

COMMONWEALTH POLICY STUDIES UNIT: 9

**2002 Commonwealth Law Ministers' Meeting:
Policy Brief**

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Policy brief for the Commonwealth Law Ministers' Meeting, 18-21 November, 2002, Kingstown, St Vincent and the Grenadines

Executive summary

Law Ministers have a meaty event ahead of them, which testifies to the continuing vitality of Commonwealth legal cooperation. They will be debating how to overhaul their constitutions and other legislation, to bring them into line with modern human rights conventions. They will discuss how to update their land laws, seeing land as a crucial resource for development capital, as well as agricultural wealth. They will have to decide whether to narrow the "political offence" exemption from extradition, to take account of international conventions against terrorism. And for the first time they have insisted on an unstructured session in which they can share their problems and achievements. With increasing recognition that the security of properly administered common law is a major economic and social advantage for Commonwealth countries, Law Ministers are being encouraged to look beyond the technicalities of their briefs.

Executive summary

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1 Status, representation, recent meetings

Participation levels at the Law Ministers' meetings, which take place every three years, compare favourably with other specialist meetings of Commonwealth Ministers. For instance, 46 states and two overseas territories attended the Trinidad meeting in 1999 -- eight more states than in Malaysia in 1996 -- and delegations were led by Ministers and Attorneys-General. Unlike other Ministerial meetings it is prepared a year earlier by a meeting of senior officials, working with staff from the Commonwealth Secretariat. The meeting is always chaired by the Law Minister or Attorney-General of the host country. The Secretariat team is being led by Don McKinnon, Commonwealth Secretary-General.

In the past, because delegations are usually small, and the host government used to be responsible only for accommodation of the delegation head and spouse, the costs were lower than for other international meetings. This had already meant that smaller Commonwealth countries, unable to take on the Commonwealth Heads of Government Meeting, had found it possible to invite the Law Ministers. However since the last meeting there has been an important change in the costing of all Commonwealth ministerial meetings. Now a host government is only responsible for providing a venue and basic support, and such hospitality as they wish. This makes it possible for almost all Commonwealth states to host a straightforward meeting, which does not have ancillary symposia. Prior to St Vincent and the Grenadines the following countries have offered a venue in recent years: Trinidad and Tobago, 1999; Malaysia, 1996; Mauritius, 1993; New Zealand, 1990; Zimbabwe, 1996; Sri Lanka, 1983; and Barbados, 1980. Unusually there have been two successive meetings in the same region, and the 2005 gathering will certainly not be in the Caribbean.

2 Record for policy

Because virtually all Commonwealth countries use the common law system, the Law Ministers collectively have an influential role; however they cannot usurp the position of their own Parliaments and judges and, as with other Commonwealth gatherings, there is a strong measure of voluntarism in who does what following any meeting.

The impact of their work comes in two main ways -- through adopting for their own countries the model legislation prepared for them by the Commonwealth Secretariat, and by mutual assistance agreements where Ministers follow common guidelines in areas like the extradition of offenders or dealing with drug traffickers. As more developing countries seek to take advantage of globalisation the security of a properly administered common law system is coming to seem more important. Recent research by Tony Addison and Aminur Rahman (in a paper presented to a conference on globalisation, growth and inequality at Warwick University, March 2002) has demonstrated the benefit, in access to world trade, for countries which use the Commonwealth common law system; they have a significantly greater share than heirs to the continental European civil code, which themselves do better than countries emerging from a socialist legal regime.

An example of the significance of model legislation lies in the model law against money laundering which was put before Law Ministers in Malaysia in 1996. Financial services are significant for several small Commonwealth states, and in recent years the OECD has been threatening reprisals for those which don't clamp down on

dubious practices. By 1998 Barbados, for example, was able to use the Law Ministers' draft to enact its own legislation -- a step which was vital in the quarrel which Prime Minister Owen Arthur was having with the OECD. In Grenada, in February 2001, the authorities removed licences from 20 doubtful offshore banks. And the work of the Commonwealth Law Ministers and Secretariat has been taken forward by the Caribbean Financial Action Task Force.

Examples of mutual assistance schemes include the "London scheme" on extradition of fugitive offenders, and the "Harare scheme" for mutual assistance in criminal matters, now increasingly called on to deal with drug trafficking and money laundering. The Commonwealth Secretariat has a small Commercial Crime Unit to support this work.

Sometimes the mutual assistance approach -- which is voluntary, and lacks the binding force of a treaty -- seems inadequate, and is supplanted by a model law. This was the case with a scheme to protect cultural heritage, which was adopted by the Mauritius meeting in 1993. It aimed to stem the illegal flow of artefacts out of poorer countries into the hands of auctioneers, galleries and collectors in richer ones. However there was a strong view among some Ministers that more was needed. Australia drafted a model law in 1996 and, after further work, it was adopted by the Trinidad meeting in 1999. Adoption of a model law does not necessarily mean that every country reproduces every paragraph without amendment, but it immensely reduces the effort for drafters, particularly in small states. It reinforces a world of common law in which precedents from one country's court are quoted in another's, and the relative predictability of Commonwealth legal systems is an attraction for firms as well as individuals.

Practical policies which have emerged from Law Ministers over the last 20 years include arrangements by which maintenance for deserted wives and their children can be extracted from fathers who live in another Commonwealth state, and by which traders can enforce judgements made in one country in another. Initiatives by Commonwealth Ministers have also led to changes at the global level. For instance a high-profile child abduction case in Barbados in 1980 led them to throw their weight behind a Hague Convention designed to prevent the abduction of children from one country to another; and the 1986 "Harare scheme" for the seizing and freezing of suspected drug money went almost word for word into the UN's formulation.

Much of the policy work of Law Ministers is, therefore, over the medium-term. Individual Ministers may have moved on before it reaches a conclusion. Similarly their work frequently interacts with other Commonwealth or UN and international developments.

In Trinidad in 1999, for example, Ministers urged member states to sign and ratify legislation to set up the International Criminal Court. They also supported a Commonwealth framework of principles on Freedom of Information. These were subsequently endorsed by Commonwealth Heads at Durban later that year, and have stimulated legislation in several countries.

3 Agenda for 2002

The provisional draft agenda, which will be confirmed or amended on the eve of the conference, is as follows:

1 Good governance and human rights

a Democracy and human rights

Human rights issues

Latimer House Guidelines

b Model legislation

Modernisation of the laws of evidence

Freedom of Information

Privacy

Protection of personal information

2 Strategies for enhancing democracy by eliminating legal barriers to development:

Law and development

Law and technology:

Model law on competition

Model law on e-commerce

Model law on e-evidence

3 International cooperation to combat crime

a Terrorism

The Commonwealth legal response to terrorism: progress report on action taken on the recommendations of the Commonwealth Ministerial Committee on terrorism

The Commonwealth legal response to terrorism: furthering the work mandated by Heads of Government

b Commonwealth cooperation in administration of criminal justice

The London Scheme

The Harare Scheme

Model law on computer and computer-related crime

4 Round Table discussion

Current issues, including a look at any report from Ministers of small states

5 Activities of the Commonwealth and its partners in the legal field

6 Any other business

Including:

- Communiqué
- Acknowledgements

- Next meeting

4 Comments on numbered agenda items

1a Democracy and human rights

Law Ministers are being asked to launch reviews of their constitutions and legislation to bring them up-to-date in terms of freedom of assembly and association and other fundamental human rights. Since this was recommended by their own officials, meeting a year ago, there is a strong likelihood that the Ministers will agree. This is a really significant development, since after a rather cautious start with the Harare Declaration, 1991, the Commonwealth has become increasingly bold in acknowledging human rights as one of its main purposes. In this it has been prodded by a non-governmental coalition, the Commonwealth Human Rights Initiative, and the more recently established Association of Commonwealth Amnesty International Sections.

The Law Ministers are being asked to involve other stakeholders, in addition to parliament, in such reviews. There are specific proposals to ensure that legislation fits international human rights standards, that opposition parties are allowed fair access to any public subsidies and to state media, and that the right to demonstrate is not subordinated to the maintenance of public order.

The Secretariat convened an expert group on guidelines for freedom of expression, assembly and association. The Commonwealth Heads, meeting at Coolum, Australia in March, made their first ever specific commitment to freedom of expression, and this may now be followed up if Law Ministers issue a statement on the fundamental values enshrined in the freedoms of assembly, association and speech. Ministers are also being asked to adopt basic principles of justice for victims of crime and the abuse of power, though it has to be said that these are somewhat absent with regard to the abuse of power by governments or private companies.

The Latimer House guidelines, designed to reconcile ideas of parliamentary supremacy and judicial independence, were deferred in Trinidad and are now likely to be accepted by Ministers. They were the product of a 1998 meeting organised by the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers Association and the Commonwealth Legal Education Association. These Commonwealth non-governmental bodies have lobbied hard for their proposals but they ran into difficulty on two counts: some governments were unhappy that the proposals seemed to allow judges total control over their own appointments, and their own budgets.

The sponsoring bodies have now moved to allay these fears. They are no longer insisting on judicial service commissions of judges alone, and recognise that other branches of the legal profession, MPs and representatives of civil society may legitimately be involved in judicial appointments. The object should be to guarantee the quality and independence of mind of those selected. Recent interference by the Mugabe regime in the appointment of senior Zimbabwe judges has of course further discredited the case for appointment by governments alone.

On finance it is now acknowledged that "a shortfall in anticipated national income might lead to budgetary constraints." So although finance ministries are urged to set realistic budgets which parliaments should approve the judges would not be given a blank cheque. A recent quarrel in Trinidad between the Attorney-General and Chief Justice, over funding for overseas travel by judges, is a reminder that finance can be a cause of friction.

1b Model legislation

Model legislation on Freedom of Information, following up the commitments made by Law Ministers at their last meeting, could lead to contention between those who think they go too far and those who say they do not go far enough. Experience in the United Kingdom, where radical thoughts of the Labour Government elected during 1997 were somewhat diluted by the time an Act was passed, typify the resistance all reformers must expect.

While stating that there is a public right to information in the possession of public authorities the proposed Commonwealth law includes a long list of exempt documents: those affecting national security, defence and international relations; those affecting enforcement or administration of the law; those affecting legal proceedings or qualifying for legal privilege; those covered by Secrecy Acts; those covering personal privacy; those relating to trade secrets and business affairs; those affecting the national economy; those containing material obtained in confidence; and those which would be in contempt of court or parliament. A general provision would allow public authorities to withhold material where it would cost too much to provide it, though they should help correspondents to reformulate their requests in ways that could be answered more cheaply.

Of these proposed exemptions perhaps the most contentious relates to the national economy -- where the Singapore government has pursued journalists who have published economic material it wished to keep secret. It could be argued that freedom of expression and good governance require more transparency here. The model law suggests that access should be given to an exempt document where there is reasonable evidence that there has been abuse of authority or official corruption, but this may not go far enough.

Logically, the Law Ministers are taking this opportunity to look at issues of privacy and the protection of personal information under the same agenda heading.

2 Strategies for enhancing democracy by eliminating legal barriers to development

These focus first on land. The Secretariat has produced a thoughtful background paper on land issues, currently a major source of contention in countries as diverse as Zimbabwe and Fiji, and an issue in St Vincent itself. It points out that many countries are working with colonial era statutes, desperately needing reform; that land is both agricultural wealth and collateral, and its better use is critical to stimulating economies; that there is a serious gender disparity, since women own only about 2 per cent of land; that poor and indigenous peoples are frequently denied title; and that land has to be cared for better in order to reduce environmental degradation. However, though encouraging Ministers to consider the need for land reform and to look at principles being proposed for Kenya's new constitution, the Secretariat has no

magic wand which will help them to resolve this thorny issue. It would be good if the Commonwealth Fund for Technical Cooperation could be used to help with the detailed technical work which could assist many member states.

2b Law and technology

Ministers have had a lively interest in the relationship between law and technology over the last decade. This is not only a matter of practicality for the law, but because there is a strong argument that Commonwealth states have a comparative advantage in the exploitation of electronic communications and e-commerce. For some time now Dr Mohan Kaul, who runs the Commonwealth Business Council, has been claiming that, outside the United States, it has been a clutch of Commonwealth states which have been driving e-commerce forward. The Commonwealth Policy Studies Unit itself, in conjunction with the Commonwealth Secretariat, is now conducting research on how e-commerce in Malaysia, Australia, South Africa and Trinidad & Tobago may be benefiting from a Commonwealth advantage.

In St Vincent the Ministers will consider model laws on competition, on e-commerce, and e-evidence. The competition law is the most substantial, setting out the powers of a Competition Authority, and taking account of South African and Zambian laws, and rules developed by UNCTAD, OECD and the European Union. It would outlaw abuse of the power of an enterprise which has a dominant position in any market. Its definition of dominant position ranges from 45 per cent of a market down to a share of less than 35 per cent, where a firm is deemed to have power over the market. These proposals may not quite match the force of trust-busting legislation in the United States, which has been deployed against Microsoft, but they may help to preserve the public interest in small states which have been exposed to strong gusts of privatisation and liberalisation. The key paragraphs in the model laws on e-commerce and e-evidence affirm the validity of contracts and evidence which are kept in electronic form.

3 International cooperation to combat crime

3a Terrorism

In world terms it is doubtful whether the Commonwealth has been a major player in the anti-terrorism drive that followed the attacks on the World Trade Center, the Pentagon and the plane that came down in Pennsylvania in September 2001. This is partly because concerns vary sharply in different member countries. For example, the Indian government has not yet received satisfaction from its Pakistani neighbour following the failed assault by Muslim militants on the parliament in New Delhi, when it requested the extradition of suspects. However several governments have passed rapid anti-terrorist laws over the last year, although some of these (in Zimbabwe for example) have repressive and idiosyncratic aspects which go wider than their claimed purpose. Two presidents of Mauritius resigned rather than approve a bill which they felt eroded civil liberties. Small member states, with financial services industries which have been under-regulated in the past, have become objects of suspicion as investigators pursue the finance for terrorism.

Six weeks after the destruction of the twin towers the Commonwealth issued a declaration condemning all terrorism but the committee it set up, chaired by the Australian Foreign Minister, has only met once. The main task it adopted then was to assist countries to carry out the obligations of the Security Council resolution 1373.

Commonwealth leaders had excoriated terrorism at summits in 1997 and 1999, and the Secretariat has been conducting technical work on money laundering for some years.

The main issue that Law Ministers must consider is whether to adjust the "London scheme" on extradition, which currently allows a loophole for political offences. The agreed scheme is clear: "the extradition of a person sought will be precluded by law if the competent authority is satisfied that the offence is of a political character." In past years the British Government, for instance, has used this as a justification for refusing to return Sikhs to India, or Tamils to Sri Lanka. In an attempt to meet the Security Council resolution this loophole would be significantly narrowed. The Law Ministers are likely to accept a Secretariat amendment to the scheme. This would rule out the "political" exception where offences are alleged under a multilateral anti-terrorism convention to which both countries -- the one wanting the suspect and the one to which the suspect has escaped -- are parties.

3b Commonwealth cooperation in administration of criminal justice

Amendment and revision of the London and Harare schemes is meat-and-drink stuff for Law Ministers. It has been estimated that, if these schemes did not exist, Commonwealth states would need 1272 bilateral treaties between them. In 1999 Ministers asked for an expert group to prepare a model law on computer crime. The upshot would, among others, make crimes of hacking, of the destruction or alteration of data, of interference with a computer system and the cutting off of electricity to a computer system. It is an ironic thought that NEPA, the incompetent national electricity agency in Nigeria, celebrated for its power cuts, could face liabilities under such a law.

4 Round Table discussion

Ministers made clear in Trinidad that they would like more opportunity for discussion outside the agenda, and St Vincent offers them this chance. Some Ministers may take the chance to put their own interests or problems on the table. Singapore, for instance, is interested in talking about the promotion of alternative ways of resolving disputes, such as arbitration and mediation; legal issues in e-government; and the harmonisation of commercial and trade law through adoption of Uncitral texts, such as the UN sales convention and the Uncitral model law on electronic commerce (a possible competitor to the proposed Commonwealth model law). Anxious to avoid any sudden silence among Ministers the Secretariat has put up notes on a variety of topics -- on regional courts, traditional and cultural knowledge, the continuing crisis in the training of legislative drafters, eliminating corruption in the judicial system, legal education, freedom of the press, and creditors' remedies. But it is quite possible that the Ministers will use the two hours set aside for quite other topics.

5 Activities of the Commonwealth and its partners in the legal field

The Commonwealth Secretariat's small Legal and Constitutional Affairs Division has been reorganised since the last meeting of Ministers. It now has three sections: a criminal law section, headed by Kimberley Prost from Canada, which now has terrorism added to its responsibilities; a justice section, headed by Katalaina Sapolu of Samoa; and a law development section, headed by Cheryl Thompson-Barrow from Jamaica. The division has recently lost responsibility for the Human Rights Unit, which had earlier come under the Political Affairs Division, and which is now a

stand-alone unit with a duty to integrate work across the Secretariat. Under a tightening of the rules no Secretariat staffer normally stays there for more than six years.

Given its constraints the Legal Division has covered a lot of ground. Its flagship publication continues to be the six-monthly Commonwealth Law Bulletin, which has a high standing and nearly pays for itself from its revenue. Its subscription will go up to £75 a year in 2003. The division has also worked on the elimination of corruption in economic management, on the rights of the child, on the promotion of Commonwealth values among young people, on curriculum development for law schools, on biodiversity, on WTO agreements, on technical assistance and on the rights of women. Like other Secretariat divisions it stands ready to help member governments where it has the resources to do so -- and sometimes where it does not.

One significant feature of the Legal Division is its close collaboration with associated non-governmental bodies -- the Commonwealth Magistrates and Judges Association, the Commonwealth Legal Association and the Commonwealth Legal Education Association. These have considerable resources and expertise in their own areas and, as a result of decisions taken by Commonwealth leaders at Coolum, there is increasing pressure on members of the Commonwealth family to pull together more effectively. One result of the successful exercise for the Latimer House guidelines is that the Legal Division and selected NGOs are now actively thinking of a "good governance think-tank." Although at an early stage, this could produce ideas on an ongoing basis on issues like the rule of law, accountability, human rights, and ways of combating corruption.

6 Any other business

By the end of Thursday 21 November it is likely that Ministers will have little energy but to agree the communiqué prepared for them by officials, to thank their hosts and support staff, and to settle on their destination in 2006.

5 Interactions with other bodies

As indicated above the Law Ministers have for some years welcomed relevant Commonwealth associations as observers to their gatherings, just as the Commonwealth Lawyers Association (CLA) welcomes Ministers at the large-scale Commonwealth Law Conferences (the next being in Melbourne in 2003). This collaboration went further last year, when these Commonwealth associations played an active role in the meeting of Senior Law Officials in London, particularly in discussing the Latimer House guidelines. The CLA is sending Colin Nicholls QC from London, but in some cases Commonwealth bodies will be represented by their regional representatives; the Commonwealth Magistrates and Judges, for instance, will ask Douglas Kipling from the Cayman Islands to go over to St Vincent. This year, with moves afoot to get a Caribbean regional court off the ground, it will be helpful if the officials and lawyers involved have a chance to liaise with the Ministers.

6 Other issues

There are three areas which Law Ministers do not have specifically on their agenda, but which they probably ought to consider this time. One is the overall significance of Commonwealth legal systems in encouraging trade, investment and economic growth.

There have been several hints recently that honestly administered common law is more important than is generally realised in achieving development objectives in an era of globalisation. It may be more important than use of the English language, accountancy and educational qualifications, or other "soft" factors which also have value. Where its reputation suffers, as in Zimbabwe lately or in the quarrel between government and judiciary in Malawi, there is risk of a negative economic impact. It is rather easy for Ministers to get bogged down in detailed work on evidence, land law and the like, and to lose sight of the value of the common law as a whole, progressively developed. They should focus more on the overall benefit, and how it may be enhanced.

This ties in with the need to make this case for the Commonwealth, as well as their own countries. Following the Coolum summit the Commonwealth Secretariat has set up an expert group to look at the relationship between democracy and development. It is chaired by Manmohan Singh, a tough-minded former Finance Minister from India. Its membership is skewed towards economic and development specialists. In recent years Commonwealth expert groups have not had the significance or the publicity that they won in Sonny Ramphal's time. But the relationship between democracy, development and poverty is complex, and Law Ministers and legal people in the Commonwealth have much to contribute. Ministers should commission a specific input on the legal contribution to this debate.

Finally, it is more than ever the case that the Commonwealth is not an island, but its legal development is stimulated and constrained by moves at the regional and international level. Does UN model legislation obviate the need for Commonwealth model laws? Do Commonwealth model laws merely draw on regional arrangements without adding enough that is extra, original, or appropriate to the Commonwealth membership and traditions? In principle there are special benefits to a transregional Commonwealth system, which can draw from and enhance good practices from around the globe. But if the system is so under-funded or so unimaginative that it is merely an exercise in "me-tooism", or of value only to small state members which have nowhere else to turn for help, it will diminish. Commonwealth Law Ministers, who have done much in the past, need to use their Round Table session and more private moments to look to the future.

Author, Commonwealth Policy Studies Unit, acknowledgments

Richard Bourne, Head of the Commonwealth Policy Studies Unit, wrote a previous Policy Brief for Law Ministers in 1999. Formerly a journalist he has undertaken several Commonwealth activities since 1982. He founded the non-governmental Commonwealth Human Rights Initiative in 1987 and has recently served as a Commonwealth election observer in Pakistan (October, 2002). The Commonwealth Policy Studies Unit (CPSU), part of the Institute of Commonwealth Studies, London University, began in 1999. It is working on aspects of globalisation, and on a "Harare programme" for democratisation, civil society and human rights. Output is publicly available on its website: www.cpsu.org.uk

The author would like to thank all those who helped him in preparing this document.