



Meeting of Law Ministers and Attorneys General
of Small Commonwealth Jurisdictions

Marlborough House, London, 4-5 October 2007

Communiqué

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COMMUNIQUÉ

1. Law Ministers and Attorneys General of Small Commonwealth Jurisdictions met in Marlborough House, London, on 4 and 5 October 2007. The Meeting, which was attended by Law Ministers and Attorneys General from 25 jurisdictions, was opened by the Commonwealth Secretary-General, the Rt Hon Don McKinnon, who had held a breakfast meeting with Heads of Delegation before the start of the Meeting. The Secretary-General spoke of recent examples of legal and constitutional developments in small jurisdictions, the pressing concerns which faced Law Ministers in national and international legal contexts, and the resilience of small jurisdictions in facing many serious legal and economic challenges. He referred to the Commonwealth (Latimer House) Principles on the Accountability of and Relationship Between the Three Branches of Government and the importance of the independence of the judiciary as an essential element of the Rule of Law.

2. This was the tenth such meeting which brought together Law Ministers and Attorneys General to discuss a range of legal issues of especial interest to small Commonwealth jurisdictions. The Meeting elected as its chairperson HRH Prince David Dlamini, the Minister of Justice and Constitutional Affairs of Swaziland.

CHALLENGES FACING SMALL STATES IN IMPLEMENTING INTERNATIONAL LEGAL OBLIGATIONS

3. The Meeting received a keynote paper designed to aid discussion by Ministers of means of strengthening the institutional knowledge and capacity of small jurisdictions in their quest to maintain the highest legal standards in complying with the ever-increasing demands of international legal obligations. The paper contained a series of recommendations, addressed both to small jurisdictions and to the Commonwealth Secretariat.

4. The paper noted that the Rule of Law encompassed international as well as domestic law and stressed the need for small jurisdictions to engage fully with the systems and processes of international law. Law Ministries needed to build relationships with civil society organisations and to have a close partnership with Foreign Ministries which often took the lead in international negotiations and in representation in international fora. The paper dealt with the value of international law in protecting the sovereign equality of states and recommended acceptance of the jurisdiction of international dispute resolution mechanisms such as the International Court of Justice. It stressed the importance of regulatory regimes for the private sector to strengthen the internal sovereignty of small jurisdictions against the coercive forces of globalisation. The paper urged systematic domestic implementation of international norms and recommended consideration of giving direct effect to international law in national legal systems. It drew attention especially to human rights obligations and related reporting obligations, issues concerning the

continental shelf, and developments relating to the rights of land-locked states and international environmental law. Throughout the paper, indications were given of the forms of assistance which might be given by the Commonwealth Secretariat.

5. In the discussion, it was observed that even within the states represented at the Meeting there were differing levels of capacity. Some small jurisdictions found it difficult to make effective use of the sovereignty of the state in international affairs, and their Law Ministers had to deal with a very great range of matters. Concern was expressed at the unforeseen effect of some international conventions, especially those the Parties to which had different capacities or outlooks, on the internal affairs of States Parties. There could sometimes be a tension between international legal obligations and local democracy. There was value in working with states in the same region or in similar circumstances to assess the impact of international treaties on national law. Attention was drawn to the special difficulties of self-governing jurisdictions which were not fully sovereign in international relations, given that international law was increasingly concerned with domestic matters; it was noted that this issue deserved further consideration.

6. On the issue of reporting requirements, differing views were expressed as to the recommendation of co-operation with civil society organisations and universities; their assistance could be valuable, especially in times of legal change, but the reporting obligation rested on the state through its elected government. It was stressed that the Commonwealth (Latimer House) Principles dealt with all three branches of government and that it was sometimes necessary to protect the proper sphere of action of the Executive as against those of the other branches. Some hesitation was voiced concerning the paper's recommendation as to the direct effect of international conventions in national law.

7. The Meeting took note of the paper and expressed warm appreciation for the work that had been put into it.

LEGAL WORK OF THE COMMONWEALTH SECRETARIAT

8. Ministers received comprehensive written and oral reports on the work over the last two years of the various sections of the Legal and Constitutional Affairs Division, and of relevant activities of other Divisions, of the Commonwealth Secretariat. Some aspects of the work were to be treated in more detail under other agenda items. The Director emphasised that the work was largely demand-driven, responding to requests from member states, and invited Ministers to approach the Division when they perceived a need for assistance.

COUNTERFEITING AND PIRACY: IMPLICATIONS FOR SMALL STATES

9. The Meeting recalled the resolution on intellectual property enforcement of the Law Ministers' Meeting in Accra asking the Commonwealth Secretariat to examine the development of appropriate responses to piracy and counterfeiting of intellectual property products within the Commonwealth and make recommendations to the next Law Ministers' Meeting. At the recently-concluded Meeting of Senior Officials a paper dealing with this matter was considered, and Senior Officials had agreed that, without duplicating other international activity, the Secretariat should further examine

the recommendations made in the paper and formulate proposals in this regard for consideration by Law Ministers.

10. Ministers from Small Commonwealth Jurisdictions received a paper dealing specifically with the implications of counterfeiting and piracy for small states. Ministers exchanged information about the experience and legislative provision in their jurisdictions. It was recognised that the issues must not be regarded as merely a matter of enforcing private rights, given the links with corruption and organised crime. It was noted that there were examples of enforcement bodies which combined government and private sector interests, and that training material was readily and freely available.

FINAL/REGIONAL APPELLATE COURTS

11. The Meeting recalled that the subject of the establishment of final/regional appellate courts had been on the agenda of Commonwealth Law Ministers in 2002 and 2005 and at the Meeting of Law Ministers and Attorneys General of Small Commonwealth Jurisdictions in 2004. The Meeting received a report on the work that the Law Development Section of the Legal and Constitutional Affairs Division had undertaken to identify best practices in such courts. Ministers took note of the report and noted that Law Ministers had already mandated the Commonwealth Secretariat to take the work further.

LANDLOCKED AND COASTAL STATES: UNCLOS

12. The Meeting noted that among the Parties to the United Nations Convention on the Law of the Sea 1982 (UNCLOS) are the land-locked states of Botswana, Uganda and Zambia, and the coastal states of Kenya, Mozambique, Namibia, South Africa and Tanzania; and that further Commonwealth land-locked states, Lesotho, Swaziland and Malawi, were actively preparing to become Parties. Senior Officials at their meeting earlier in the week had considered two sets of model treaty provisions prepared by the Commonwealth Secretariat and recommended Law Ministers to adopt the model provisions, which could be adapted in the light of existing bilateral and regional instruments.

13. The first set of model treaty provisions was designed to be used by a land-locked country and its transit neighbour to give effect to the terms of Part X of UNCLOS, which affirms the right of land-locked states to access to and from the sea. The second set of model treaty provisions offered a means by which land-locked and coastal states might co-operate in implementing the approach to the sharing of the living resources of the EEZ regime in the manner contemplated by Part V of UNCLOS.

14. Ministers expressed their thanks to the Commonwealth Secretariat for the work it had done over recent years in raising awareness of the important issues raised by UNCLOS, and agreed to the adoption of the drafts.

LEGAL REFERRAL SERVICE (HIPC CLINIC)

15. The Meeting recalled the history of the work of the Commonwealth Secretariat in providing legal assistance to Heavily Indebted Poor Countries (HIPC), in an initiative supported by Commonwealth Heads of Government and involving the Legal and Constitutional Affairs Division, the Economic Affairs Division (EAD) and the Special Advisory Services Division (SASD) of the Commonwealth Secretariat. Law and Finance Ministers at their 2005 Meetings approved the establishment of a Legal Referral Service, which has become known as the HIPC Clinic. The Clinic assists HIPC and other sovereign debtors, and operates on the basis of strict confidentiality. The Clinic has been operational since September 2006 and Ministers received an account of its activities thus far. Ministers gave approval to the continuing efforts of the HIPC Clinic to provide relevant assistance as required.

SMALL STATES AND LAW REFORM

16. Ministers welcomed the preparation for their consideration of a discussion paper prepared by the Commonwealth Association of Law Reform Agencies (CALRAS). The paper recognised that the ideal was an independent law reform agency in every state, but that this was not always possible in small jurisdictions. There was already a degree of regional co-operation in some parts of the Commonwealth, and the paper suggested the development of such co-operation. A further possibility was the establishment of regional law reform agencies, but there were seen to be some difficulties, both practical and political, in such a course.

17. There was an exchange of experience with law reform bodies in small jurisdictions and discussion of issues as to the role, composition, methodology and financing of such bodies, and the special issues raised by systems of customary law. Several Ministers spoke of the value of even small law reform agencies, and of the importance of law reform which included local consultation and did not draw uncritically on legislative models developed elsewhere.

LEGAL IMPLICATIONS OF HIV/AIDS

18. Ministers were reminded that, at the end of 2006, 39.5 million people were known to be living with HIV or AIDS, and that Commonwealth countries carried a disproportionate 60 per cent of the world's HIV positive persons. The Meeting received a paper prepared by the Commonwealth Secretariat examining the stigma and discrimination suffered by people living with HIV or AIDS. Such stigma and discrimination constituted an enormous barrier to an effective fight against the epidemic.

19. Stigma could be addressed through inclusive education; the empowerment of marginalised groups in support and advocacy; the mobilisation of religious and community leaders to foster openness and respect; and the provision of integrated care for people living with HIV/AIDS. Efforts to address discrimination could include the implementation of non-discriminatory policies, professional codes of conduct, training and education of employers and employees; the use of legal action to challenge discrimination and human rights violations; and the establishment of rights awareness programmes.

20. The Meeting heard accounts by Ministers of the situation in their countries and the strategies adopted by their Governments. It was agreed that stigma and discrimination did discourage people from coming forward for diagnosis, and that legal action had a role alongside educational approaches. Some states, however, had yet to introduce legislation against discrimination on grounds such as gender and would find it difficult to deal first with discrimination on the ground of illness. Ministers exchanged views on particular issues such as the introduction of compulsory testing (for categories such as those seeking certain types of employment, students going abroad to study, or prisoners) which was not favoured by the World Health Organization; the effect of HIV/AIDS on the right to marry; and whether and in what terms to create a criminal offence covering cases of intentional infection of others. There was a growing recognition that legal measures should be utilised to promote and protect the human rights of people living with HIV/AIDS, but the human rights of those people needed to be held in balance with the wider public interest.

21. Ministers thanked the Secretariat for the paper which had provided a helpful basis for their own discussions and could be useful in exploring the issues in their own countries.

FREEDOM OF INFORMATION ISSUES FOR SMALL STATES

22. The Meeting received a paper addressing the issues surrounding freedom of information (FOI) legislation in small states. It drew attention to the Commonwealth Principles and Guidelines on the Right to Know and to the model laws on Freedom of Information and Privacy and Protection of Personal Information developed by the Commonwealth Secretariat and to relevant provisions in international conventions, and reviewed the position in a number of small Commonwealth states.

23. It was argued that there were political and economic arguments for giving effect to what was in some countries a constitutional right to know, or to freedom of expression with which a right to freedom of information could, in the view of some delegations, be inferred. However, some Ministers doubted whether such a right was a fundamental right, and it had to be balanced by consideration of the particular circumstances in small states and the resource and capacity implications. The paper had noted that a good records management system was a critical prerequisite of FOI legislation. Capacity issues arose in some small states even in relation to the collection, storage and recovery of information, and unless and until those issues were addressed it was impossible to contemplate FOI legislation. The view was expressed that the existence of FOI legislation might actually discourage the maintenance of certain types of records.

24. It was recognised that a right to information was not an absolute one, and there were difficult issues as to the limits of the right. One view was that the only necessary limits concerned such matters as the security of the state and ongoing criminal investigations. Other Ministers saw a need for a more tightly-drawn right. An active press would assert a high public interest in obtaining and disseminating information but there were circumstances in which the public interest required confidentiality of government discussions and many states had an Official Secrets Act, often one inherited from pre-independence times. Ministers whose jurisdictions

had enacted FOI legislation spoke of the experience of their jurisdictions, in some of which amendments had been found necessary to the original legislation to exempt certain types of public authorities from its scope.

25. Attention was drawn to the strategy outlined in the paper to give effect to what had been recognised as a fundamental political value of the Commonwealth, a strategy which was not prescriptive and which emphasised an incremental approach which took account of the circumstances of small states. It did not seek to pre-empt discussion of the principles and the local context in individual states. Ministers encouraged the Commonwealth Secretariat to continue its work in this area within the general terms of the strategy. The strategy indicated the assistance the Secretariat could provide, and this might include assistance in drafting not only primary legislation but also implementing regulations.

CONFLICT OF INTEREST

26. The Meeting received a paper which discussed possible strategies to address and manage conflicts of interest. Such conflicts were becoming more common with the closer links, and greater mobility of personnel, between public and private sectors. The issues tended to be particularly acute in small jurisdictions, in some of which the prevailing culture encouraged practices which could be seen as creating conflicts of interest. Possible measures include the introduction of a carefully targeted requirement of a declaration of interests and assets by public officials throughout their tenure, the establishment of a clear code of conduct for public officials (which would include guidance as to the treatment of gifts above a defined threshold); and consideration of disciplinary provisions and/or criminal sanctions.

27. Ministers gave accounts of the experience in their states of the discussion of, and in some cases the operation of, such measures and related anti-corruption activity. It was emphasised that it was important to direct measures not only at those in leadership roles but also at middle-rank officials (especially those in sensitive positions dealing with applications from the public) and the police and other law enforcement agencies. In some circumstances, a regional or sub-regional resource for carrying out investigations might be of value. Attention was drawn to other issues including those concerning proof of improper enrichment and conduct after an official had left office. Ministers recognised the tension between the right of a public official to a private life and the demands in a code of conduct for the disclosure of information, and the danger of discouraging applications to join the public service.

28. Ministers welcomed the work done by the Commonwealth Secretariat in this area and drew attention to work by other organisations such as the Pacific Islands Forum. The Meeting approved a programme of work by the Secretariat including the drafting of a model code of conduct and legislative provisions, specifically aimed at the needs of small jurisdictions and capable of adaptation to meet the needs of particular states; the production of a technical guide to conflicts of interest issues; and the development of practical training programmes.

ANTI-CORRUPTION STRATEGY FOR SMALL JURISDICTIONS

29. Ministers noted that Senior Officials at their Meeting earlier in the week had received a report of the Commonwealth Secretariat's activities in combating corruption and had welcomed the strategy which had been developed. Senior Officials had also agreed that they would consider a revised draft of a *Commonwealth Legislative Guide* to UN Convention against Corruption (UNCAC) at their Meeting immediately before the next Commonwealth Law Ministers' Meeting.

30. Some Commonwealth states had signed or ratified UNCAC, and its provisions, supplemented by the recommendations of the Expert Working Group on Asset Recovery, gave an appropriate basis for work by the Commonwealth Secretariat. It was proposed that this should include the development of detailed guidance on the drafting and implementation of anti-corruption strategies for small jurisdictions; the development of a framework for monitoring the implementation of such strategies; a training programme; and technical assistance to states. Ministers gave their approval to this programme of work.

JOINT INVESTIGATION TEAMS

31. Transnational crime, such as drug and human trafficking, corruption and the financing of terrorism, required specialised and resource intensive law enforcement activity which presented particular difficulty for small states. The Meeting received a paper raising the possibility of providing a framework for the use of joint investigation teams by Commonwealth member states. It was noted that this practice had already been developed in other contexts and that the operational and jurisdictional issues that arose had proved capable of solution. Were this considered useful, the Commonwealth Secretariat could work in this area, providing guidance to states, to be approved by Law Ministers, on the setting up and operation of joint investigation teams, and preparing a model memorandum of understanding for use when a team was being established.

32. Ministers recognised the value of joint investigation teams as one technique amongst others and some testified to the success of the technique in particular cases. They expressed some concern that work on this topic by the Commonwealth Secretariat might duplicate work being done at regional level and through bilateral arrangements. It was explained that the proposed framework was intended to supplement but not duplicate that work. Ministers agreed that the Commonwealth Secretariat should assess further the present experience of the use of joint investigation teams in member states before bringing any further proposals to Law Ministers.

33. It was reported that at the meeting of the Commonwealth Network of Contact Persons the issue had been raised as to the reporting to the Commonwealth Secretariat of the making of a request for mutual legal assistance to another Commonwealth state, so allowing a degree of monitoring and perhaps avoid the delays sometimes experienced. At that meeting the proposal was not taken forward. Ministers noted the resource implications of such a reporting mechanism if it was to be serve a useful purpose, and suggested that the working of the Network itself could resolve the problems experienced in processing requests.

CRIMINAL JURISDICTION: IS IT WIDE ENOUGH?

34. Ministers received a paper examining the bases for the criminal jurisdiction of States in customary international law and in particular international conventions, which often imposed an obligation to ‘extradite or prosecute’ (*aut dedere aut judicare*) or sought to establish universal jurisdiction in States Parties. The paper invited Ministers to consider whether their domestic law as presently drafted, reflected the jurisdiction obligations set out in those international instruments to which their states were party. Ministers asked the Commonwealth Secretariat to draft a set of criteria to be taken into account when dealing with competing jurisdictions.

ALTERNATIVE SENTENCING OPTIONS

35. The Meeting received a paper analysing the results of a survey, carried out by the Commonwealth Secretariat between June and August 2007, of sentencing options alternative to custodial sentences, and also other forms of disposal such as mediation and caution, used in small Commonwealth jurisdictions. The paper identified a number of perceived advantages of alternative sentences over incarceration, and proposed that the Secretariat undertake a Penal Reform Programme. It would include a series of regional workshops involving key stakeholders in criminal justice systems and civil society to consider and make proposals for the adoption and implementation of specific alternative sentencing options tailored and relevant to the needs of states in the region. The results of the workshops would lead to the preparation of a policy and legislative guide outlining the features and benefits of various alternative sentencing options, with advice as to the infrastructure needed for effective implementation.

36. Ministers noted the steps that had been taken in some countries to review penal codes, a process which had sometimes led to the development of alternative sentences, for children or for adult offenders. They agreed that effective alternative sentences had great advantages, as had the concept of restorative justice. Much existing legislation requires that offences be dealt with by imprisonment and an educational programme would be needed if the judiciary, legislators and the general public were to welcome alternative sentences. Ministers noted the impact of mandatory minimum prison sentences and the continued existence of corporal punishment in some jurisdictions.

37. Ministers expressed appreciation for the paper and welcomed the proposed Programme.

HUMAN RIGHTS ISSUES

38. The Meeting recalled the Commonwealth Secretary-General’s Initiative on Human Rights, which aims to encourage governments to ratify the two main human rights instruments: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). The Human Rights Unit (HRU) had provided advice and assistance to countries, including the publication of the *Commonwealth Handbook on Ratification* for officials. A paper before the Meeting examined the ratification status of small Commonwealth countries and some of the reasons for non-ratification. Ministers encouraged the

HRU to continue its work of assisting countries to ratify and implement international human rights instruments, especially the ICCPR and the ICESCR.

REPORTS FROM PARTNER ORGANISATIONS

39. Ministers received written and oral reports from the Secretariat's partners in the legal field on their activities over the last two years: the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers Association, the Commonwealth Association of Law Reform Agencies, the Commonwealth Legal Education Association, and the Commonwealth Parliamentary Association. Ministers noted the preparedness of the partner organisations to provide various types of assistance. The reports prompted, amongst other things, an exchange of views between Ministers about certain aspects of the Commonwealth (Latimer House) Guidelines.

ROUND TABLE DISCUSSION

40. The Meeting had an opportunity to discuss a range of other issues, on some of which information papers had been provided.

(a) SMALL ARMS AND LIGHT WEAPONS

41. The Meeting approved the following resolution:
The Law Ministers and Attorneys General of Small Commonwealth Jurisdictions recalled that the Heads of Government in November 2005 expressed their deep concern over the illicit production, illegal trade and uncontrolled availability of small arms and light weapons. Law Ministers and Attorneys General of Small Commonwealth Jurisdictions expressed their deep concern on the effects of the uncontrolled manufacture and distribution of small arms and light weapons on small Commonwealth jurisdictions. They urged that this issue be included in the agenda for consideration by the Heads of Government when they meet in Kampala, Uganda, in November 2007.

(b) ENVIRONMENTAL ISSUES

42. Ministers recalled that Commonwealth Law Ministers at their Accra Meeting in 2005 had received a report of the Commonwealth Secretariat's Seminar on the Implementation of International Environment Instruments by small states, held earlier in 2005, and endorsed the continuation of the process of assistance and capacity-building initiatives. The Meeting received an information paper on the regional seminars which had taken place since 2005 to promote understanding and ratification of the main international environmental conventions.

(c) THE COMMONWEALTH LAW BULLETIN

43. The Meeting received an information paper summarising for Ministers recent developments concerning the *Commonwealth Law Bulletin*.

(d) MAKING LEGAL MATERIALS AVAILABLE ONLINE IN SMALL STATES

44. Ministers were informed of a number of internet-based legal information services, such as AustLII (the Australian Legal Information Institute), BAILII (the British and Irish Information Legal Institute), and more recently CommonLII (the Commonwealth Legal Information Institute, launched in 2005), which provide free access to case law and legislation. They were told of the recent decision of the trustees of BAILII to co-operate with any endeavour to make the case law and legislation of small Commonwealth jurisdictions available on an appropriate Legal Information Institute website, at a cost much below that of commercial publication.

(e) PROMOTION OF INTERNATIONAL HUMANITARIAN LAW WITHIN THE COMMONWEALTH

45. The meeting received an information paper from the International Committee of the Red Cross in collaboration with the British Red Cross which presented information as to ratification of the more important International Humanitarian Law treaties by Commonwealth Member States and gave information about the Second Commonwealth Red Cross and Red Crescent Conference on International Humanitarian Law.

(f) ALERNATIVE DISPUTE RESOLUTION FOR STATES

46. A final paper gave information on recent work and a publication by the Commonwealth Secretariat on alternative dispute resolution in international disputes.