

REPORT OF

THE COMMONWEALTH MEETING OF

THE EXPERT GROUP TO EXAMINE THE REMOVAL OF APPELLATE JURISDICTION

FROM THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL BY MEMBER

COUNTRIES

MARLBOROUGH HOUSE, LONDON, 10 -13 JUNE 2003

F O R E W O R D

The Meeting of the Expert Group to examine The Removal of Appellate Jurisdiction from the Judicial Committee of the Privy Council by Member Countries (The Expert Group) during the week of June 10 – 13, 2003 at Marlborough House was indeed timely.

The Prime Minister of Britain announced on the 12th June, the decision by his Cabinet to remove the Lord Chancellor's post and establish a Supreme Court to replace the House of Lords as the United Kingdom's highest Court. In this single act, notice was given that a thousand years of British judicial history was giving way to a new jurisprudential era. Of course, along with this announcement by the British Prime Minister, has come the inevitable recognition that traditional common law judicial regimes are indeed changeable.

The Expert Group canvassed and shared thoughts deemed instrumental in putting in place the necessary arrangements for a new Final Appellate Court. The collective contributions of the participants were invaluable. It is hoped that the Conclusions and Recommendations emanating from the Expert Group will serve as a guide for Commonwealth Countries seeking to ultimately de link from the JCPC, while simultaneously ensuring that the process of so doing guarantees a smooth transition, being cognisant that the wealth of high standards synonymous with the common law is maintained.

Sincere and profound thanks are extended to the participants of the Expert Group, by the Legal and Constitutional Affairs Division in particular and by the Commonwealth Secretariat in general.

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The Commonwealth Secretariat.

INTRODUCTION AND BACKGROUND

The 2003 Commonwealth Law Ministers' Meeting was held in Kingstown, St. Vincent and the Grenadines on November 18 – 21. Among other jurisprudential matters of note, the Law Ministers examined the issue of Regional and Final Appellate Courts.

In the Communiqué issued from that meeting, the Law Ministers recognised that a number of Regional and Final Appellate Courts have already been established and that others are in contemplation. These Courts have varying jurisdictions, original and appellate and may have authority to give authoritative interpretations on regional arrangements. Some of these Courts would be replacing the Judicial Committee of the Privy Council (JCPC).

The Law Ministers viewed that regarding the Courts which would be replacing the JCPC, an examination should be made with the purpose of sharing experiences on the operation of these Courts and facilitating the transition to the new Appellate Courts so as to ensure uniformly high standards of justice.

OBJECTIVES AND PURPOSE OF THE MEETING

In light of the mandate granted by the Law Ministers, the purpose of the meeting was to:

- **examine the experiences of Commonwealth Member States which had already removed jurisdiction from the JCPC as their Final Appellate Court;**

- examine the experiences of Commonwealth Member States which were in the process of establishing Final Appellate Courts to replace the jurisdiction of the JCPC;
- examine the experiences of Commonwealth Member States which had established or are en route to establishing Regional Courts operating final and/or original jurisdiction; and
- exchange views among the above Member States so as to share information and produce guidelines which would be helpful to any Commonwealth Member Country, thus ensuring a smooth transitional process and simultaneously maintaining Commonwealth standards.

A small group of Experts from the Commonwealth Member States (the Expert Group) was convened taking into account the required collective experiences set out above (**ANNEX 1**).

At the Conclusion of the Meeting of the Expert Group, a set of Conclusions and Recommendations was prepared which gave a synopsis of the discussions as well as guidelines for Member Countries making the transition from the JCPC to their own Courts. These are at **ANNEX 2**.

METHODOLOGY

Following the Agenda, ¹ several participants presented issue Papers², examining the following topics:

- **The Caribbean Court of Justice – an Historic Necessity**

¹ See **ANNEX 3**

² See **ANNEX 4** for texts of Papers

- **Australia's Experience In Abolishing Privy Council Appeals**
- **Preparatory Steps to be Taken So As to Achieve a Smooth Transition in Removing the Jurisdiction of the Judicial Committee of the Privy Council**
- **The Implications Of Sovereignty Of Member States Whose Regional Court Assumes Supra National Jurisdiction – An Assessment Of Such Implications At Both The Original And Appellate Jurisdictions**
- **Operation Of A Regional Court – The COMESA Experience**
- **Strengths And Weaknesses Of A Regional Appellate Court And Recommendations For Enhancing Such Court's Effectiveness**

Discussions would ensue after the presentation of each issue Paper. Where relevant, appropriate pieces of legislation/instruments were examined and discussed. Of particular note are the following:

- **The Supreme Court Bill of New Zealand ³**
- **The Caribbean Court of Justice Act, 2003 – 9 of Barbados ⁴**
- **The Caribbean Community Act, 2003 – 8 of Barbados ⁵**

³ See ANNEX 5

⁴ See ANNEX 6 – The Schedule to this Act may be viewed in the Compendium of Instruments Relating to the Caribbean Court of Justice – Agreement Establishing The Caribbean Court of Justice at ANNEX 9

⁵ See ANNEX 7

- **Compendium of Instruments Relating to the Caribbean Court of Justice** ⁶
- **Court of Justice Rules of COMESA** ⁷
- **The Bangalore Principles** ⁸

The discussions, it is expected, will assist Member Countries invaluablely as they seek information on the best manner of JCPC delinking. Further, the Expert Group, in their intense deliberations were able recommend some improvements in the present appellate regime.

⁶ See **ANNEX 8**

⁷ See **ANNEX 9**

⁸ See **ANNEX 10**

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CONCLUSIONS AND RECOMMENDATIONS

1. Commonwealth Law Ministers at their meeting in November 2002 in St. Vincent and the Grenadines addressed the matter relating to the severing of links with the Judicial Committee of the Privy Council (JCPC) by those Member Countries which still maintain appeals to that body. They mandated the Commonwealth Secretariat to convene an Expert Group (the Group) to look into the matter. The objective of the Group was to:
 - 1.1 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;
 - 1.2 ensure that the high standards set by the JCPC were maintained after severance by such other Courts as might replace the JCPC;
 - 1.3 make such recommendations as are considered appropriate and report thereon to the Law Ministers.

2. The Group met in London from 10-13 June 2003 and was chaired by Sir David Simmons, Chief Justice of Barbados. The members were:

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|--------------------------|---|--|
| Hon. Adrian Saunders | - | Justice of Appeal of the Eastern Caribbean Supreme Court |
| Hon. Margaret Ann Wilson | - | Attorney General of New Zealand |
| Hon. Delano Bart | - | Attorney General of St. Kitts and Nevis |

| | | |
|----------------------------|---|---|
| Mr. Duke Pollard | - | Legal Consultant - CARICOM Secretariat |
| Mr. Siphso Zwane | - | Registrar of the Court of Justice of COMESA |
| Ms. Sandra Power | - | Assistant Secretary Attorney General's Department – Australia |
| Ms. Evelyn Ann Petersen | - | Registrar of the Supreme Court of Trinidad & Tobago |
| Ms. Cheryl Thompson-Barrow | - | LCAD - Commonwealth Secretariat |
| Ms. Margaret Bruce | - | LCAD - Commonwealth Secretariat |
| Ms. Jan Yves Remy | - | EAD - Commonwealth Secretariat. |

The Group also benefited from interventions and contributions by Lord Cooke of Thorndon; Mr. John Watherston, Registrar of the JCPC and Mr. Terence Arnold, Solicitor General of New Zealand.

The Group considered and adopted the objectives of the meeting as stated above. Papers were presented by:

Sir David Simmons
Hon. Justice Adrian Saunders
Hon Margaret Ann Wilson
Mr. Duke Pollard
Mr. Siphso Zwane
Ms. Sandra Power

3. GENERAL

The Expert Group made the following observations and recommendations:

- 3.1 On the issue of appointing Judges to the proposed Final Courts, divergent views were expressed. One of these was that the composition of the Court should be restricted to nationals as is contained in the Bill for the proposed Supreme Court of New Zealand. However, in respect of the Caribbean Court of Justice (CCJ), judicial eligibility is open to persons from the Commonwealth and the Group noted that it may not be necessary to appoint all 10 Judges at the inauguration of the Court. It was recognised that there was value and utility in appointing or co-opting overseas Judges to the CCJ as the need arose.
- 3.2 Simultaneously with the inauguration of the proposed Final Courts, attention should be paid to the upgrading and modernisation of the entire judicial system so as to enhance the efficiency and effectiveness of the Final Courts.
- 3.3 In considering the importance of public awareness, wide consultation and public education should be pursued to sensitise the general public. The Group commended the efforts made both in the Caribbean and New Zealand in this regard.
- 3.4 Careful attention should be paid to transitional arrangements in order to preserve the rights of litigants.
- 3.5 In light of the differences in the constitutional provisions of certain Organisation of Eastern Caribbean States (OECS) countries, the Group noted that careful attention needed to be paid to their constitutional procedures for de-linking from the JCPC. Those countries may wish to consider retaining a consultant to examine and analyse the constitutional steps required by such Member States and make specific recommendations as to the precise procedures necessary to sever links with the JCPC and to prepare the appropriate enabling legislation.
- 3.6 Final Appellate Courts should set for themselves realistic and manageable workloads so as to provide ample time for judicial preparation, reflection and timely delivery of opinions.
- 3.7 Final Appellate Courts should have an underlying philosophy that goes beyond mere correction of errors. Such Courts have

a central role to play in the development of jurisprudence reflecting the collective social ethos of the people whose interests they serve.

- 3.8 The Group acknowledged the importance of written codes of conduct for the Judges and for other members of staff of Final Courts. The code of conduct for Judges should take into account the Bangalore Principles.

4. JURISDICTION OF REGIONAL COURTS

- 4.1 The group examined two regional court arrangements of note in which Commonwealth countries participate namely, the court of Justice of COMESA and the proposed CCJ.
- 4.2 The Group noted that the Court of Justice of COMESA is established as a Court of original jurisdiction for the purpose of adjudicating its treaty of association and that the CCJ has the unique feature of being both a Court of original jurisdiction for purposes of the CARICOM Treaty and also the Final Appellate Court of the region. The Group further noted that in relation to the CCJ separate rules of procedure and practice have been drafted to take account of the separate jurisdictions of that Court.
- 4.3 The group noted that the original jurisdiction of the CCJ had implications for the practice of law in the region and in this regard it recommended that the University of the West Indies and the Law Schools provide programmes of core subjects and continuing education and training in the specialised areas of public international law with which the Court will be concerned. The Group also stressed the importance of developing and refining the skills of those legal practitioners in the public sector who are exposed to the practice of international law.
- 4.4 That following the COMESA experience, prior to the inauguration of the CCJ, Judges and officials of the Court, should visit the European Court of Justice, the JCPC and the International Court of Justice to observe at first hand practices and procedures. The good offices of LCAD of the Commonwealth Secretariat should be utilised to facilitate such visits.

5. EXAMINATION OF ENABLING LEGISLATION

The Group having examined the Draft enabling Bill for the CCJ, the Caribbean Court of Justice Act 2003 of Barbados and the Draft Supreme Court Bill of New Zealand recommends:

- 5.1 That the Draft enabling Bill for the CCJ as prepared by the CARICOM Secretariat should be revisited.
- 5.2 That the Barbados Act be amended and that its provisions should be revisited by the CARICOM Legislative Drafting Facility (the Facility) of the CARICOM Secretariat so as to render it fully in accordance with the provisions of the Agreement establishing the CCJ and the Revised Treaty of Chaguaramas.
- 5.3 That the Facility produce a model enabling Bill for enactment by all Member States, using the Barbados Act as a working draft.
- 5.4 That such enabling Bill incorporate a clause providing that the CCJ will have all of the powers of the Courts below. Clause 24 of the New Zealand Bill is a recommended precedent.
- 5.5 Alternatively, the Agreement establishing the Court could be amended appropriately to give effect to this recommendation.
- 5.6 Enabling legislation of the CCJ should preserve all the existing rights of access currently enjoyed by litigants to the JCPC.
- 5.7 Enabling legislation could usefully follow the simplicity of drafting style used in the New Zealand Draft Bill.

6 ADOPTION OF BEST PRACTICE BY FINAL APPELLATE COURTS

- 6.1 The Group generally agreed that whereas it was necessary to be conscious of the value of judicial time, written submissions and skeleton arguments should be buttressed by the reasonable allocation of time for the presentation of oral arguments. The principle of orality should be continued but confined within reasonable limits.
- 6.2 Where appropriate the Registrar could be invested with the power to issue procedural directions.
- 6.3 The workload of the Courts should be kept at a reasonable level and ample time should be reserved for reading and writing opinions.
- 6.4 The current practice in the JCPC of the simultaneous filing of cases by parties should be replaced by one that allows for a reasonable interval between such filings.
- 6.5 The Group recommends that in the general appellate jurisdiction of Final Courts, allowance should be made for the delivery of dissenting opinions. However in respect of the original jurisdiction of the CCJ it is recommended that the practice of international Courts of delivering a single opinion only should be followed.
- 6.6 Final Courts should within their financial abilities, make optimum use of available technology and access to justice will be considerably enhanced by the maintenance of a web site that is regularly updated with appropriate information regarding the workings of the Courts.