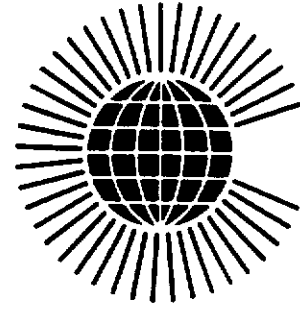


# Commonwealth Legal Assistance News



Issue 1, June 1993

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## Introducing CLAN

CLAN is intended to provide the law officers, central authorities, and prosecutors of all Commonwealth Countries with information which will assist them in handling criminal cases which have an international aspect.

If CLAN achieves its aim it will obviate the need for Commonwealth countries to spend time seeking information on the existence of legislation in another member country, it will provide speedy access to lists of States parties to relevant multilateral instruments and it will give references to major cases of interest to international criminal lawyers.

CLAN's usefulness will be considerably enhanced if Commonwealth countries contribute to it by advising the Commercial Crime Unit of new legislation relevant to international criminal law and by providing copies of decided cases which can be used by other countries to guide them in making requests. To enable us to respond to requests for copies of documents which are the subject of a report or comment in CLAN we would appreciate receiving copies of legislation, cases, treaties etc.

Budgetary constraints mean that a limited number of copies of CLAN can be sent free to each country. With this issue is an order form for your free copies. It only needs to be filled in if we have sent this issue to too few people or to the wrong people. If your country needs more than 5 copies a charge will have to be made for the additional copies. Details of costs for these can be obtained from the CCU.

**COMMONWEALTH COUNTRY MEMBERSHIP OF MULTILATERAL DRUG CONVENTIONS**  
as at 31 May 1993

**CONVENTIONS**

COUNTRIES	1961 Single Convention	1972 Protocol to Single Convention	1971 Psychotropic Substances Convention	1988 Trafficking Convention
Antigua & Barbuda	x	x	x	x
Australia	x	x	x	x
Bahamas	x	x	x	x
Bangladesh	x	x	x	x
Barbados	x	x	x	x
Belize	-	-	-	-
Botswana	x	x	x	-
Britain	x	x	x	x
Brunei Darussalam	x	x	x	-
Canada	x	x	x	x
Cyprus	x	x	x	x
Dominica	x	-	x	-
The Gambia	-	-	-	-
Ghana	x	x	x	x
Grenada	-	-	x	x
Guyana	-	-	x	x
India	x	x	x	x
Jamaica	x	x	x	-
Kenya	x	x	-	x
Kiribati	-	-	-	-
Lesotho	x	x	x	-
Malawi	x	x	x	-
Malaysia	x	x	x	-
Maldives	-	-	-	-
Malta	x	x	x	-
Mauritius	x	-	x	-
Namibia	-	-	-	-
Nauru	-	-	-	-
New Zealand	x	x	x	-
Nigeria	x	x	x	x
Pakistan	x	x	x	x
Papua New Guinea	x	x	x	-
St Kitts & Nevis	-	-	-	-
St Lucia	x	x	-	-
St Vincent & The Grenadines	-	-	-	-
Seychelles	x	x	x	x
Sierra Leone	-	-	-	-
Singapore	x	x	x	-
Solomon Islands	x	x	-	-
Sri Lanka	x	x	-	x
Swaziland	-	-	-	-
Tanzania	-	-	-	-
Tonga	x	x	x	-
Trinidad & Tobago	x	x	x	-
Tuvalu	-	-	-	-
Uganda	x	x	x	x
Vanuatu	-	-	-	-
Western Samoa	-	-	-	-
Zambia	x	-	-	-
Zimbabwe	-	-	-	-

## MULTILATERAL DRUG CONVENTIONS

### CRIMINAL LAW ASPECTS

There are three major international conventions (one of which also has a protocol) which have as their aim control of the use, production and distribution of narcotic drugs and/or psychotropic substances. A great percentage of Commonwealth countries are parties to one or more of these instruments as the preceding table shows.

All States parties to these Conventions have undertaken, at international law, certain obligations to the other States Parties. The Commercial Crime Unit is particularly interested in those articles of these Conventions which oblige parties to create criminal offences, give assistance, extradite, control proceeds of crime and claim extraterritorial jurisdiction over people who commit certain offences. Because each State party may ask for and can expect from every other State party specific co-operation and assistance in the war against drugs it is essential that States parties have the domestic laws necessary to enable them to respond to requests for the assistance envisaged by the Conventions. The following paragraphs briefly describe the obligations undertaken by states parties to each of the Conventions.

#### **1961 Single Convention on Narcotic Drugs**

The Single Convention is predominantly concerned with the control of those narcotic substances primarily derived from natural sources, such as, opium poppy and cannabis plant and certain related synthetic narcotics. Its purpose is to ensure that necessary drugs are made available for medical purposes under appropriate levels of control while at the same time minimising the possibilities of drug dependence.

*Article 35* of the Single Convention obliges parties, which may have due regard to their constitutional, legal and administrative systems, inter alia, to:

- (a) assist each other in the campaign against illicit traffic in narcotic drugs;
- (b) co-operate in maintaining a co-ordinated campaign against illicit traffic; and
- (c) expeditiously pass on papers transmitted for the purpose of prosecution;

*Article 36* obliges parties, subject to their constitutional limitations, to make punishable conduct related to cultivation, sale, purchase, transport, import and export and conspiracy to commit these offences (to name a few) where the conduct is contrary to the Convention and the Article requires parties to try or to extradite alleged offenders. The Article also encourages parties to treat the conduct described in its paragraphs 1 and 2 as constituting extraditable offences.

*Article 37* requires the seizure and confiscation of drugs, substances and equipment used in or intended for the commission of the offences described in Article 36.

#### **1972 Protocol to the Single Convention**

The protocol includes provisions to strengthen the obligations in the Convention relating to the creation of criminal offences and the requirement for international co-operation. In particular Article 36 was amended so as to:

- (a) extend the definition of offences in paragraph 1;
- (b) delete (as between States parties to the protocol) the provision encouraging parties to treat offences as extraditable offences and to replace it with a provision which deems the offences in paragraph 1 to be included as extraditable offences in any existing extradition treaty between States party to the protocol. In effect, this protocol operates as a protocol to bilateral (and multilateral) extradition treaties between parties to it. The new provision also required States party to the protocol to include the paragraph 1 offences as extraditable in future extradition treaties between them; and
- (c) permit States parties to the Protocol to treat it as an extradition treaty (if domestic law made extradition conditional upon the existence of a treaty) or required parties which did not require a treaty to treat the paragraph 1 offences as extraditable.

## **1971 Convention On Psychotropic Substances**

*Article 21* deals with the same area as Article 35 of the Single Convention and requires co-operation between States Parties.

*Article 22* of this Convention mirrors Articles 36 and 37 of the Single Convention and requires States Parties to criminalise certain conduct, to seize and confiscate substances and equipment used in the commission of offences and encourages parties to include the listed offences as extradition crimes in existing and proposed treaties between them. It has not been amended in the way the Single Convention has so it cannot, of itself, be relied on as a basis for making an extradition request to a country which does not make extradition conditional upon the existence of a treaty.

## **1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances**

Unlike the earlier drugs conventions, the 1988 Convention has as its purpose the strict control of movement of and trade in drugs. It is designed to stop illicit traffic in drugs and the precursor chemicals which may be used in their manufacture. The obligations it imposes on states parties relate specifically to deterring illicit dealings in drugs. A country which becomes a party to the 1988 convention undertakes at international law heavy obligations for it must be able to respond to requests from any other State Party for certain types of assistance.

Unlike the former conventions, the 1988 instrument does not make the obligations of parties dependent upon their constitutional, legal or administrative systems. Obligations are strict.

*Article 3(1)* contains an absolute obligation on parties to criminalise the intentional commission of specified conduct which includes cultivation, production, manufacture, etc., distribution, dispatch, possession for sale, possession of equipment etc for use in illicit production, involvement in enumerated offences and, very importantly the knowing conversion or transfer or disguising of property derived from listed offences (money laundering is caught by this provision). Article 3(2) and 3(3) require other offences are to be created provided the constitutional principles and basic concepts of the legal system so permit. Other paragraphs of Article 3 deal with procedure, sentencing jurisdiction and related issues.

*Article 4* requires parties to establish certain jurisdiction. Paragraph 1 contains an absolute obligation on parties to establish jurisdiction over territorial offences (including flag carrying ships and planes) and in cases where it refuses to extradite on grounds related to nationality or extraterritoriality. It permits the claiming of jurisdiction over nationals, habitual residents, those engaging in extraterritorial conduct having territorial effects.

*Article 5* obliges parties to legislate to enable confiscation of proceeds of drug offences, of drugs and of instrumentalities of drug crimes. Parties must be able to identify, trace and freeze or seize proceeds, property, instrumentalities or other relevant material for the purposes of facilitating eventual confiscation. Under this article Parties must be able to require bank records to be made available and bank secrecy may not be invoked to avoid this obligation. It is Article 5 which obliges parties to give effect to confiscation orders or other state parties and to take all action necessary to enable ultimate confiscation (ie trace, identify, freeze, seize, etc.).

*Article 6* contains the extradition obligations. They are, in essence, like those contained in the 1972 Protocol to the Single Convention. Pre-existing treaties are treated as having been amended by this Protocol to the extent necessary to include in the earlier instruments the offences in Article 3. Like its 1972 predecessor this article provides that the Convention may be treated as an extradition treaty and for this purpose it includes some standard "extradition treaty" provisions such as providing for provisional arrest in cases of urgency, listing safeguards, and providing for prosecution in lieu.

*Article 7 is the mutual assistance Article.* It obliges parties to render substantial assistance, upon request, in the investigation and prosecution of offences. The article is, insofar as the listed crimes are concerned, a mutual assistance treaty in itself (except where parties have a separate treaty upon which they can rely) with detailed provisions on the form and content of requests, the assistance which must be provided, grounds of refusal, etc.

### **Meeting Convention Obligations**

Each country which is a state party to any of the drug conventions has undertaken at international law to comply with the provisions of the convention. This means that any state party to, say, the 1988 Convention has a right to ask any other State Party for the sort of assistance outlined in Article 5 and/or Article 7. The requesting State has a right to expect the assistance sought unless the requested state is permitted to refuse by the Convention. The non-existence of a domestic mechanism for providing the assistance sought is not a valid reason for refusal and, indeed, a party which refuses assistance on such a ground is in clear breach of its obligations at international law and appropriate remedies could be sought by the injured requesting state.

The positive side of the equation is that Commonwealth countries listed as members of conventions in the table at the beginning of this article can legitimately expect to receive any sort of assistance outlined in any of the conventions from any other Commonwealth country listed as a State Party. Each of the members of the 1988 Convention has undertaken that it will, for example, be able to trace, identify, freeze and ultimately confiscate the proceeds of drug trafficking offences listed in Article 3. Each has undertaken to respond to a mutual assistance request to take evidence, to effect a search or seizure, to provide bank records, etc. for another country conducting an investigation or prosecution relating to conduct described in Article 3.

From a Commonwealth perspective membership of all the major conventions, and from a more limited CCU perspective membership of the 1988 Convention, is necessary if Commonwealth countries are to achieve the commitment made by Heads of Government, first in 1985 and successively at all CHOGMs since then, to fight the drug problem. Law Ministers and their officials will no doubt be delighted to see an increasing number of Commonwealth Countries appearing on the lists of members of these Conventions. There is still a long way to go but progress towards ratification is being made by other countries who are simply awaiting the enactment of final domestic legislation which will enable them both to fully undertake the obligations imposed by the Convention and to deposit their instruments of ratification, accession or acceptance.

All States Parties to the 1988 Convention are required to notify the Secretary-General of the United Nations of the details of the authorities which can receive requests for mutual assistance made under *Article 7 of the Convention*. The most recent list made available by the UNDCP (insofar as it relates to Commonwealth Countries) is reproduced below.

#### ***Australia***

Assistant Secretary  
International Branch  
Attorney-General's Department  
Robert Garran Offices  
BARTON A.C.T. 2600

Fax: 61-6-250-5920

#### ***Brunei Darussalam***

Ministry of Foreign Affairs  
Jalan Subok  
BANDAR SERI BEGAWAN 1120

Fax: 673-222-4709

#### ***Bahamas***

The Attorney-General  
P.O. Box 3007  
NASSAU

Fax: 1-809-322-2255

#### ***Canada***

The Minister of Justice  
International Legal Assistance Div.  
Room 456, Department of Justice  
239 Wellington Street  
OTTAWA, ONTARIO K1A 0H8

Fax: 1-613-957-8412

**Cyprus**

Ministry of Justice  
NICOSIA  
Fax: 357-246-1427

**Grenada**

Assistant Secretary  
Policy and Research Division  
Ministry of External Affairs  
Botanical Gardens  
ST GEORGES  
Fax: 1-809-440-4184

**Malta**

Executive Secretary  
Interdepartmental Commission against Drug  
Abuse and Illicit Trafficking  
c/o- Centru Hidma Socjali  
469 St Joseph High Road  
SANTA VENERA HMR 18  
Fax: 356-24-2707

**Papua New Guinea**

Director  
National Narcotics Bureau  
P.O. Box 3880  
BOROKO N.C.D.  
Fax: 675-25-8842

**Sri Lanka**

Secretary  
Ministry of Foreign Affairs  
Republic Building  
COLOMBO 01  
Fax: 94-1-54-6091

**Uganda**

Anti-Narcotics Unit  
CID Headquarters  
Uganda Police Headquarters  
P.O. Box 2973  
KAMPALA  
Phone: 256-41-23-2359

**Zambia**

The Commissioner  
Drug Enforcement Commission  
P.O. Box 50997  
LUSAKA  
  
Fax: 260-1-22-2124

**Ghana**

Deputy Secretary  
Ministry of Interior  
P.O. Box M-42  
ACCRA  
Phone: 233-216-66345

**India**

Narcotics Control Bureau  
Department of Revenue  
Ministry of Finance  
North Block  
NEW DELHI 110 001  
Fax: 91-688-5240

**Pakistan**

Secretary  
Narcotics Control Division  
75 West Eagle Plaza  
Blue Area  
ISLAMABAD  
Fax: 92-51-21-4920

**Saint Lucia**

Executive Secretary/Co-ordinator  
Control and Prevention of Drug Abuse  
Prime Minister's Office  
Government Building  
CASTRIES  
Fax: 1-809-453-7352

**Swaziland**

Superintendent of Police  
Officer-In-Charge, Interpol  
OID Headquarters  
Royal Swaziland Police Headquarters  
P.O. Box 49  
MBABANE  
Fax: 268-44545

**United Kingdom**

UK Central Authority for Mutual Legal  
Assistance in Criminal Matters  
C2 Division  
Home Office  
50 Queen Anne's Gate  
LONDON SW1M 9AT  
Fax: 44-71-273-4400

**Zimbabwe**

Ministry of Health  
Drug Control Council for Secretary  
for Health  
P.O. Box 8204  
Causeway  
HARARE  
Fax: 263-473-6980

## MUTUAL ASSISTANCE IN CRIMINAL MATTERS

### *Commonwealth Laws*

Implementation of the Harare Scheme proceeds apace with a number of Commonwealth Countries now having legislation which enables them to grant assistance in the investigation and/or prosecution of crime. Our latest information is that the following Commonwealth Countries have laws dealing with mutual assistance in criminal matters.

Antigua and Barbuda 1993  
Bahamas 1988  
Botswana 1992  
Canada 1988  
Malawi 1991  
Nigeria 1988  
Zimbabwe 1990

Australia 1987  
Barbados 1992  
Britain 1990  
Dominica 1990  
New Zealand 1993  
Vanuatu 1989

Unlike the model law for implementing the Harare Scheme, some of these laws require bilateral treaties before assistance will be given. Others require the designation of the requesting country. CCU would very much appreciate receiving details of the Central Offices and/or Central authorities of the countries which have enacted mutual assistance in criminal matters laws so that all Commonwealth countries have some point of contact for first enquiries as to whether they might be able to successfully make a request in reliance on one of these laws.

### *Other Laws*

Thailand has a new law on Mutual Assistance in Criminal Matters which covers assistance in investigations, prosecutions, forfeiture and proceedings relating to criminal matters. Section 9 of the Act provides that assistance can be given in the absence of a treaty between Thailand and the requesting country provided the requesting country "commits to assist Thailand under the similar manner when requested". Where no treaty exists dual criminality is mandatory before assistance can be granted. The Act also provides for transfer of proceedings in cases where Thailand would have jurisdiction and the requesting country asks that the matter be heard in Thailand.

### *Central Authorities*

Some Commonwealth Countries have designated Central Authorities or Central Offices whose task it is to receive and facilitate the execution of foreign requests for Mutual Assistance in Criminal Matters and who have authority to make requests on behalf of the authorities of their own country. The addresses of which CCU has been advised are listed below. Other Commonwealth Countries which have enacted MA in criminal matters laws may care to advise the Editor of the name and address (and contact numbers) of their Central Authorities so that they can be published to all member countries.

#### **Australia**

Assistant Secretary  
International Branch  
Attorney-General's Department  
Robert Garran Offices  
BARTON A.C.T. 2600

Fax: 61-6-250-5920

#### **Bahamas**

The Attorney-General  
P.O. Box 3007  
NASSAU  
Fax: 1-809-322-2255

#### **Canada**

The Minister of Justice  
International Legal Assistance Div.  
Room 456, Department of Justice  
239 Wellington Street  
OTTAWA, ONTARIO K1A 0H8  
Fax: 1-613-957-8412

#### **United Kingdom**

UK Central Authority for Mutual Legal  
Assistance in Criminal Matters  
C2 Division  
Home Office  
50 Queen Anne's Gate  
LONDON SW1M 9AT  
Fax: 44-71-273-4400

## EXTRADITION CASE NOTES

### **Extradition - Evidence in support of requisition - retraction by witness**

A Swedish request for extradition was made pursuant to the 1966 Extradition Treaty between the UK and Sweden. The evidence submitted by the requesting country in support of its extradition request included a statement by an alleged accomplice of the fugitive. At the hearing before the magistrate the accomplice repudiated his earlier statement. The magistrate committed the fugitive to await surrender. An application to the Divisional Court for a writ of habeas corpus succeeded. The case was taken on appeal to the House of Lords.

Their Lordships held, unanimously, that the proper test was set out in the principle laid down by Lord Lane CJ in *R v Galbraith* [1981] 1 WLR 1039, 1042 which stated that where the prosecution evidence is such that its strength or weakness depends on the view to be taken of the witness's reliability or other matters within the province of the jury and where, on one possible view of the facts, there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty then the judge should allow the matter to be tried.

*R v Governor Pentonville Prison, ex parte Alves* [1992] 3 WLR 844

### **Extradition - material before a magistrate - additional evidence**

Hong Kong sought the surrender of an accused from the United Kingdom. At the committal hearing the fugitive sought an adjournment of the proceedings to permit him to call evidence relating to the effect of the transfer of sovereignty over Hong Kong from Britain to China which he argued could result in the imposition of the death penalty. The magistrate refused the application for an adjournment. Applications for judicial review of the magistrate's decision and for the issue of a writ of habeas corpus were filed.

*Held:* If the requesting state provided sufficient material in support of its application for surrender the committing magistrate did not have to go beyond the material provided. The committing magistrate had no power to consider the political dimensions of the case and was correct in treating them as irrelevant to his decision. The power to consider political issues relevant to the extradition request resides with the Secretary of State.

*R. v. Metropolitan Stipendiary Magistrate, ex parte Lee* (1993) Times 15 February (QBD). The case is now before the House of Lords. CLAN will continue to follow it.

### **Extradition - Abuse of Process - Evidence in support of requisition unlawfully obtained - laundering proceeds of drug trafficking: whether extraditable**

After committal to await surrender the applicant applied for the issue of a writ of habeas corpus on three grounds being (a) the offence of laundering the proceeds of drug trafficking was not extraditable under English law; (b) the magistrate should have declined jurisdiction in the committal proceedings on the ground that the applicant's case depended entirely upon evidence obtained unlawfully in a third country and the application was, accordingly, an abuse of process; and (c) the unlawfully obtained evidence should have been excluded.

*Held:* On the first ground, that properly construed the Extradition Act 1932 (UK) included the Drug Trafficking Offences Act 1986 and accordingly the offence of laundering proceeds of drug trafficking is an extraditable offence. On the second ground the Court held that there was no abuse of the process of the magistrate's court because the illegality and breach of sovereignty involved in the collection of the evidence occurred before the matter came within the jurisdiction of the magistrate's court. On the third ground the Court held English law acknowledged that the detection and proof of drug trafficking offences might involve the employment of unlawful means and those means did not in this case provide sufficient grounds for excluding the evidence.

*R. v. Governor of Pentonville Prison, ex parte Chinoy* [1992] 1 All ER 317 (QBD)