the Commonwealth grouping.

The Conference was also involved in having periodic meetings on the workings of the various conventions, both in practice and in content.

PROFESSOR McCLEAN made a plea that as many countries as possible accede to the Convention to minimise the misery caused to parents who were unlawfully denied custody of their children.

THE DELEGATE FOR BRITAIN said that the UK had introduced legislation to implement the convention in 1986. They had had two to three years' experience in operating the system. In the period since August 1986 they had received 42 applications from other states which operated the same system, and had made 32 orders that the child in question should be returned to the applicant. These orders had been made in the UK courts. In five of the remaining ten cases, the courts had found against the applicant and determined that the child should stay where it was. The other five cases had been disposed of in other ways. In the same period, the UK had made 82 applications to a variety of countries, most of them non-commonwealth. Of these, only 21 had been successful. They thought there were some reasons for the differing rates of success. The first problem with the convention was that too few countries had signed it, and a person abducting a child, who was knowledgeable on the topic, can choose to take the child to a state to which the convention did not apply. Secondly, it was not simply a question of just signing or even ratifying the convention - one member of the European Community had signed and ratified the convention but had not yet introduced any legislation to implement it, with the result that there were still no arrangements in force under the convention. Even when legislation had been enacted two further problems arose. The first was that of practical assistance to the woman (since it usually was a woman) who was trying to secure the return of the child, who was unlikely to be rich, unlikely to be knowledgeable as to the law in the country to which the child had been taken and therefore needed help. The UK had established a panel of solicitors to whom any application was referred, who were knowledgeable in the relevant UK law and well placed to assist the applicant. This meant that the applicant did not have to work her way through the legal system from scratch. Secondly, the UK tried to move reasonably quickly because in practice, if the case took a long period of time there was a risk of the child disappearing before it was concluded. Delay in such cases is the same as negation. They therefore tried to resolve these cases in a matter of days rather than a matter of months. Where an appeal was involved, they try to have the matter resolved at least within weeks. In their experience this procedure had been reasonably helpful to applicants. He assured delegates that the United Kingdom's Central Authority (which was in fact the Lord Chancellors Department) would do all it could to be helpful to requests received from Central Authorities whilst of course remaining impartial. He expressed his country's hope that as many countries as possible would consider becoming party to the Convention which was one capable of removing a good deal of misery from individual citizens and their children.

THE DELEGATE FOR AUSTRALIA echoed the comments of the British delegation. It had also been their experience that increasing number of children were being taken from Australia, and the statistics suggested that almost as many children were being brought to Australia after they had been abducted by the non-custodial parent.

Australia had become a party on 1 January 1987, and had subsequently received 28 applications for action to be taken in Australia and had made 30 applications to Convention countries requesting the return of children abducted from Australia. Increasingly they received calls from distraught politicians who were being pressured by constituents, and she had had difficulty explaining that extradition was of no help in such matters and further that the country to which the child had been taken was not a party to the convention. At least seven or eight Commonwealth countries had fallen into this category within the past several months. It was the view of Australia that both the parents and interests of the child could be enhanced by maximum cooperation being assured in this area.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT explained by way of background that The Hague Convention under discussion was regarded by Commonwealth Law Ministers as very much a fruit of Commonwealth endeavour. He paid tribute to the hard work and inspiration of Mr Adair which had brought about the Convention and recalled that Canada had been at the forefront in feeling the need for a Convention such as this. Because of concern over the topic the matter had been listed for the agenda for the 1980 Meeting of Commonwealth Law Ministers in Barbados. The day before the Meeting was due to open, the estranged wife of the Chairman of the Barbadian Bar had flown into Barbados on a United Nations passport, had gone to the school play-ground where the child was playing (the father having custody after a full hearing in Barbados) and had removed the child from the play-ground. By the time the alarm was raised, mother and child were on a flight to France, and that was the end of the matter. Such a sensation had given particular poignance to the deliberations of Law Ministers, as it brought home very forcefully the agony involved in such an abduction.

There was a further matter. Time and again applications were coming before courts brought by parents who were living out of the jurisdiction who wished to take a child, for the purpose of access, to the country where they were living. A mother might have custody in Britain with a father living in New Zealand. The father wished to have the child for holiday in New Zealand. The Secretariat had found that, with surprising frequency, they were receiving telephone calls from judges from their chambers, asking what would happen if he were to allow such access and the child was not returned. Too often, the Secretariat had to advise that there would be no redress. It was therefore the perception of the Secretariat that legitimate applications for access were being denied by courts simply because not enough countries were participating in the Convention. He suggested they bear in mind that access was a right of the child, not just of the parent. Bearing this in mind, and seeing that the UK, Canada and the United States had all ratified the Convention, its potential assistance in helping with other Commonwealth countries was very considerable. He suggested that the Meeting might wish to pick up the suggestions made by Australia and Canada to the effect countries who had not done so or to consider becoming parties to this convention.

MR DYER acknowledged the considerable contributions made by Commonwealth countries to the production of the Child Abduction Convention. It had been a proposal by the Canadian government in 1976 which had started them off on the process of undertaking the necessary research. A Scottish law professor had served as president of the Commission, and several Commonwealth countries were among the 13 who were now parties to the convention.

The convention depended for its ultimate effect on having a broad network of countries cooperating in the matter. There were a number of countries in the process of going forward with ratification and he expected the number to be 18 or 20 within the next two

years. Once again, the Commonwealth Secretariat had prepared explanatory documentation for Commonwealth jurisdictions wishing to accede to the Convention and the Permanent Bureau was always available to provide assistance and documentation.

Notes on the Servicing of the New Arrangements

THE CHAIRMAN noted the need for government lawyers to have ready access to up to date information on mutual legal assistance arrangements. This had been provided by the Commonwealth Secretariat to date, but it was a growing field making increasing demands on its slender resources. The proposal was that the Meeting invite the Secretariat to explore the proposal to establish an information system with major legal publishing houses so as to establish the cost-effectiveness of such a service to Commonwealth governments. If a major legal publishing house were prepared to have such a matter farmed out to it, it might result in considerable savings to governments and to the Secretariat.

THE DELEGATE FOR BERMUDA said that something had to be done and he asked what support there would be for an alternative proposal, namely a recommendation that the Legal Division of the Commonwealth Secretariat get more manpower. He asked how practical such a counter proposal might be. He knew how hard-pressed and short of manpower the Legal Division was. Delegates around the table who received assistance on regular basis, such as his own, were in a position to appreciate just how overstretched the Legal Division was.

THE CHAIRMAN asked the representative of the Commonwealth Secretariat to respond to the suggestion.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT expressed appreciation for the remarks by the delegate for Bermuda, but expressed the view that before such a course could be followed the Finance Committee under which the Secretariat operated would expect all other avenues to be exhausted. He cautioned as well that notwithstanding a strong plea, even from Law Ministers, it would not necessarily follow that additional staff would in fact be provided by the Finance Committee on which all Commonwealth governments were represented. The Secretariat was under pressure to keep its staff to a minimum, and in the order of priorities it might be that a new post was needed to coordinate the various Commonwealth activities in the drugs area, of which law was only one.

THE CHAIRMAN noted that the meeting appeared to agree with the proposal made by the Secretariat. He invited the Commonwealth Secretariat to speak briefly on the question of the costs of distribution of the Commonwealth Law Bulletin. This was a growing item on the Secretariat's budget, and delegates had been invited to suggest how distribution might be made more effective whilst reducing costs.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT suggested that the most fruitful approach might be for individual delegates who had ideas as to how savings might be achieved to mention these to the Secretariat, either during the Meeting or subsequently. Then appropriate bilateral arrangements could be made. Their postal costs were enormous, and the Legal Division accounted for a highly disproportionate amount of the Secretariat's postal vote. Concern had been expressed in Finance Committee, but not about production of the Commonwealth Law Bulletin, as that was not in issue. The concern was the cost of its distribution. If ideas there were any for the saving of costs in distribution, governments would be saving their own money and this would also be much appreciated by the Secretariat.

THE CHAIRMAN asked if distribution through High Commissions could be used.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT cautioned that, for reasons of cost to the High Commissions themselves, some High Commissions were loathe to play a role in this way. However the Secretariat would be happy to pursue the matter with individual High Commissions who were prepared to play such a role.

Consideration of report of the drafting committee

(Interventions to correct minor typographical and stylistic matters are not recorded here).

THE DELEGATE FOR JAMAICA recalled that in the course of the discussions he had asked whether in fact any countries had experienced difficulties with the prima facie rule. His question had remained unanswered and he asked whether, in that respect, the report from the Drafting Committee accurately reflected the discussion. It would, he suggested, be entirely appropriate for delegations, if they had expressed difficulties, to voice them at this stage.

THE DELEGATE FOR AUSTRALIA said it was a little difficult in a forum such as the Meeting to be articulating in public specific difficulties which were being experienced with fellow Commonwealth member countries. In a sense the point was well taken, but had been very conscious when he had been making his own remarks that his own country had been experiencing very real difficulties. He had spoken in generalities and not in specifics in order to avoid embarrassment.

THE CHAIRMAN noted that the draft as it stood now accurately recorded the discussion. (Suggestions for amendments were made by the delegations of: Australia, Bermuda, Botswana, Britain, Canada, Dominica, Hong Kong, Jamaica, Jersey, Lesotho, Malaysia, Malta, Sri Lanka, Tanzania, Zambia, Zimbabwe, CARICOM, Professor McClean and the Commonwealth Secretariat).

Next meeting

THE CHAIRMAN invited the Commonwealth Secretariat to introduce discussion on the next meeting of Senior Officials from Law Ministries.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT suggested that delegates might wish to reflect on the timing for their next meeting. In the normal course of events, Senior Officials would be meeting briefly on Sunday 22 April on the eve of the next Law Ministers Meeting. He suggested that experience in Zimbabwe, where the Harare Scheme and the Scheme for the Transfer of Convicted Offenders as well as amendments to Commonwealth Extradition Arrangements had all been agreed, suggested that it was extremely unsatisfactory for Senior Officials to be dealing with substantive matters at a time when their Law Ministers were meeting, or just about to meet. He recalled that the Meeting had decided to consider a recasting of the Canadian proposal in respect of the prima facie case. It was expected that the Canadian's revised paper should be in Commonwealth capitals well before the end of the year, giving Commonwealth Governments perhaps six months in which to consider policy aspects prior to Senior Officials coming together again. He suggested that it might be too optimistic to expect the matter to be concluded within the space of an afternoon on the eve of the Law Ministers Meeting.

The week before the Meeting of Commonwealth Law Ministers in Christchurch, the Commonwealth Law Conference would be held in Auckland, also in New Zealand. A good number of senior officials and Ministers would be attending the Commonwealth Law Conference in Auckland. With the meetings being held back-to-back it would make possible a single visit

covering both major Commonwealth legal events. Its also created the opportunity for Senior Officials from Law Ministries to meet late in the Commonwealth Law Conference week, on the afternoon of Thursday, 19 April. This was scheduled as a vacant half-day on the Conference programme. He suggested that delegates consider inviting the Secretary-General to consider reconvening the meeting at an appropriate time on the eve of next Law Ministers Meeting, and perhaps in Auckland on 19 April. This would mean that some hours could be spent on the Thursday without the guillotine of the start of the Law Ministers Meeting hanging over the heads of delegates. If the discussions had not concluded in Auckland, it would be possible for them to be resumed in Christchurch were this necessary. If agreement could not be reached, then clearly the matter would have to wait for another three years before Law Ministers next met. He suggested, however, that it would be a pity if agreement were achievable, for an effort not to be made to establish common ground and agree amendments in 1990 rather than 1993.

THE DELEGATE FOR BERMUDA asked to be the first to recommend that the meeting do indeed request the Secretary-General to reconvene the meeting in Auckland on 19 April.

THE CHAIRMAN recorded the meeting's agreement to this course.

THE DELEGATE FOR CANADA said that he thought that course was eminently sensible and they would endeavour to have the document ready, in close consultation with Australia and others, in accordance with the timetable which Mr Pope had indicated.

Appreciation

THE DELEGATE FOR DOMINICA expressed his own appreciation, and that of all the delegates present, for the quality of leadership and the guidance which the Chairman, and his deputies, had given the meeting. It had been run with a firm but gentle hand, and it was to the Chairman's credit that the business had been dealt with so efficiently. Lawyers had the reputation of being long-winded and for stretching out discussion, but a combination of excellent weather and the Chairman's guidance had combined to tame these temptations to linger. He expressed gratitude, too, to the distinguished delegates from Australia, Canada and Jamaica for the sessions which they had chaired. All delegates were greatly rewarded by the meeting. He was sure every delegate had benefited greatly and he was confident that the deliberations would assist them all at their national level as well as the forthcoming Law Ministers Meeting to wrap up and put in place the various Schemes. (Applause).

THE CHAIRMAN thanked the delegate for Dominica for his generous words. He thanked the meeting for the honour of electing him as its Chairman. He thanked the staff of the Legal Division of the Commonwealth Secretariat for the preparatory work which they had undertaken, not only for the meeting but also for himself as chairman. He recorded the indebtedness of the meeting in particular to their consultant, Professor McClean. He added his own appreciation of the parts played by delegates of Australia, Canada and Jamaica in relieving him of part of the burdens of office. He knew he spoke for them as well in saying that the meeting had been so successful because of the positive spirit in which Commonwealth Lawyers traditionally approached their common problems.

END

MEETING OF SENIOR OFFICIALS FROM LAW MINISTRIES

London, 19-21 June 1989

A G E N D A

1. Opening
2. Election of Chairman
3. Introductions of Delegations
4. Adoption of Agenda
5. The Scheme for the Rendition of Fugitive Offenders within the Commonwealth
 - (a) country reports on implementation by legislation
 - (b) practical experience under the Scheme
 - (c) consideration of proposals for amendment
6. The Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth
 - (a) country reports on implementation by legislation
 - (b) the United Nations' Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (done at Vienna on 20 December 1988) and the relationship of its mutual assistance provisions to the Commonwealth Scheme
 - (c) practical experience under the Scheme (excluding forfeiture of criminal profits)
 - (d) consideration of any proposals for amendment (if any)
7. The forfeiture of criminal profits
 - (a) country reports on legislation providing for domestic forfeiture and experience and practice under it
 - (b) country reports on legislation for the enforcement of forfeiture orders made abroad and practice under it
 - (c) consideration of proposals for amendment to the relevant provisions of the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth

8. The Commonwealth Scheme for the Transfer of Convicted Offenders
 - (a) country reports on implementation by legislation
 - (b) practical experience
 - (c) consideration of any proposed amendments (if any)
9. Bi-lateral Arrangements for Mutual Legal Assistance in Criminal Matters with non-Commonwealth Countries
 - (a) country reports
 - (b) practical experience
10. Administrative Arrangements for Handling Mutual Legal Criminal Assistance
11. Any Other Business

Consideration of report to the 1990 Meeting of Commonwealth Law Ministers.

Close

19 February 1989

AMENDMENTS RECOMMENDED TO THE SCHEME FOR MUTUAL ASSISTANCE
IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH

1. Paragraph 1(3) (1)

To read: (i) tracing, seizing and forfeiting the proceeds of
 . criminal activities.

2. Paragraph 3(1)

To read: For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted has been committed.

Insert a new paragraph 3(3):

"Forfeiture proceedings" means proceedings, whether civil or criminal, for an order -

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

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

(ii) used in, or in connection with,

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

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

3. Transfer paragraph 22(1) to become paragraph 21(3), and omit paragraph 22(2).

4. Insert a revised text of paragraph 22:

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

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

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

5. Delete paragraphs 26 to 29 and substitute:

Tracing the proceeds or instrumentalities of crime

26. (1) A request under this Scheme may seek assistance in identifying, locating, and assessing the value of, property believed to have been derived or obtained, directly or indirectly, from, or to have been used in, or in connection with, the commission of an offence and believed to be within the requested country.
- (2) The request shall contain such information as is available to the Central Authority of the requesting country as to the nature and location of the property and as to any person in whose possession or control the property is believed to be.

Seizing and confiscating the proceeds or instrumentalities of crime

27. (1) A request under this Scheme may seek assistance in securing
- (a) the making in the requested country of an order relating to the proceeds or instrumentalities of crime; or
 - (b) the recognition or enforcement in that country of such an order made in the requesting country.
- (2) For the purpose of this paragraph, "an order relating to the proceeds or instrumentalities of crime" means
- (a) an order restraining dealings with any property in respect of which there is reasonable cause to believe that it has been derived or obtained, directly or indirectly, from, or used in, or in connection with, the commission of an offence;
 - (b) an order confiscating property derived or obtained, directly or indirectly, from, or used in or in connection with, the commission of an offence; and
 - (c) an order imposing a pecuniary penalty calculated by reference to the value of any property so derived, obtained or used.
- (3) Where the requested country cannot enforce an order made in the requesting country, the requesting country may request the making of any similar order available under the law of the requested country.
- (4) The request shall be accompanied by a copy of any order made in the requesting country and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required in connection with the procedures to be followed in the requested country.
- (5) The law of the requested country shall apply to determine the circumstances and manner in which an order may be made, recognised or enforced in response to the request.

Disposal or release of property

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

- (a) forfeited; or
 - (b) obtained as a result of the enforcement of a pecuniary penalty order as a result of a request under this Scheme.
 - (2) The law of the requested country shall apply to determine the circumstances in which property made the subject of interim seizure as a result of a request under this Scheme may be released from the effects of such seizure.
6. The remaining paragraphs to be renumbered appropriately.

AMENDMENTS RECOMMENDED TO THE SCHEME FOR MUTUAL ASSISTANCE
IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH

1. Paragraph 1(3) (1)

To read: (1) tracing, seizing and forfeiting the proceeds of criminal activities.

2. Paragraph 3(1)

To read: For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted has been committed.

Insert a new paragraph 3(3):

"Forfeiture proceedings" means proceedings, whether civil or criminal, for an order -

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

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

(ii) used in, or in connection with,

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

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

3. Transfer paragraph 22(1) to become paragraph 21(3), and omit paragraph 22(2).

4. Insert a revised text of paragraph 22:

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

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

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

5. Delete paragraphs 26 to 29 and substitute:

Tracing the proceeds or instrumentalities of crime

26. (1) A request under this Scheme may seek assistance in identifying, locating, and assessing the value of, property believed to have been derived or obtained, directly or indirectly, from, or to have been used in, or in connection with, the commission of an offence and believed to be within the requested country.
- (2) The request shall contain such information as is available to the Central Authority of the requesting country as to the nature and location of the property and as to any person in whose possession or control the property is believed to be.

Seizing and confiscating the proceeds or instrumentalities of crime

27. (1) A request under this Scheme may seek assistance in securing
- (a) the making in the requested country of an order relating to the proceeds or instrumentalities of crime; or
 - (b) the recognition or enforcement in that country of such an order made in the requesting country.
- (2) For the purpose of this paragraph, "an order relating to the proceeds or instrumentalities of crime" means
- (a) an order restraining dealings with any property in respect of which there is reasonable cause to believe that it has been derived or obtained, directly or indirectly, from, or used in, or in connection with, the commission of an offence;
 - (b) an order confiscating property derived or obtained, directly or indirectly, from, or used in or in connection with, the commission of an offence; and
 - (c) an order imposing a pecuniary penalty calculated by reference to the value of any property so derived, obtained or used.
- (3) Where the requested country cannot enforce an order made in the requesting country, the requesting country may request the making of any similar order available under the law of the requested country.
- (4) The request shall be accompanied by a copy of any order made in the requesting country and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required in connection with the procedures to be followed in the requested country.
- (5) The law of the requested country shall apply to determine the circumstances and manner in which an order may be made, recognised or enforced in response to the request.

Disposal or release of property

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

- (a) forfeited; or
 - (b) obtained as a result of the enforcement of a pecuniary penalty order as a result of a request under this Scheme.
- (2) The law of the requested country shall apply to determine the circumstances in which property made the subject of interim seizure as a result of a request under this Scheme may be released from the effects of such seizure.
6. The remaining paragraphs to be renumbered appropriately.

ANNEX 3

AMENDMENT RECOMMENDED TO SCHEME FOR THE TRANSFER OF CONVICTED
OFFENDERS WITHIN THE COMMONWEALTH

Delete para. 19 and substitute:

19. Any country which enacts legislation to give effect to this Scheme shall notify the Commonwealth Secretary-General of that fact and shall inform him of the proper channel for communication and deposit with him a copy of the legislation.

CHECKLIST OF PROPOSED AMENDMENTS TO THE COMMONWEALTH SCHEMES

This document contains a checklist of amendments to the various Commonwealth Schemes which are before Ministers for consideration. Those amendments which relate to the Schemes for the Transfer of Convicted Offenders and relating to Mutual Assistance in Criminal Matters are recommended by Senior Officials for adoption. The possible amendments to the Scheme for the Rendition of Fugitive Offenders have been carefully examined by Senior Officials and are transmitted to Ministers for their consideration.

The relevant documents are:

LMM(90)12 (Amendments to Commonwealth Schemes ...)

LMM(90)32 (Report of the Meeting of Senior Officials to Consider Further Amendments
to Commonwealth Schemes ...)

A. AMENDMENT TO THE SCHEME FOR THE TRANSFER OF CONVICTED OFFENDERS
WITHIN THE COMMONWEALTH

1. Paragraph 19: ACCEPTANCE OF SCHEME

amended text set out on page 1 (para.3) of LMM(90)12.

B. AMENDMENTS TO THE SCHEME RELATING TO MUTUAL ASSISTANCE
IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH

1. Paragraph 1(3)(i): PURPOSE AND SCOPE

amendment set out in para.15 (page 10) of LMM(90)32, replacing earlier amendment in LMM(90)12.

2. Paragraph 3(1): CRIMINAL MATTER

amended text set out on page 8 of LMM(90)12 but note that the final three words, "has been committed" were included in error and should be deleted.

3. Paragraph 3(3): CRIMINAL MATTER

amendment set out in para.16 (page 11) of LMM(90)32 replacing earlier amendment in LMM(90)12.

4. Paragraph 15: SERVICE OF DOCUMENTS

new sub-paragraph 15(5) set out in para.17 (page 12) of LMM(90)32.

5. Paragraph 22: AUTHENTICATION

amended text set out on page 14 of LMM(90)12.

6. Paragraph 23: PERSONAL APPEARANCE OF WITNESS IN THE REQUESTING COUNTRY

new sub-paragraph 23(4) set out in para.17 (page 12) of LMM(90)32.

7. Paragraph 24: PERSONAL APPEARANCE OF PERSONS IN CUSTODY

new sub-paragraph 24(5) [requiring consequential renumbering] set out in para.17 (page 12) of LMM(90)32.

8. Paragraphs 26 & 28: [PROCEEDS OF CRIME]

amended text [requiring consequential renumbering] set out on pages 16 to 18 of LMM(90)12.

C. AMENDMENTS TO THE SCHEME FOR THE RENDITION OF
FUGITIVE OFFENDERS WITHIN THE COMMONWEALTH

Possible addition to paragraph 19 and Annex 3 set out on pages 8 to 10 of LMM(90)32.

REPORT OF THE MEETING OF SENIOR OFFICIALS

Held in Auckland, New Zealand, on 19 April 1990

Prepared by the Commonwealth Secretariat

INTRODUCTION

1. Senior Officials from 24 countries met in Auckland, New Zealand, on 19 April 1990 under the Chairmanship of Mrs Janice Lowe (New Zealand). They reconvened in Christchurch on 22 April 1990.

This paper supplements paper LMM(90)12 and reflects the views expressed by Senior Officials at that meeting. It deals with amendments to two Commonwealth Schemes, those on the Rendition of Fugitive Offenders within the Commonwealth and on Mutual Assistance in Criminal Matters within the Commonwealth.

RENDITION

2. Proposals for the amendment of clause 5 of the Commonwealth Scheme for the Rendition of Fugitive Offenders have been under consideration for a number of years. The Government of Australia raised the issue of the "prima facie case requirement" at the Law Ministers' Meeting in Harare in 1986, and the Canadian Government has subsequently prepared papers for consideration by Senior Officials, both in London in June 1989 and in New Zealand in April 1990.

3. Clause 5(4) of the Scheme provides as follows:

"Where a warrant has been endorsed or issued as mentioned in clause 3(1) the competent judicial authority may commit the fugitive in 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."

4. This provision contains a number of elements. It ensures that the fugitive's position is examined by the competent judicial authority in the requested part of the Commonwealth. It requires that authority to consider all evidence admissible under the law of the requested part of the Commonwealth (the part in which the fugitive is to be found, rather than that in which the ultimate trial will take place). It requires that authority to be satisfied that the case against the fugitive warrants his standing trial for the offences alleged against him.

5. The arguments advanced during consideration of these issues by Senior Officials in June 1989 are summarised in the Report of that meeting (LMM(90)11) as follows:

"in the course of the discussions a variety of views was voiced. A number of delegates expressed their view that:

- the position was emerging where extradition was becoming much simpler as between a Commonwealth country and non-Commonwealth country than it is between two fellow Commonwealth countries, a position which seemed to them to be incongruous given the special nature of the Commonwealth association and its history of maximising judicial assistance;
- some delegations had experienced serious difficulties with extradition arising from the existing prima facie case requirement and its uneven, and at times overly-severe, application by some judges and some magistrates;
- the proposal maintained the concept of non-return of a fugitive in the absence of a sufficiency of evidence for trial, while modifying formal evidential requirements in a way which would eliminate the source of difficulty with the existing prima facie rule and at the same time preserving the safeguard and essential fairness of a form of the prima facie rule.

Other delegates, in expressing reservations about the options, observed that:

- the prima facie rule was a traditional requirement of common law systems, and the fact that some common law countries have moved away from this position in their dealings with non-common law countries was no reason why they should do so as between themselves;
- in respect of their own experience the prima facie requirement was working satisfactorily and was not the source of any serious problems;
- across the field of mutual legal assistance in criminal matters there were more compelling priorities for legislative and political action than a move away from the strict requirement of the prima facie case requirement in extradition proceedings;
- the surrender of a person within a country to the jurisdiction of the courts of another was a serious step which called for proper safeguards in sensitive legal and political factors."

6. That Meeting asked that the proposal be given further study by Canada and for it, in consultation with Australia, to submit a further paper to Officials taking account of the views expressed in the discussions.

7. The Canadian paper argued that the requirement of evidence in the form of first person affidavits, devoid of hearsay, was particularly onerous and expensive, and that the common law rules as to admissibility were disproportionately onerous for application to proceedings on rendition and could be expanded without material loss of protection to rendition.

8. The Canadian proposal would enable Commonwealth countries wishing to retain the Scheme in its present form to do so, while also providing for bilateral arrangements between pairs of countries for the application of the Scheme with modifications designed to ease the difficulties experienced in the operation of clause 5(4). In its eventual form, the proposal enables countries to negotiate whatever modifications are appropriate in their circumstances, but presents one particular model which many countries might choose to adopt.

9. This model involves the use of a "record" of the case, stating the evidence available against the fugitive, and supported by an affidavit of the officer responsible for its preparation and by a certificate of the Attorney-General of the requesting part of the Commonwealth that in his opinion the material justifies a prosecution. It would remain the responsibility of the competent judicial authority of the requested part of the Commonwealth to consider whether the available material was sufficient to warrant committal for trial, but it would have to take into account the contents of the record, regardless of whether or not they would be admissible in evidence under the law of the requested part.

10. The Canadian explanation of the proposal was as follows:

"The crux of the present proposal is to allow the courts of the requested part, in cases of persons accused of an offence, to receive a record of the case from the requesting part as the evidentiary basis for its decision. Receipt of the record would be contingent solely upon compliance with the formal and substantive conditions enumerated. The principal objective and advantage of this proposal is that it would eliminate much of the disparity that can arise between the legal systems and standards of different jurisdictions. It creates a unique document of process that would not only promote uniformity among legal systems but would significantly enhance speed and efficiency of preparation. Provided that the record is prepared in compliance with the terms of the Scheme, a provision to compel receipt of the record will also overcome many formal objections to admissibility.

As for the substantive test of sufficiency under the proposed alternative to the requirement for a prima facie case, the judge of the requested part would ask the following question:

Is the evidence presented in the record of the case that supports this request for rendition sufficient to warrant committal for trial, notwithstanding that some or all of the evidence contained in the record might be inadmissible in these courts?

This proposal comprises a substantive test of sufficiency according to the law of the requested part but upon evidence admissible under the laws of the requesting part. By definition, this proposal would entail a change in the test of sufficiency because it would expressly allow for the admission of evidence that might not be in a form or of a quality admissible according to the rules of evidence in the requested part. Accordingly, the proposal suspends the exclusionary rules of evidence in the requested part for the purposes of rendition. It would compel the judge to make a decision on the request for rendition without determining whether the evidence contained or described in the record would be admissible in the requested part. The evidence provided by the requesting part might, for example, contain hearsay. Statements or declarations might not have been made under oath or affirmation. Statements of the accused, evidence obtained by search and seizure and evidence obtained by electronic surveillance would not be tested for admissibility according to the exclusionary rules of evidence in the requested part. By contrast, questions relating to the reliability of evidence will have been initially determined by the Attorney General who approved the request and questions pertaining to the admissibility of evidence will be determined later by the trial court in the requesting part.

The principal attraction of the proposed test is that it effectively constrains the court of the requested part to receive and admit the record of the case as a complete foundation for determining the sufficiency of evidence contained in the record of the case that supports the request for rendition. Accordingly, it promotes greater uniformity in the law and alleviates problems that many requesting parts

have in meeting the requirements of admissibility in requested parts. Yet the alternative procedure preserves the requirement for judicial examination of the sufficiency of the request for rendition on each charge. The fugitive would face a request for rendition based primarily upon the same evidence intended for use at trial. The principle set out in this proposal assumes that the trial in the requesting part, which might be conducted according to different rules of procedure and evidence, meets the standards of fair trial expected of members of the Commonwealth."

11. At their discussion in Auckland, Senior Officials noted that a number of Commonwealth countries placed the highest value on existing rendition procedures and would not themselves wish to take advantage of the proposed freedom to adopt alternative practices in place of clause 5(4). Some were opposed to that freedom being given within the Scheme, while noting that clause 18 of the Scheme already permitted alternative arrangements to be made.

12. Other countries, however, recognised that there were indeed difficulties and felt that it was important to the future of the Commonwealth Scheme that provision for their resolution be made within the Scheme, rather than outside it. It was agreed, therefore, to transmit a revised proposal to Law Ministers for their consideration. It was noted in particular that Heads of Government, in the Communique of their Meeting in Kuala Lumpur, had asked Law Ministers to take action in this matter so as to ensure that Commonwealth extradition arrangements were no less onerous than those with non-Commonwealth countries.

13. After considerable discussion the proposal was modified in ways which attracted the support of most but not all of the countries represented at the Meeting. A drafting committee met to draft the proposal as amended and this now reads as follows:

(a) The following be added as a second sub-clause to clause 19:

"Two or more parts of the Commonwealth may make arrangements under which in matters of rendition between them clause 5(4) will be replaced either by Annex 3 or by other provisions agreed by the Governments of those parts."

(b) The text of the proposed new Annex 3 is as follows:

"ANNEX 3

ALTERNATIVE PROVISIONS AS TO COMMITTAL PROCEEDINGS

1. 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) the contents of the record of the case received under this Annex whether or not admissible in evidence under the law of the requested part, and any other evidence admissible under the law of the requested part, are sufficient to warrant a trial of the charges for which rendition has been requested; and
 - (b) the fugitive's return is not precluded by law, but otherwise will order the fugitive to be discharged.

2. The competent judicial authority will receive a record of the case prepared by an investigating authority in the requesting part if it is accompanied by:
 - (a) an affidavit of an officer of the investigating authority stating that the record of the case was prepared by or under the direction of that officer, and that the evidence has been preserved for use in court; and
 - (b) a certificate of the Attorney General of the requesting part that in his opinion the record of the case discloses the existence of evidence under the law of the requesting part sufficient to justify a prosecution.
3. The record of the case will contain:
 - (a) particulars of the description, identity, nationality and, to the extent available, whereabouts of the person sought;
 - (b) particulars of each offence or conduct in respect of which rendition is requested, specifying the date and place of commission, the legal definition of the offence and the relevant provisions in the law of the requesting part, including a certified copy of any such definition in the written law of that part;
 - (c) the original or a certified copy of any document of process issued in the requesting part against the person whom it seeks to have committed for rendition;
 - (d) a recital of the evidence acquired to support the request for rendition of the person sought; and
 - (e) a certified copy, reproduction or photograph of exhibits or documentary evidence."

MUTUAL ASSISTNACE IN CRIMINAL MATTERS

14. Senior officials gave consideration to a number of proposals for the further amendment of the Scheme for Mutual Assistance in Criminal Matters. As a result of discussions, the following amendments are recommended to Law Ministers.

15. Amendment of paragraph 1 (Purpose and Scope). Paragraph 1(3)(i) should be amended to read:

"tracing, seizing and confiscating the proceeds or instrumentalities of crime."

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