



## The Law as a Tool for Development

**The Legal and Constitutional Affairs Division (LCAD)** of the Commonwealth Secretariat bases its work on the application of the law as a tool, to inter alia, foster a conducive legal environment in Member Countries. We endeavour to ensure that a requisite enabling legal environment is predicated on the Commonwealth Principles as stated in the Harare Declaration of 1991 and embodied in the 2003 *Aso Rock* Communiqué.

**The Law Development Section (LDS)** of **LCAD**, thus has a particularly significant function to discharge. The status of the world as a global village has ensured that a country cannot operate in isolation and as lawyers we are aware that the rules of international law have to be mirrored at the national level. Furthermore, conscious that not all Member Countries have the resources and the capacity to enact the requisite enabling legislation, **LCAD** has been at the forefront of providing legal assistance to Member Countries through the development of model laws for adaptation to national requirements. In this context, **LDS's** role in the development of appropriate strategies to enhance both the human and institutional capacity of legal drafters to develop new laws and improve existing legislation should be noted. Additionally, **LDS's** initiatives over the past year have been reflected in areas such as electronic commerce, electronic evidence, competition law, including business regulation and good governance with a focus on providing an enabling business regulatory system which seeks not only to attract investment and promote economic growth but provides the necessary sustenance to drive the engine of growth as well.

**LDS** has also played a significant role in the recent movement by some Member Countries, notably in New Zealand and the Caribbean, away from the

### FROM THE DIRECTOR'S DESK



Judicial Committee of the Privy Council as their final Appellate court. This role, we believe, has gone some way towards ensuring that common law principles will continue to be maintained in the evolution of national or regionally based appellate courts. In its role of developing legal norms based on common law principles, **LDS** also maintains a close legal 'eagle' eye on current developments to be in a prime position to advise Member Countries of the Commonwealth on policy issues involving international trade and taxation issues.

This newsletter is the first from **LDS** and is intended to bring you a digest of legal developments in a wide range of areas from around the Commonwealth. I hope you will enjoy following the developments brought to your attention and as I am welcomed to **LCAD** as its new Director, I welcome you to the inauguration of the **LDS** newsletter. Enjoy this issue.

Betty Mould-Iddrisu

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## Updates on Technology Laws Within the Commonwealth

### Commonwealth model laws

Following the mandate of Commonwealth Law Ministers, LCAD developed 5 model laws relating to technology. The model laws were adopted by Law Ministers at their last meeting in November 2002 in St Vincent and the Grenadines.

In an inter Divisional collaborative effort, the Law Development Section (LDS) along with the other sections of the Division organised workshops with the Governance and Institutional Development Division (GIDD) for the Caribbean region in November 2003 to consider these laws and adopt or adapt them for use in Member Countries. The subjects covered by these model laws are, **eCommerce, eEvidence, Freedom of Information, Privacy and Computer and Computer Related Crimes**. The model laws are on [www.thecommonwealth.org/law](http://www.thecommonwealth.org/law).

### Australia – Anti-spam law

Australia has recently passed the Spam Act 2003. The legislation will come into effect on 11 April 2004, allowing businesses time to adjust their practices where necessary.

The Act prohibits sending unsolicited commercial electronic messages that have an Australian link. This means commercial spam, sent by mobile phone or email, cannot originate from Australia and is not allowed to be sent to Australian addresses, no matter the point of origin. Businesses which persist in sending spam will face penalties of up to \$ (AUS)1.1 million for a single day of infringements. The Australian Communications Authority will be

responsible for enforcing the legislation once its penalty provisions come into effect. The National Office for the Information Economy will also coordinate a 12-month information campaign about the legislation and about spam, commencing early this year.

### The Bahamas

The Bahamas has concentrated on three laws relating to technology. These are the Electronic Communications and Transactions Act 2003, the Computer Misuse Act, 2003 and the Data Protection (Privacy of Personal Information) Act 2003 all largely drawn from the Commonwealth Secretariat models. The first two are already effective but the Data Protection law has not yet been passed into law.

### Belize

Belize's Parliament has passed the Electronic Transactions Act (No. 8 of 2003) and the Electronic Evidence Act (No. 9 of 2003) to recognise the admissibility of electronic records as evidence in legal proceedings. Both pieces of legislation drew very heavily from the Commonwealth's model laws. The two Acts are not yet in force but may be viewed at [www.belizelaw.org](http://www.belizelaw.org)

### St Vincent and the Grenadines

Two laws relating to technology were enacted by St Vincent and Grenadines. These are the Freedom of Information Act and the Privacy Act. Both were enacted on 27th June 2003.



Participants at the Caribbean regional workshop in Kingston, Jamaica, November 2003

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### Canada - Health Privacy Bill

The Parliament of Ontario, Canada introduced a new health privacy bill in December 2003. The bill establishes new rules governing the collection, use and sharing of health information. Among other things, the new law would guarantee how and when health information is used or disclosed, that people know when their consent is required for the collection, use or disclosure of their information and the enforcement of people's right to privacy. The Privacy Commissioner is charged with the powers of enforcement under the Bill. She commented that legal protection in this area was long overdue.

### Canada – E-Commerce Code for Consumer Protection

Canadian federal, provincial and territorial ministers responsible for consumer affairs have endorsed a Code to deal with consumer protection issues. The Code known as the Code of Practice for Consumer Protection in Electronic Commerce was endorsed on 16 January 2004. The Code establishes benchmarks for good business practices for merchants conducting online commercial activities. It deals with issues such as identity, theft, clear information, payment security, contact formation

and complaints handling. The adoption of the Code does not affect existing rights, remedies and other obligations that subsist as a result of consumer protection and privacy. It also complements other laws, regulations and voluntary codes of conduct to which vendors may subscribe. The Code can be viewed on <http://cmcweb.ca>

### Kenya – ICT Body to be Established

A new policy document has confirmed that Parliament is planning to pass legislation to establish a national information and communication technology coordination body to advise the government on matters relating to the development and implementation, monitoring and evaluation strategies to accelerate the process of transforming Kenya into an ICT-enabled information-based society. The Council will be based in the Office of the President and will work closely with the National Economic and Social Council.

The document proposes amendments to several laws including the Penal Code to make room for crimes committed on cyberspace; the Evidence Act to allow electronic documents, signatures and records to be admissible as evidence in court; the Official Secrets Act to recognise electronic documents and signatures and copyright laws to enhance protection of intellectual property rights.

## Whither the Judicial Committee of the Privy Council?

The Judicial Committee of the Privy Council (JCPC) remains the court of last resort for some Commonwealth Countries. The question of access to justice on the one hand and the urge for a nation state to adjudicate its own as a seal on its sovereignty, on the other hand, have witnessed the role of the JCPC withering away from the judicial landscape of some Member Countries.

Some of these countries are now taking steps to establish their own final Courts. Assisting countries towards this goal is the Law Development Section (LDS). The Section convened an Expert Group meeting in June 2003, pursuant to a 2002 mandate from the Commonwealth Law Ministers. The terms of reference of that Expert Group meeting were to (1) examine the manner in which Commonwealth jurisdictions proposing to sever relations with the JCPC could effect a smooth transition from the jurisdiction of that Court; (2) ensure that the high standards set by the JCPC were maintained after severance by such other Courts as might replace the JCPC; and make such recommendations as are considered appropriate and report thereon to Law Ministers.

The meeting was comprised of experts from jurisdictions which had already severed ties with the JCPC; jurisdictions/regions which were putting in place the necessary legislative arrangements for the transition; and contributions from regional courts which were already functioning. They shared thoughts on the necessary arrangements for a new final appellate Court including the jurisdiction of final and regional courts, the enabling legislation and the adoption of best practices by those courts. Such best practices comprise the ability:

- To maintain the principle of orality which must be confined within reasonable limit in the allocation of time;
- To invest registrars with the power to issue procedural directions;
- To keep court workload at reasonable level and ample time reserved for reading and writing opinions;
- To allocate reasonable time intervals between parties on filing of cases;
- To allow the delivery of dissenting opinion in the general appellate jurisdiction of Final Courts and the delivery of single opinion in the original jurisdiction of the Final Court;

- To permit optimum use of information technology which would enhance access to justice

The electronic version of the Report of the Expert Group can be found on [www.thecommonwealth.org/law](http://www.thecommonwealth.org/law).

Some countries had originally enacted laws to limit appeals to the JCPC. They subsequently passed laws to discontinue appeals. Countries which have stopped sending appeals to the JCPC include:

- Australia - via the Australia Act 1986
- Botswana - via the Privy Council (Abolition of Appeals) Act 1973
- Canada – via the Supreme Court Act 1985
- Malaysia – via the Court of Judicature (Amendment) Act 1985
- Malawi – The Republic of Malawi (Constitution) Act 1966

Countries currently sending appeals include Antigua and Barbuda, Bahamas, Barbados, Belize, Grenada, Jamaica, St. Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Tuvalu.

There was a significant expression of appreciation of the work of the JCPC and the standards it has established and maintained over the years. Member Countries represented at the Expert Group Meeting reiterated the importance of maintaining these standards and building on them.

### CARICOM AND NEW ZEALAND

Since the Expert Group meeting, the Heads of Government of the Caribbean Community (CARICOM) have, on 4th July 2003 signed four instruments relating to the establishment and operation of the Caribbean Court of Justice (CCJ). The instruments are the Protocol on the Privileges and Immunities of the CCJ and the Regional Judicial and Legal Services Commission; Protocol to the Agreement Establishing the CCJ; The Agreement Establishing the CCJ Trust Fund and Vesting Deed of the CCJ Trust Fund. The signing of these instruments is a significant step towards removing the jurisdiction of the JCPC.

On October 14, 2003, New Zealand passed the Supreme Court Act under which for the first time New Zealanders will have the opportunity to have their case heard at the highest level on national soil. The Act became effective from 1 January 2004 and the Court will be sitting to hear appeals from 1 July 2004.

### New Zealand - Supreme Court Registry Commence Business

The Registry of the Supreme Court has opened on 5 January. Cases heard by the Court of Appeal from 2 January 2004 can now be appealed against by making an application for leave to appeal to the Supreme Court instead of the Privy Council as is previously the case.

The rules for the Supreme Court are not yet promulgated and until then, the rules for the Court of Appeal will apply, subject to modification where necessary.

The Registrar can be contacted on email but matters which can be addressed via that channel is limited. Matters such as applications for leave to appeal, notices of appeal and other court documents cannot be communicated by email.

Fees payable are governed by the Supreme Court Fees Regulations 2003 which came into effect on 1 January and can be found at [www.justice.govt.nz/supremecourt/fees.html](http://www.justice.govt.nz/supremecourt/fees.html).

A practice note – The Supreme Court (Applications for Leave to Appeal) Practice Note - has also been issued for the Supreme Court and this can be found at [www.justice.govt.nz/practicenotes](http://www.justice.govt.nz/practicenotes).

### South Africa – Reform of Privacy and Data Protection Laws

The South African Law Reform Commission has issued a Discussion Paper to consider issues relating to the protection of information privacy which would be compatible with international instruments such as the Council of Europe Convention and the OECD Guidelines which incorporate technologically neutral principles on how personal information are collected, retained and used.

The decision to reform is also influenced by the need to remove trade barriers. This is demonstrated by the EU Data Protection Directive which stipulates that personal data from the EU can flow to non EU countries only where such countries can guarantee similar level of protection.

Issues which are being considered for reform include:

- Whether privacy and data protection should be regulated by legislation

- How the general principles of data protection could be developed and incorporated in the legislation;
- Whether a statutory regulatory agency should be established
- If it is a viable option to promote a flexible approach in terms of which industries will develop their own codes of practice (in accordance with the principles set out in the legislation) which could be overseen by the regulatory agency

The proposed reform will impact on existing laws such as the Promotion of Access to Information Act 2 of 2002 and the Electronic Communications and Transactions Act 25 of 2002.

### UK - Privacy and Electronic Communications

The Privacy and Electronic Communications (EC Directive) Regulations 2003 came into force on 11 December 2003. It contains two new rules for email marketing where the prior consent of the individual subscriber is needed in order to send unsolicited marketing materials by email. Where prior consent is not required certain criteria must be satisfied. The 2003 Regulations supersedes the Telecommunications (Data Protection and Privacy) Regulations 1999. The Information Commissioner is responsible for enforcing both Regulations and full details can be found on [www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk).

### India - Employment Quota for the Economically Disadvantaged

India has taken a further step in combating poverty by approving, in principle, the proposal to amend the Constitution in order to provide a reservation quota in government jobs for people belonging to “economically backward classes” (EBCs).

A proposal to set up a Commission to study the issue was also approved. The Commission would work out the modalities to provide reservation for EBCs not covered by the existing reservation policy. Part of the functions of the Commission would be to examine the criteria for determining EBC.

### South Africa - Stiff Fine for Hacker Under New Legislation

A man caught installing an interception device on a Standard Bank internet terminal to gain access to customer accounts has been found guilty and fined 20,000 Rands (the maximum penalty under the law). He was convicted of the new crime of possessing a device designed to breach security measures used to protect data, with the intention of using data for unlawful purposes. The case is the first victory for prosecutors under the new law – the Electronic Communications and Transactions Act - which defines new offences in legislation in the electronic age.

### Australia Signs Free Trade Agreement

Australia has concluded a Free Trade Agreement (FTA) with the United States. The Trade Minister, Mark Vaile said that the “historic deal offers enormous opportunities to all Australian companies interested in profiting in the world’s largest and most dynamic economy”. The Agreement includes benefits such as:

- Immediate, free and open access to the US market for Australian exporters of almost all manufactured goods and services;
- Duty-free access from day one for over 97 per cent of Australia’s manufacturing exports to the US, worth \$5.84 billion last year;
- Substantially-improved access for Australia’s agricultural sector, including for beef and dairy producers, with more than 66 per cent of agricultural tariffs going to zero from day one of the Agreement;
- Full access for Australian goods and services to the market for federal government procurement in the United States; and,
- Enhanced legal protections that guarantee market access and non-discriminatory treatment for Australian service providers in the US market.

The minister was confident about the opportunities created by the agreement which he believed would further integrate the Australian economy with that of the United States and deliver lasting benefits for generations of Australians.

The agreement also includes an extension of the term of copyright in Australia, the creation of an Australian process to allow copyright holders to

engage Internet Service Providers (ISPs) to deal with allegedly infringing material and tighter controls on circumventing technical protection measures.

Under the FTA, Australia was able to retain the flexibility to implement in a way that reflects its domestic circumstances and ensure that critical elements of public policy have not been compromised. An example is the provision of a mechanism to introduce public interest exceptions in relation to technological protection measures. Also, the systems in place to ensure that health and environment are protected - such as Australia’s quarantine regime and the public’s access to quality, affordable medicines – remain unaffected.

The text of the agreement can be found at [www.dfat.gov.au/trade/negotiations/us.html](http://www.dfat.gov.au/trade/negotiations/us.html)

### Nigeria to Amend Law on Advance Fee Fraud (419)

The government has proposed amendments to its Advanced Fee Fraud (419) and other related Offences Act 1995. If the amendment is passed into law all public financial institutions, Bureaux de change operators, ISPs and GSM (mobile phone) operators would be required to register with the Economic and Financial Crimes Commission. In addition, they must demonstrate “due diligence” in keeping records of transactions.

Penalties under the proposed amendments include refund of the total amount involved in the transactions, a fine of up to N100,000 and/or one year imprisonment, with five years minimum conviction for those found guilty of offences under the Act. The proposed amendment is part of the government effort to stamp out fraud-related and other global confidence scams that unfairly cast the country and its people as those that cannot be trusted in any business deals.

### Belize – Privy Council Throws Out Request to Prevent Construction of Dam

The Privy Council has rejected a request from environmentalists to stop the construction of a dam which is being built on the Upper Macal River which houses rare and endangered species, including Belize’s national animal, the tapir. They claim that there had been failure to carry out adequate environmental impact assessment (EIA) of the area.

### Belize Experience in the Implementation of TRIPS Agreement

Belize has modernised its intellectual property laws by enacting several laws which are compatible with international treaties. A note issued by the Deputy Registrar, Belize Intellectual Property Office provides details of the course of action taken in the implementation of the TRIPS agreement, particularly in the area of trade marks. The note and the relevant laws can be found at ([www.belipo.bz/e-library](http://www.belipo.bz/e-library)). Developing Member Countries might find the note useful in taking steps to implement the TRIPS agreement and in developing jurisprudence in this area.

By enacting the Trade Marks Act of 2000 (TMA), not only did Belize update its laws, it also severed links with the relevant United Kingdom laws which had direct application in Belize. Section 1 of the TMA gives a description of the types of marks which are protected and these include:

- famous marks
- well known marks (usually owned by foreigners)
- certification marks; and
- collective marks (owned by two or more persons)

The TMA will not protect all marks. Such marks are also specifically stated and these include marks which are:

- not distinctive
- descriptive and generic.
- identical to earlier registered trademark and performs the same functions as the earlier registered trademark
- similar to earlier registered trademark (where the granting of such is likely to result in confusion with the existing trademark)

Although the TMA only protects marks which are registered, unregistered marks are not left entirely unprotected as this can still be achieved under the common law of passing off. Also, where a mark is unregistered, it can be regarded as part of the goodwill of a business and therefore protected by the Act.

The texts of all the laws of Belize are available at the extensive and informative website - [www.belizelaw.org](http://www.belizelaw.org).

### India - Company Immunity

The central government of India has introduced the Company Law Settlement (Jammu and Kashmir) Scheme 2003. The Scheme grants immunity from

prosecution to companies with a registered office in the state of Jammu and Kashmir, who delay in filing certain documents under the main legislation – the Companies Act, 1956. Applicants, under the Scheme are required to submit certain documents and make a declaration to the Registrar of Companies with a fee. The Registrar of Companies will then take the necessary steps to issue Immunity Certificate to the applicant company. The Scheme follows a previous Scheme introduced in 2000 and which companies registered in Jammu and Kashmir could not participate. The change in business environment in Jammu and Kashmir since the 2000 Scheme made it necessary to introduce the 2003 Scheme which commenced in 1st October 2003 and will be in effect until 31st March 2004. The text of the 2003 Scheme can be found on [www.dca.nic.in](http://www.dca.nic.in).

### Singapore – Update in Patent Laws

Singapore has issued the Patents (Amendment No.3) Rules 2003 which came into force on 1st January 2004. Under the Rules the prescribed period for the purpose of national phase entry under Chapter 1 of the Patent Cooperation Treaty (PCT) is 30 months from the relevant date. Also, the prescribed period for filing a request for an examination report under the Patents Act is 32 months from the relevant date. A copy of the Rules can be found on [www.egazette.com.sg](http://www.egazette.com.sg) for a limited period and can be purchased at [www.myepb.com](http://www.myepb.com). The Rules follow the previously issued Patents (Amendment No. 2) Rules 2003 which came into force on 1st August 2003 under which applicants must now file applications electronically through the Electronic Online System (EOS). Applicants can also be requested by the Registrar of Patents to submit an English translation of a priority application.

The PCT is a World Intellectual Property Organisation (WIPO) administered treaty which provides a streamlined procedure in the filing of patent applications. Protection can be obtained in contracting countries through a single application in a contracting state. The states where protection is given must be stated in the application. A national of a PCT contracting state or a person who is resident or have business in a contracting state can file a PCT application in that state. The latest Regulations under the PCT came into force on 1st January 2004 and can be found on [www.wipo.int/pct/en/texts](http://www.wipo.int/pct/en/texts).

# Upcoming Activities

**23 – 26 March 2004**

Commonwealth Africa Regional Expert Group Meeting on  
Legislative Framework for Business Activities  
Johannesburg, South Africa

**April 2004**

Commonwealth Asian Regional Workshop on Law and Technology  
Colombo, Sri Lanka

**18 – 20 October 2004**

Commonwealth Meeting of Senior Officials of Law Ministries  
London, UK

**21 – 22 October 2004**

Meeting of Law Ministers of Small Commonwealth Jurisdictions,  
London, UK

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