



Meeting of Law Ministers and Attorneys General of Small Commonwealth Jurisdictions

Marlborough House, London, 4-5 October 2007

Provisional Agenda Item 8

LMS CJ(07)11

SMALL STATES AND LAW REFORM

**Paper prepared by Michael Sayers,*
for the Commonwealth Secretariat**

EXECUTIVE SUMMARY

1. The need for reform of the law has become increasingly important in any state, large or small. Law reform can assist in ensuring the practical application of the Commonwealth's agreed fundamental values.
2. Independent law reform has particularly significant benefits. Independent Law Reform Agencies have been established in about half of all Commonwealth countries, often with considerable success. Their key features are independence, expertise, continuity and focus on law reform. Other important characteristics are their commitment to full consultation and public participation, and their ability to handle new and complex problems, together with their thoroughness, use of outside volunteer experts, openness and accountability. Rightly, they vary greatly according to local circumstances, especially in smaller jurisdictions; they do not need to be large or expensive to be worthwhile.
3. Small states have particular problems that are not faced by larger states, even though they have similar needs to larger states. The problems particularly relate to a lack of both human and financial resources. The need for effective law reform processes is as necessary in small states as in large states. Strategies therefore need to be developed which will enable important law reform work to be undertaken. Work has been done in parts of the Commonwealth to assist small states' law reform efforts, but many would agree that it would be valuable to consider taking that work further. Regional co-operation is an effective way of coping with the lack of resources.
4. This paper addresses the main issues that arise when considering the possibility of further regional co-operation in law reform, possibly in some circumstances leading to a regional Law Reform Agency.

*Michael Sayers is the General Secretary of the Commonwealth Association of Law Reform Agencies (CALRAS) and former Chief Executive of the UK Law Commission

CONTENTS

	Page
INTRODUCTION	1
BACKGROUND	1
Law Reform Agencies: Their Development	1
Law Reform Agencies: Their Advantages	2
Law Reform Agencies: Their Impact	5
CHALLENGES FOR INDEPENDENT LAW REFORM IN SMALL STATES	6
Small States' Law Reform Agencies and their Important Work	6
Challenges	7
Human and Financial Resources	7
Development of Appropriate Law Reform Processes	7
Political Will	7
Keeping up with Demand	7
POSSIBLE SOLUTIONS	8
(1) More Law Reform Agencies	8
(2) Regional Co-operation	8
Projects suited to Regional Co-operation	8
(a) Co-operative Work on Particular Reviews	9
(b) Providing Information about each other's Projects	9
(c) Law Reform Methods	9
(d) Mutual Support and Smaller Law Reform Agencies	10
(e) Visits, Exchanges, Secondments and Internships	10
(f) Regionally	10
(g) Across the Commonwealth	10
(3) Regional Law Reform Agencies	12
Regional Law Reform Agencies: Issues	12
ISSUES FOR CONSIDERATION	13
ANNEX: The Pacific	14
References and Sources	18

INTRODUCTION

1. Reform of the law has become an increasingly important need in the legal system of any state, large or small. Law reform can also assist in ensuring the consistent practical application of the Commonwealth's agreed fundamental values.
2. Reform of the law is the responsibility of states' governments and parliaments. Sometimes law reform is undertaken by government ministers and their officials. This is always likely to be the way in which most changes of the law are brought to the attention of parliament. However, many states have found it advantageous to have an independent Law Reform Agency (LRA) which initiates legal reform and passes its recommendations to government.
3. In 2005 Law Ministers considered a paper at their meeting which invited them to look at a number of recommendations (including the recommendation that governments have special regard to the position of LRAs in small jurisdictions), amounting to a detailed strategy for encouraging law reform¹. The final Communiqué (available by a link at the same website) from that Meeting included the following statement about law reform:

"The Meeting heard a presentation on behalf of the Commonwealth Association of Law Reform Agencies (CALRAs) in support of its paper on the role and effectiveness of law reform agencies. Law Ministers were very conscious of the need for continuous reform of the law to keep pace with changes in society, to cope with the often highly technical requirements of international bodies such as the Financial Action Task Force, and in some cases to complete the overhaul of legislation dating from pre-Independence times. Individual Ministers from the Caribbean, Southern Africa and the Pacific were able to testify to the great advantages to be gained from collaboration with other law reform agencies in their region: duplication was avoided and the resulting commonality in legislation across a region was very helpful."

Noting that only about a half of Commonwealth countries had a law reform agency, Law Ministers welcomed the establishment of CALRAs, encouraged the creation of law reform agencies in more Commonwealth countries, and agreed that an adequately resourced agency, working independently of Government but responsive to Government priorities, offered many advantages over other models. The Meeting hoped that CALRAs would continue its work and give consideration to the particular needs of small jurisdictions."

4. This paper considers possible ways in which small states, which tend to have especially limited human and financial resources, might still be able to make greater use of independent law reform. The possibilities include the establishment of more LRAs, and greater regional co-operation in law reform or even a Regional Law Reform Agency (RLRA).

BACKGROUND

LAW REFORM AGENCIES: THEIR DEVELOPMENT

5. A major innovation in the legal world over the last 40 years has been the establishment and development of LRAs. They have a variety of names such as Law Reform Commission, Law Reform Committee, Law Commission and Law Reform Institute. They have brought whole new features to the legal landscape. They can provide principled and imaginative new law, and can be catalysts of change, responsive to the world and to the public they serve. Even on a conservative estimate, there are some 60 LRAs across the world, with responsibilities to many millions of people. The great majority are in the Commonwealth. National LRAs exist in about half of all Commonwealth countries, and in about a quarter of the Commonwealth's small states. Nearly all of those without an

¹ The paper is available at www.calras.org/Other/future_commonwealth.htm.

independent LRA are small states. The most typical LRA covers a country or a governmental region within a country (such as a province in Canada or a state in Australia), is substantially autonomous and has authority to review a wide range of areas of law. However, LRAs come in many shapes and sizes. For example, some cover countries with populations of well over a hundred million people (for example, India, Pakistan and Bangladesh) while others are for jurisdictions with populations well under a million (for example, the British Virgin Islands and the Northern Territory of Australia), and for many more there are populations in between those numbers. They are standing bodies, ready to take on new work quickly. They are often very small, especially in smaller jurisdictions.

6. LRAs are expert, advisory law reform bodies, independent of government. They review particular areas of law and recommend any changes needed. Until an LRA is established, where there is law reform it is usually done by government ministries, governmental committees, parliamentary committees and other committees and bodies established for one-off reviews and inquiries. This is generally done on a part-time and temporary basis, from time to time. Such alternative mechanisms are often extremely worthwhile but tend to be very far from ideal. An LRA is established to overcome these disadvantages.

LAW REFORM AGENCIES: THEIR ADVANTAGES

Independence

7. An essential feature, and a key advantage, of an LRA, is its independence, not only from Government but also from all other institutions and organisations. This independence has a particular value as it demonstrates that the LRA's views are objective and impartial and are not dependent on others' views. The executive and the legislature frequently need and value specialist advice in the planning and formulation of law reform. This advice is best provided by an independent body. An LRA is independent in the recommendations it makes as to the reform of any particular area of law. An LRA has no preconceptions and no inbuilt bias.

8. An LRA's independence, together with its practice of wide public consultation, enhances the credibility of its work with everyone, including politicians of all parties. It sets an LRA apart and enables it to be more vibrant, innovative and authoritative. If law reform is to be successful in modern society, it normally has far better prospects of genuine widespread acceptance if it is produced independently of government and others.

9. An important aspect of this independence is the LRA's intellectual independence, "the willingness to make findings and offer advice and recommendations to government without fear or favour.... [The LRA must] be, and must be perceived to be, scrupulously free of political partisanship or association with private or special interests....Few other institutions in our society are as accustomed as [LRAs] to sharing openly their work in progress...."²

10. Key ways in which governments have to honour this independence include ensuring that appointments of commissioners are non-political and free from conflicts of interest; that the terms of reference for law reform projects are not designed to produce any particular outcome; and that there is no improper governmental or other external pressure upon the LRA to produce any particular recommendations. The great majority of LRAs are established by statute. Apart from the stability and stature that this tends to provide, the statute often ensures that the LRA has an existence separate from government.

² Weisbrot, Professor David, President of the Australian Law Reform Commission, The Future of Institutional Law Reform, a chapter in The Promise of Law Reform p.38

11. Quite appropriately, a typical LRA's independence is subject to checks and balances in certain areas. First, its work programme is generally agreed between the LRA and the government; indeed, many LRAs find that there are areas of law which in practice (or sometimes because of their governing legislation) they do not review, possibly because they may concern matters that involve heavy party-political issues.

12. Secondly, it is publicly accountable to government. It must report to the minister at least annually, it must have all its reports and programmes of work placed before parliament and published, and it must comply with public sector requirements regarding, for example, openness, management and finances. Moreover, an LRA only makes *recommendations* as to the reform of the law. Rightly, it is only the legislature that can change statute law.

13. Anticipating that it will achieve a balance between independence and accountability, an LRA should establish strong, constructive and open links with others. They include government ministers, ministries and departments, politicians, the Civil Service, the judiciary, legal and other academics, the media and all areas of the legal profession, non-governmental organisations (NGOs) and other groups and individuals with an interest in law reform and in the particular areas of law under review at a particular time. An LRA may need to be relatively ambitious and assertive to ensure, for example, that it obtains consultation responses from all key experts in a particular field; on the other hand, an LRA needs to be humble in how it projects itself and its work and recommendations.

Expertise

14. An LRA builds up a fund of expertise, knowledge and specialist contacts in both the law and law reform. This is vital for successful law reform. It increases the likelihood of consistently high quality work. The LRA's reputation and independence also appeal to experienced commissioners, staff and consultants. Commissioners are appointed against the background of both any statutory requirements for eligibility and the need to appoint commissioners and staff who are well suited for the particular task of law reform, who are of the highest calibre and who are to be engaged in that task for several years. Commissioners are high quality lawyers from the judiciary, from academic backgrounds, from private practice and (in some jurisdictions) from other fields. Many held important positions before serving on the LRA, and the legal and other staff often have invaluable skills and experience.

15. Apart from its own collective expertise, an LRA obtains additional expertise and advice from a wide range of people, cultivating a dynamic relationship. For example, it seeks to capture the attention of outsiders; its consultation processes are open, thorough, imaginative and responsive. As a result, opinions are not only obtained from all quarters but are also taken fully and seriously into account. This is mainly to help ensure that the best recommendations are made. It also helps to empower ordinary people and to avoid their feeling marginalised – with all the adverse consequences which can flow from that. Some LRAs also use consultants, who are mainly legal experts who assist with aspects of particular projects. LRAs also often appoint working parties of experts, representatives from NGOs and other interested parties.

16. An LRA's methods ensure that its recommendations are thoroughly worked through before they reach government and parliament. An LRA's publications, and especially its final reports, are authoritative documents. They provide detailed and up-to-date explanations of the current law and of its deficiencies (both in principle and in practice), and recommendations for its improvement.

Focus

17. An LRA has the great advantage of having a central focus and purpose: law reform. “The Reform of the Law” started: “Like everything else the law needs to be kept up to date; indeed, a great deal of it needs to be brought up to date in the first place. The problem is of course largely one of machinery; and the reason why so much of our English law is out of date, some of it indeed quite antediluvian, is that nobody has ever been entrusted with the job of looking after it” (Glanville Williams, p 9). “It may be your Lordships’ experience that things in life do not get done unless it is somebody’s job to do them. It has never been anybody’s job in England, who could do it, to see that our law is in good working order and kept up-to-date”³

18. As a result, it can concentrate its energy and resources on this single purpose and is saved from the distractions, interruptions and trouble-shooting faced by many other bodies, not least by government and ministers and their ministries all over the world. That is one reason why law reform tends to lag behind other priorities unless there is an LRA. It is able to devote its resources, time and energy to this purpose.

19. There is great benefit in having commissioners and staff whose work is devoted to improving the law. Focus on the job to be done is achieved through the appointment of dedicated commissioners, tailor-made internal structures and publication of reports. A body established for the purpose of law reform is able to undertake reviews of subjects which are broader and more closely interlinked than would be feasible for others.

Continuity

20. There is an enormous advantage in having law reform undertaken by a body which is continuing in existence. Continuity enables an LRA to acquire and apply its expertise long-term. It also gains considerable experience in the processes which are most useful for the complex task of law reform. It avoids transient bodies each having to learn the skills. It helps productivity. It provides a better opportunity to establish a sound reputation. It also increases the justification for investing properly in modern technology, accommodation and library facilities.

21. LRAs are normally intended to undertake work in many areas of law. Their ability and willingness to embark on such work also has the advantage of providing a standing body ready to undertake work in a great variety of law (substantive, evidential and procedural). In addition, projects are often linked by their subject matter, so that the knowledge and experience gained in one project benefits the LRA when it is working, often later, on another; and the LRA’s continuity ensures a consistent approach both to particular areas of law and to the law reform process -- which is otherwise most unlikely. As a standing body, an LRA is able to discuss with government, over what can amount to several years, the reasons for its recommendations, and their strengths and any weaknesses. An LRA saves government ministries considerable resources in actually conducting the law reform process and producing recommendations.

³ Lord Gardiner, the Lord Chancellor, discussion in Parliament in 1965 about what became the statute establishing the two LRAs for England and Wales and for Scotland, during its Second Reading stage.

LAW REFORM AGENCIES: THEIR IMPACT

22. There is going to be a need for law reform for the foreseeable future. The law is constantly in need of considerable review and updating, and never more so than when changes in life are so fast and so many as they are nowadays throughout the world.

23. As purely advisory bodies, LRAs need to combine, on the one hand, the dynamic and innovative approach which can lead to ground-breaking work and radical ideas and, on the other hand, the high standards which are necessary to gain the respect of those with whom they deal. Those high standards are demonstrated by the high quality of its work, the importance of the areas in which it works, and the wisdom of its recommendations.

24. When considering whether to review an area of law, LRAs will sometimes deal with topics which involve particular values. They could be issues concerning individuals, for example respect for the dignity of the individual (and his or her fallibility), respect for the rights and liberties of the citizen, and fair and equal treatment for everyone. They could be issues about changes in society -- for example, keeping pace with scientific and technological developments. They could be issues about the effectiveness of the law -- for example, its accessibility to the citizen, its cost-effectiveness, and the speedy resolution of disputes without unnecessary confrontation and litigation.

25. The Commonwealth's long-accepted fundamental values relate to human rights and the rule of law, gender equality, democracy and good governance, and sustainable economic and social development (Singapore and Harare). The law has a vital role to play in ensuring the practical application of these values. Law reform is a key leader and participant in that process.

26. LRAs have the task of making law reform recommendations. They fully recognise that it is the responsibility of government to decide the outcome of those recommendations, and whether to implement them by legislation or alternative means, or not at all. They appreciate that there may be many reasons why some of those decisions cannot be made quickly.

(a) Legislation

27. New legislation is the most typical impact of LRA recommendations. Experiences of law reform legislation undoubtedly differ between LRAs. The rate of legislative implementation varies between LRAs and over different times in their histories.⁴ Several LRAs have high implementation rates, of over two thirds: e.g., those for Australia, England and Wales, Scotland, and Manitoba (Canada).

(b) Alternatives to Legislative Implementation

28. LRA work has important alternative uses. Many LRAs occasionally publish reports that do not call for legislation at all. This may be because they do not recommend any change in the law, because their recommendations can be implemented without legislation or because they are intended purely as guidance, as advice or as vehicles for discussion rather than for law reform.

⁴ "Truly strait is the gate, and narrow the path which, so far as law reform is concerned, leads to the statute book" (Lord Hailsham, Lord Chancellor, (1981) "Obstacles to Law Reform", Current Legal Problems p283).

29. In addition, legislation is not the only way in which some recommendations can take effect. Some can in effect be implemented by the courts.⁵ LRA reports also have a significant effect in changing views and in providing guidance to the courts on particular subjects. This can lead to a gradual change in the law by developments through the courts. In reported cases in England in a recent two-year period, over 40 referred to the work of the Law Commission for England and Wales.

CHALLENGES FOR INDEPENDENT LAW REFORM IN SMALL STATES

30. Many of the challenges which are faced by LRAs are very similar, whether the LRA serves a large or small country. However, human resources and financial resources are probably the most important problems for law reform in small states. Before considering the challenges which small states face in establishing LRAs, it is important to note a little about their LRAs and what they have already achieved.

SMALL STATES' LAW REFORM AGENCIES AND THEIR IMPORTANT WORK

31. The small states that are known to have LRAs, of varying kinds, are Cyprus, Fiji Islands, Lesotho, Mauritius, Namibia, Papua New Guinea, Solomon Islands, and Trinidad and Tobago. The British Virgin Islands and Jersey are two other small jurisdictions within the Commonwealth which have LRAs. In addition, several other small states have passed (or introduced) legislation to enable them to establish LRAs, such as Samoa, Swaziland and Vanuatu. There is also a Law Commissioner Office in Cyprus and there are references in the literature to the Bahamas Law Reform and Revision Commission, the Law Reform Commission of The Gambia and the Cayman Islands Law Reform Commission.

32. The following are just a few examples of important recent projects by LRAs in small states:

- establishment of a family court (Mauritius);
- compensation for victims of crime (Trinidad and Tobago);
- bribery and corruption (Fiji);
- violence against women and children (Namibia);
- adoption (Trinidad and Tobago);
- codification of criminal law (Namibia);
- computer misuse (Trinidad and Tobago);
- implementation of the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of the Child (Fiji)⁶;
- judicial review (Trinidad and Tobago).

33. LRAs do not need to be large or expensive to do worthwhile work. Most of the aforementioned LRAs are both small and inexpensive. Another example is the Jersey Law Commission, which has an annual budget of under £40,000

⁵ For example, in *Heil v Rankin* [2001] QB 272 a specially convened five-judge Court of Appeal in England heard eight joined appeals about the appropriate level of damages for non-pecuniary loss for personal injury. The hearing was arranged in response to the Law Commission's report on the subject, published less than a year earlier.

⁶ Family Law Act; also see Reports such as Ministry for Women and Culture, Fiji Islands.

CHALLENGES

Human and Financial Resources

34. First and foremost, in order to undertake the many obligations imposed on an LRA, high quality personnel are required, both commissioners and staff. Even the very small numbers needed for small LRAs may not be available. Senior, trained staff too often leave the LRA, perhaps for more lucrative appointment elsewhere. LRAs tend to find it difficult to attract more staff with the expertise required, due to the inadequate pay it can offer.

35. In order to pursue its functions with the kind of professionalism required for law reform, an LRA must have available to it the resource materials required, access to electronic data, and occasional attendance at relevant international conferences. There should also be continuous training for its staff and attendance at training programmes.

36. It is understandable that, without outside funding, the establishment and support of even a very small LRA can impose a difficult financial burden on a government. In terms of governmental priorities, an LRA is probably ranked at the lower end of the scale.

37. Smaller LRAs often rely heavily on donor funding, commitment and support since they are perceived as vehicles for democratic change. If an LRA is seen as independent and competent, and commands the respect of civil society, donors may be willing to fund its activities. However, this may be a short-term arrangement and an LRA may therefore be faced with the challenge of devising ways of sustaining the current levels of funding in the event of donor fatigue.

Development of Appropriate Law Reform Processes

38. Smaller LRAs face the challenge of developing appropriate and effective law reform processes to ensure maximum input from stakeholders. It may not be appropriate simply to try to copy the processes from bigger LRAs.

Political Will

39. A major challenge for smaller LRAs is to cultivate political will. On occasion a government may suspect that an LRA is inclined to advance either a donor agenda or the opposition agenda, due to the LRA's independence from mainstream government and its unusual funding arrangements. On the other hand, others may on occasion suspect that a government uses its LRA mainly as an indication of its democratic credibility and as a means of securing donor aid rather than recognising the LRA for what it is.

Keeping up with Demand

40. A number of smaller LRAs emerged from the new democratic dispensations that introduced new constitutions in the 1990s in many developing nations. As a result, there is great pressure to reform many of the archaic laws still dominating the statute books. This has culminated in some LRAs having to take on too many projects for their limited capacity. There is the additional challenge of the time frames for law reform programmes. Criticisms are often levelled against LRAs' time frames which are seen to be unduly long. The LRAs can be faced with the challenge of convincing government, stakeholders and donors that adequate time frames are necessary to allow for proper research and consultations and that these processes are indispensable in law reform.

POSSIBLE SOLUTIONS

(1) MORE LAW REFORM AGENCIES

41. It can be seen at “Small States’ Law Reform Agencies and their Important Work”, above, that many small states have LRAs, that many have done very worthwhile work and that they do not need to be large or expensive. In principle, it would be good for LRAs to be established in many more states. However, it is clear that that would not be possible in the foreseeable future in all states, especially in some very small states.

(2) REGIONAL CO-OPERATION

Projects suited to Regional Co-operation

42. An array of substantial and serious issues confronts many small states. The following are just some examples of issues that it would be beneficial to tackle co-operatively:

- regional security, and model legislation to address terrorism;
- the spread of HIV/AIDS; how the law should respond in terms of testing, confidentiality and other health matters;
- model legislation in connection with economic, commercial and trade issues; long-term sustainable development efforts are needed to ensure economic improvement and trade competitiveness;
- transnational organised criminal activity;
- law and order issues;
- environmental law, climate change and climate-related disasters;
- fundamental issues raised in national constitutions (land, custom, traditional authority, ethnic and immigrant communities) remain unresolved. There should be examination of the mass of imperial laws that were introduced during the periods of political dependence as to whether or not they reflect the present needs of the country, alongside an examination of the relationship between the written laws, both introduced and locally enacted, and the unwritten customary law and common law;
- implementing declarations on Law Enforcement Co-operation; the harmonisation of laws to facilitate cross border transactions, prosecution and litigation;
- model legislation on weapons control;
- the implementation of legislation for the control of foreign fishing vessels; and
- the outstanding need in many countries for the revision and reporting of statutes.

43. Some of the current co-operative activities between LRAs need to be developed much further. These activities may be developed on a fairly informal basis, between the states in the region. However, there may be regions where it would be beneficial to put such regional co-operation into a clearer and longer term foundation, perhaps with a small regional office providing expertise, advice, research capacity, library and IT facilities, and skills in fields like planning, gaining public participation, communication and technology. Some or all of those features could be made available to the LRA (or law reformers in government) in any contributing small state in the region. Some would say that a regional

body should focus primarily on research and the drafting of model laws which individual states may wish to adopt or amend to suit their particular domestic needs. Accepting individual references from each state government may be unworkable and would not foster harmonisation.

44. The following are examples of co-operative work:-

(a) Co-operative Work on Particular Reviews

45. "There can be opportunities for law reform agencies to co-operate on reviews of particular areas of law. This would most likely arise where either there are similar problems with an area of law in different jurisdictions or where an area of law has strong cross-border importance." As Justice Kirby has remarked, "In the past quarter century, the number of tasks of law reform that have international significance has grown commensurately with the advance of global technology"⁷. Co-operation can consist of mutual exchange of papers, or be as full as joint working. The latter possibility is difficult but, if successful, can provide an even better and more acceptable outcome. The two LRAs for England and Wales and for Scotland conduct a number of projects jointly.⁸ Some of the Australian LRAs have also done so, and the western Canada LRAs have recently conducted two reviews together.

(b) Providing Information about Each Other's Projects

46. It clearly makes sense for an LRA which is reviewing an area of law to consider reviews of that area which have been conducted elsewhere. Senior courts are well used to looking at authoritative decisions in the courts in other jurisdictions. Having made due allowance for all the differences between the jurisdictions and the factors surrounding the area of law, an LRA can often find extremely useful ideas in the reports of another LRA. Frequently, LRA reports cite reviews in other countries. LRAs are increasingly exchanging their publications with each other, or alerting each other to their new publications.

47. Some LRAs may have additional common interests. For example, some may need to be mindful of legal agreements in their region – such as international or regional treaties and conventions on human rights, on business, on trade, or on the treatment of women, children or minorities. It is useful for LRAs within a region to pool information and ideas about the effects of those agreements.

(c) Law Reform Methods

48. It is invariably helpful to share experience on methods and good practice for carrying out law reform -- for example:

Planning:	planning and project management for law reform work;
Public participation and expertise:	engagement with the general public and with particular interest groups; approaches to diverse populations, such as those which are small, indigenous, ethnic minorities, scattered, disabled, illiterate or ill-educated; consultation methods and timing and use of consultation responses;
	the use of consultants, working parties and advisory

⁷ "The ALRC: A Winning Formula", M.Kirby, (2003) 82 Reform 58

⁸ "Promise of Law Reform", M Sayers (2005); p 249).

groups, seminars and public meetings;

Research and publications: legal research, writing skills; socio-legal, economic and other empirical research; discussion papers and consultation papers, and draft legislation;

Communications: presentation of material, for example, length and style of writing, use of graphics, supplementary material such as separate summaries and publicity, websites, media contacts and IT systems;

Post-report work: whether, and how, to engage with government and others to ensure proper consideration of a final report.

(d) *Mutual Support and Smaller Law Reform Agencies*

49. Mutual support can be particularly helpful for LRAs which are in smaller jurisdictions or newly established. The deliberately independent and separate position which most LRAs have tends to make them lonely and isolated places to work – even more so if they are small. Besides practical interaction and support, many LRAs therefore greatly value encouragement and moral support from others across the world with the same role in their jurisdictions – so that they do not become weary in well doing. Some LRAs have especially close relationships, perhaps because of geographical proximity or for historical reasons. There would also be advantages in twinning arrangements being formed between certain LRAs, most obviously between larger and smaller LRAs.

(e) *Visits, Exchanges, Secondments and Internships*

50. A good deal of interaction between LRAs already takes place by way of individual visits, which generally prove extremely valuable. Where useful, these opportunities should be expanded, both in number and sometimes in duration. More LRAs might be prepared to have a commissioner or staff member seconded to them, or to participate in internships or exchanges of personnel.

(f) *Regionally*

51. There are several regional arrangements in place.

- The Association of Law Reform Agencies of Eastern and Southern Africa was formed in 2000, covering some 13 countries.
- An Australasian Law Reform Agencies Conference has been a regular feature since 1973.
- The Federation of LRAs of Canada covers the LRAs across Canada.
- There have been meetings of the LRAs of the Indian sub-continent.

(g) *Across the Commonwealth*

52. The Commonwealth Association of Law Reform Agencies (CALRAs) has recently been formed to foster and promote international co-operation on law reform. CALRAs has the potential to take forward initiatives to strengthen independent law reform in the Commonwealth.

53. For many years there has been strong and widespread informal support for establishing a Commonwealth Association, to encourage, facilitate and take forward co-operative initiatives in law reform. CALRAs' website (www.calras.org) includes information about CALRAs and has links to the websites of LRAs and others across the world. CALRAs has been established with the strong support of the Commonwealth Secretariat and has been granted accreditation by the Commonwealth.

Regional Co-operation in Law Reform: Issues

54. The issues will differ according to the particular region in the Commonwealth. However, greater regional co-operation in law reform would:

- (a) enable states to share resources;
- (b) assist in obtaining outside funding. Donors are more likely to provide funding and, often increase funding if they know that the money will contribute to the legal development of several states. The regionalisation of aid programmes has been developed to ensure that assistance is sustainable; these programmes have been implemented in many parts of the world;
- (c) avoid duplication of effort and work by different states: a good example would be the production of model legislation (or framework legislation) to avoid the need for individual states to undertake full law reform exercises, and yet to give each state the opportunity to adapt model legislation to its own particular need;
- (d) increase the likelihood of important law reform taking place, with a significantly independent element;
- (e) be easier where the issues in the particular state and field of law under discussion were common to the other states in the region;
- (f) greatly reduce the need for good quality personnel in each state;
- (g) be made easier if there were already regional organisations in existence, giving confidence to the establishment of regional co-operation;
- (h) depend partly on the geographical proximity of the small states in the region;
- (i) improve harmonisation of law in the region; and
- (j) be a good first step, keeping open the option of yet greater co-operation in the future, even to the extent of a regional LAR (RLRA) if appropriate.

55. Such issues form the context in which the need and potential for law reform in small states should be assessed.

56. The LRA in Trinidad and Tobago would welcome the idea of regional co-operation in law reform. Trinidad and Tobago has been part of the wider regional community since the establishment of the Caribbean Community and Common Market (CARICOM:www.info@caricom.org) over 30 years ago. CARICOM was born out of the need to promote co-operation among Commonwealth Caribbean states in order to achieve sustained economic development and to promote social, cultural and technological exchanges.

57. The Caribbean region, in particular CARICOM member states, has experience in establishing regional institutions. They include the Council of Legal Education, the University of the West Indies and lately the Caribbean Law Institute, which was established to clarify the laws of the region affecting trade, commerce and investment, while taking account of the unique needs of each jurisdiction. A regional court, the Caribbean Court of Justice, has also been established as a final appellate court for member states. Barbados and Guyana have already passed the enabling legislation. CARICOM states may well find it feasible to support regional co-operation on law reform.

(3) REGIONAL LAW REFORM AGENCIES (RLRA)

Regional Law Reform Agencies: Issues

58. The issues will differ in different parts of the Commonwealth. Each of the issues summarised above concerning regional co-operation (at paragraph 54 above) would be relevant, often to a greater extent. In addition:

- (k) in some regions there is considerable difference between the different states' current law, legislation, legal procedures, legal practice and other circumstances: the greater the difference, the greater the difficulty an LRA would have in making recommendations for each state;
- (l) if, as is often the case, governments do not instigate a sufficient amount of law reform, *for a variety of reasons*, they may be even less likely to do so if the recommendations come from a body outside their state;
- (m) law reformers in government (ministers and officials) tend throughout the world to be reluctant to pass any of that responsibility on to others within their state – especially until an LRA has proved its value there. It is likely that they would be even more reluctant to do so to a body outside the state unless there were very pressing reasons for doing so since to establish an LRA, which is independent and long-lasting, might be seen as a real stumbling-block;
- (n) there are clearly potential difficulties in establishing and maintaining an RLRA;
- (o) an RLRA would have problems of credibility and acceptability in each of its constituent states and ministries; and
- (p) the likelihood of achieving agreement on e.g. funding, appointments, structure and organisation, responsibilities and powers, extent of the work, and the need for frameworks of law, is in question.

59. If consideration was given to establishing an RLRA, the following are key points:

- while an RLRA would depend on Government for funding and assistance, it should be an independent agency and not be subject to instruction from state parties – although that independence should be subject to checks and balances (see paragraphs 7 to 13 above);
- the source of personnel for an RLRA, and the way they are selected - at levels from commissioner downwards - would probably depend on the overall process for establishing and maintaining the RLRA. However, it is clearly vital to have high quality people such as a Chairperson, commissioners and senior staff. It may be possible to advertise many of the posts within (and possibly beyond) the states. It may be desirable for an RLRA to have a revolving position of Chairperson;

- the organisational and funding pattern and structure could be adapted from the pattern and structure used by other regional organisations in the particular region. Those basic structures would also depend on the political leadership of the various regions and should be open for discussion. For example, in the Caribbean, these matters could be decided by CARICOM Heads of State. Membership and funding would depend to a large extent on the commitment given by each government;
- donor funding for regional law reform work could take several different forms. It could be for the establishment of a regional organisation, whether for co-operation or as an RLRA. It could be for specific set-up costs (e.g. IT or a library) or ongoing costs (e.g. particular personnel or particular projects in particular areas of law);
- while an RLRA's expertise should benefit the region as a whole, it should only complement but not replace the work of any existing national LRA.

60. Some, but by no means all, believe that RLRA's could be a real possibility in the Pacific (see the **ANNEX** to this paper), where commonalities in legal systems and social and cultural values exist. However, opinions are not unanimous. It is just possible that there would be support in some quarters for an RLRA in the Caribbean. There is little evidence that an RLRA would have much support elsewhere, because alternative methods of regional co-operation are thought more appropriate and for the reasons cited in paragraphs 54 and 58 above.

ISSUES FOR CONSIDERATION

61. Law Ministers are therefore invited in light of the above to consider the following:
- (i) it is in principle desirable for a small state to have an independent LRA, with a size and capacity appropriate to its needs and resources (paragraph 41 above);
 - (ii) if a small state does not currently have an independent LRA and is not at this stage in a position to establish one, it is desirable for the state to work, probably regionally, with one or more other states in cooperating on law reform (paragraphs 42 to 57 above);
 - (iii) it may be desirable and practicable in some regions for small states to establish a small regional body which does not have all the roles of an LRA but which provides some assistance on law reform to those states, on the lines summarised at paragraph 43 above;
 - (iv) there may be one or two regions where the possibility of establishing an RLRA is worth considering (paragraphs 58 to 60 above).

Commonwealth Secretariat
 Marlborough House
 Pall Mall
 London SW1Y 5HX

September 2007

THE PACIFIC

THE CURRENT POSITION:

(1) The Law

1. "jLaw reform in the Pacific Island States⁹ is complicated by the fact that the states typically draw upon five distinct sources of law, which contribute to the current legal system in different ways:
 - the customs and traditions of their people, to the extent that these are reflected in current rules of customary law;
 - laws made under colonial arrangements prior to independence, which are reducing in number as law revision and reform proceed;
 - common law and equity (usually "English" or "of England") in so far as they are not inappropriate to the circumstances of the country concerned;
 - post-independence laws of the state; and
 - the constitution, as supreme law of the land." (Powles, p. 408)
2. Significant attention¹⁰ has been given in recent years to the law reform needs of the small states in the Pacific, a region with a large number of Commonwealth (and other) small states.

(2) Law Reform Agencies

3. Legislation for the establishment of an LRA has been passed in each of the following small island states: Papua New Guinea (1975); Fiji (1979); Vanuatu (1980); Solomon Islands (1994); and Samoa (2002) (and there is a record¹¹ of the one-time existence of the Law Reform Committee of Tonga). However, only three of those states have actually had LRAs and, even so, they have had dormant periods – for example: the Papua New Guinea LRA for most of 1997 to 2005; and the Solomon Islands LRA for most of 1998 to 2006. In Vanuatu, the LRA has not been brought into existence. In Samoa, a Commission was established in 2002 but has never been formalised. In large measure the situation there would mirror that of several other small countries in the region that do not have formal LRAs. All law reform and law revision work is undertaken in and by the Office of the Attorney General which, in addition to its constitutional responsibilities, incorporates the functions that would normally be carried out in other countries by a separate or independent Solicitor-General, Director of Public Prosecutions and Parliamentary Counsel. The LRA envisaged for Samoa would be a modest stand-alone Commission consisting of a full time Commissioner, part-time Commissioners and a small team of researchers/lawyers. The problem, however, is that the budget estimates

⁹ In particular, the nine independent "common law" states of Fiji Islands, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

¹⁰ This Annex makes particular use of the work of: Slade, MacFarlane and Lakshman, Powles, the New Zealand Law Commission, and the Pacific Islands Forum Secretariat, all identified at "References and Sources" on pages 16 and 17 above.

¹¹ Law Reform in the Commonwealth; law reform proposals and their implementation, Issue 2: July 1983, p 95.

for the new institution would amount to almost two-thirds of the total budget for the Office of the Attorney General.

(3) Regional Legislative Developments

4. A significant range of activities is being undertaken in the region for the development of legislative frameworks and for the review and general reform of the law in order to support various social, trade and economic development programmes. They are activities which would be impossible for any one country to manage, and which need to be carried out on the basis of the active partnership and collaboration that exists in the Forum structure of the region. Increasingly, the smaller countries are resorting to and drawing assistance from the legislative development work of specialist regional agencies like: the South Pacific Regional Environment Programme, based in Samoa (for legislation on environmental issues); the Forum of Fisheries Agency, based in Solomon Islands (for fisheries related legislation); the Pacific Community, based in New Caledonia (for legislation on health and social issues); and the Forum Secretariat, based in Fiji. Following regional studies and consultations, these agencies work to develop model legislation (usually with associated programmes for the monitoring of implementation) on a variety of subjects.

5. Several initiatives have also been undertaken by the Pacific Islands Forum Secretariat:

- intellectual property rights
- traditional knowledge
- trade related legislation
- commercial and business environment.

THE NEEDS

6. At least two broad types of law reform are needed in the region. First, there are issues mandated by the political leadership of the region and acknowledged as of common benefit and value to all countries (to foster, for instance, a sound environment for investment and trade) and to preserve traditional knowledge.

"Modernisation of the law is a fundamental operational principle for law reform.... The desire for improved provisions for the better expression and protection of human rights has been raised from time to time on a Pacific-wide basis, and will continue to be raised. It is a matter that calls for attention, clearly with the most careful regard to the cultural sensitivities and traditional nature of Pacific societies, but also with regard to the fact that the Pacific is one of those few areas of the world not yet governed by an international or regional framework, instrument or arrangement on human and cultural rights."¹²

7. Secondly, significant activities requiring the change and reform of laws in the Pacific are taking place in the Commonwealth and throughout the world as a result of the influence of or pressure from the international community. Today, small states face severe challenges in drafting and organising legislation on issues relating to international terrorism¹³, money

¹² Concluding remarks in an address by Justice H.E Tui洛ma Neroni Slade, 'Law Reform Potential in the Pacific Area', Paper presented at the Australasian Law Reform Agencies Conference, Wellington, New Zealand, April 2004.

¹³ One could take the example of the requirements of Security Council Resolution 1373 which followed the terrorist attacks on the United States on 11 September 2001 and which imposed binding obligations on all member states of the United Nations. Resolution 1373 required all states to take steps to combat terrorism and to become a party to 12 international terrorism conventions and protocols as soon as possible. In doing so, it created uniform obligations for all 191 member states of the United Nations, so going beyond the existing international conventions and protocols binding only those states that are parties to them.

laundering, drug smuggling, small arms weaponry¹⁴, and other issues, arising from international commitments and requests from a variety of sources including the United Nations, World Bank, IMF and the Financial Action Task Force. The international legislative agenda has grown to a point that the external demands are becoming quite onerous for some states, especially the smaller ones. Although the demands for the reform and for new laws are often accompanied by offers of expert advice and legislative drafting assistance, the additional requirements (for training of personnel and of monitoring and implementation measures over an extended period of time) do add to the burden.

POSSIBLE SOLUTIONS

8. First, there could be even greater use of the forms of contact and co-operation that have already been used. For example, some have been worked out on a bilateral basis between the law reform authorities in small island states and their counterparts in Australia and New Zealand. A further opportunity for contact and for the exchange of views is offered by conferences such as the Australasian Law Reform Agencies Conference and through the participation of law reformers from the island countries in meetings of the respective law reform institutions of Australia and New Zealand. As between the island states themselves, in view of the law reform activities that take place in the region, it is worth considering some more organised system for the spread and sharing of information among the law reform authorities of the Pacific as a region.

9. “There is merit in the ideal of having a more organised system for the region for the better sharing of experience. Training in law reform for the Pacific region can be undertaken through the University of the South Pacific. Models such as that for the Protection of Traditional Knowledge and Expressions of Culture have been developed within the region and for the region, taking account of international obligations” (Qetaki).

10. The circumstances of some smaller countries might warrant consideration of new forms of partnerships. Instead of two small jurisdictions each undertaking a major programme of, say, implementation legislation, it might be more effective, in cost and in time, for both jurisdictions, especially if neighbouring countries, to share the same programme (clearly with room for adaptation). Perhaps some capacity for law reform related research or training might be considered for the University of the South Pacific, possibly in connection with the regional work on the development of model legislation.

11. The region “does not have a strong history or commitment to law reform institutions. This leads to the suggestion that perhaps it is time to consider a regional law reform commission” (MacFarlane). It is of interest that the New Zealand Law Commission recently concluded that it would be premature to introduce a Pacific Court of Human Rights, in the absence of a regional call for such a mechanism and that it would raise formidable practical obstacles. Although an RLRA would be very different, some of the obstacles would be similar. On the other hand, they have suggested that consideration could be given to the establishment of a Pacific RLRA which countries could opt into or contract with as they wish, and which would help small states have access to a wider range of experience and expertise (New Zealand Law Commission, pp 228-228).

12. However, when considering the possibility of an RLRA, one commentator considers that, although an RLRA may appear attractive, there may be insurmountable difficulties and challenges, such as: the lack of policy expertise; the number of countries which would be

¹⁴ Philip Alpers and Conor Twyford, Small Arms in the Pacific, 2003, Occasional Paper No. 8, Small Arms Survey; Tuilaoma Neroni Slade, The Magnitude and Scope of Illicit Trafficking in Small Arms and Light Weapons: The Experience of the Pacific Islands Forum Region 2001, a paper to the UN Asia Pacific Regional Disarmament Conference, Wellington, NZ

involved in the co-ordination of an RLRA; the difficulty faced by an RLRA if having to work in non-aligned areas; and the difficulties caused by an RLRA requiring manpower, which might have repercussions on the individual states. A question would be “whether an RLRA would be the best approach, and whether the advantages would outweigh the disadvantages”.

13. There are “three reasons that commend consideration of the establishment of a regional law reform agency”¹⁵, although it may be that they also support the idea of regional co-operation. “The first concerns finances and resources.... By establishing a regional law reform commission these costs can be shared among member countries.... In this way all jurisdictions get the benefits that come from an active law reform agency without having to be responsible for all the costs and overheads.

14. The second reason for a regional commission is that there is only limited expertise in the region.... By combining existing South Pacific law reform agencies (apart from existing Australian and New Zealand Commissions) and by encouraging participation by those from the USP (University of the South Pacific) with skills in relevant areas, it is suggested that an expert group of part time members could be assembled who could provide independent advice as well as draft legislation for governments....

15. The third reason for a regional agency is simply that most of the issues in need of consideration by South Pacific law reform commissions are issues that are common across the region. There seems little point in one commission looking at the relationship between custom and introduced law when other commissions have carried out the same task. In much the same way, for example, the work of one agency concerning HIV/AIDS in relation to reporting and confidentiality would be of direct relevance to other regional jurisdictions. One of the strengths of the Pacific lies in the capacity of member states to adopt a regional approach to issues.

16. A legitimate question of course would be the position of the current (and active) Fiji and PNG Law Reform Commissions. The view of the writers [expressed in 2005, before the rejuvenation of the LRA for the Solomon Islands] is that the Fiji Law Reform Commission should be broadened to form the South Pacific Law Reform Commission. It could, for the time being, be based in Suva, with offices in each of the regional (member) jurisdictions. This is not to say that it would always have its head office in Suva and, as member countries become more committed to the sharing of resources, individual governments might apply to have the head office moved to their own jurisdiction for a time. Membership would be contingent upon a government commitment to assist in funding. It is suggested that each participating jurisdiction has one full time member but that the Commission has power to appoint other persons as part time members for the purposes of a particular reference. References would come to the Commission via the Attorneys-General of each member country. In time the PNG Law Reform Commission might wish to merge with this wider law reform agency.”

¹⁵ The text quoted, in this and the next three paragraphs, is from MacFarlane.

REFERENCES AND SOURCES

References

- Gardiner, Lord, the Lord Chancellor, discussion in Parliament in 1965 about what became the statute establishing the two LRAs for England and Wales and for Scotland, during its Second Reading stage.
- Hailsham, Lord, of St Marylebone, Lord Chancellor, (1981) “*Obstacles to Law Reform*”, Current Legal Problems 283.
- MacFarlane, Peter, and Lakshman, Chaitanya, *Law Reform in the South Pacific* (2005) 9 Journal of South Pacific Law (<http://law.usp.ac.fj/jspl> and www.paclii.org/journals/JSP).
- Powles, Guy *The Challenge of Law Reform in Pacific Island States*, a chapter in *The Promise of Law Reform* (see below).
- Qetaki, Alipate (2004) *Commentary on “Law Reform Potential in the Pacific Area”* (see at Slade, below) presented at the Australasian Law Reform Agencies Conference, New Zealand, April 2004 (<http://www.lawcom.govt.nz>).
- Sayers, Michael (2005) *Co-operation across Frontiers*, a chapter in *The Promise of Law Reform* (see below).
- Singapore and Harare: the Commonwealth’s fundamental values were set out in the Singapore Declaration of Commonwealth Principles (1971) and the Harare Commonwealth Declaration (1991).
- Slade, H E Tuiloma Neroni, *Law Reform Potential in the Pacific Area*, paper presented at the Australasian Law Reform Agencies Conference, New Zealand, April 2004 (<http://www.lawcom.govt.nz>).
- Weisbrod, Professor David, President of the Australian Law Reform Commission, *The Future of Institutional Law Reform*, a chapter in *The Promise of Law Reform* (see below).
- Williams, Professor Glanville, ed, (1951) “*The Reform of the Law*”, the Haldane Society.

Other Sources

- An informal survey was conducted by the Commonwealth Association of Law Reform Agencies in mid-2007, by a variety of means such as requesting information from a sample of Commonwealth LRAs, especially in small states, and studying LRA annual reports, literature and websites (for many of which, links can be found from the CALRAs website: www.calras.org).
- Banda, Janet (2005) *Smaller Law Reform Agencies: Prospects and Challenges*, paper for Conference of Commonwealth Association of Law Reform Agencies.
- Commonwealth Secretariat (2005) *Law Reform Agencies: Their Role and Effectiveness*, paper for 2005 Commonwealth Law Ministers Meeting (www.calras.org/Other/future_commonwealth.htm)
- Commonwealth Secretariat, “*Commonwealth Co-operation on the Field of Law Reform*”, paper for meeting of Commonwealth Law Reform Agencies, August 1977.
- New Zealand Law Commission (2006) *Converging Currents – Custom and Human Rights in the Pacific*, Study Paper (www.lawcom.govt.nz/Project Study Papers).
- Kirby, Justice Michael “*The ALRC: A Winning Formula*” (2003) 82 Reform 58.
- Kuemlangan, Blaise (2006) *Law Reform and Development for Nation-Building in the South Pacific in Pacific Futures*, Powles, Michael (ed), Pandanus Books, Canberra, Australia.
- Murphy, Gavin (2003) *Law Reform Agencies*.
- Pacific Islands Forum Secretariat (2005) *A Pacific Plan for Strengthening Regional Co-operation and Integration*.
- Permanand, Justice Jean (2005) *Challenges and Opportunities for Smaller Law Reform Agencies*, paper for Conference of Commonwealth Association of Law Reform Agencies.
- *The Promise of Law Reform*, (2005) published to mark the 30th Anniversary of the Australian Law Reform Commission, Federation Press, Leichhardt, New South Wales, Australia.
- Sayers, Michael (2003) “*International Co-operation in Law Reform*”, a paper in “*The Law Commission of Sri Lanka Commemorative Journal 2003*” to mark their 25th Anniversary.