



# Commonwealth (Latimer House) Principles

on the Three  
Branches of  
Government



# **COMMONWEALTH PRINCIPLES ON THE ACCOUNTABILITY OF AND THE RELATIONSHIP BETWEEN THE THREE BRANCHES OF GOVERNMENT**

As agreed by Law Ministers and endorsed by the  
Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003

## **INTRODUCTION**

At their meeting in St Vincent and the Grenadines in November 2002, Commonwealth Law Ministers gave detailed consideration to a set of Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary, in the promotion of good governance, the rule of law and human rights. These were drawn up by a conference sponsored by the Commonwealth Parliamentary Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Lawyers' Association, which was held in the United Kingdom at Latimer House, Buckinghamshire, in June 1998, and revised by those associations after their initial consideration by Law Ministers in Port of Spain in 1999 and further work by senior officials.

Ministers fully endorsed the importance of the issues addressed in the document. They hoped that it would be possible for Commonwealth Heads of Government to agree a statement of principles, which could assist reflection on those issues. In response to the request of Law Ministers, a small ministerial working group was convened by the Commonwealth Secretary-General to develop such principles, based on the Latimer House Guidelines.

Taking into account the views expressed by Commonwealth Law Ministers, the working group of the Law Ministers of Australia, Ghana, India, Jamaica, Kenya, Singapore, South Africa and the United Kingdom finalized an agreed text of Commonwealth Principles on the Accountability of and Relationship between the Three Branches of Government.

At the Commonwealth Heads of Government meeting in Abuja, Nigeria, in

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December 2003, the Heads of Government fully endorsed the recommendations of their Law Ministers on the Latimer Guidelines, which specify the Commonwealth Principles on the accountability of and relationship between the three branches of Government.

It is acknowledged that these Commonwealth Principles buttress the declarations of Commonwealth values found in the Harare Declaration and the Millbrook Action Programme.

I have stated earlier that the Commonwealth commitment to democratic principles is more than rhetoric since it seeks to ensure that all of a country's democratic institutions reinforce one another. These institutions, whether legislative, judicial or executive, must always have the confidence of their people in that they must be transparent in their deliberations and accountable for their decisions. Each institution has a distinct role to play as well as each being a check or balancing mechanism for another.

What we now wish to see is the sharing of best practices and dissemination of agreed values and principles. This will enable member countries to move to that optimum state of governance which is predicated on the rule of law in our Commonwealth member states.

**H.E. Rt Hon. Don McKinnon**  
**Commonwealth Secretary-General**

## INTRODUCTION

As a result of the 2002 Meeting of Commonwealth Law Ministers held in St Vincent and the Grenadines in November 2002 the Commonwealth Secretary-General invited me to chair a small meeting of colleague Law Ministers from Australia, Ghana, India, Jamaica, Kenya, Singapore and the United Kingdom to review and develop principles based on the Latimer House Guidelines. These principles were to reflect the accountability of and relationship between the three branches of government, namely: the Executive, Legislature and Judiciary.

It is indicative of the importance which my colleague Ministers attached to this undertaking that we were able to come out with an agreed text which it was felt encapsulated the essence of these values. It is acknowledged that, especially in the developing and emerging democracies whose citizenry makes up the bulk of the Commonwealth's 1.7 billion constituents, the co-efficient balancing of the relationship of the three arms of government is essential to entrench the rule of law.

We were thus delighted that at their meeting in Abuja, Nigeria, in December 2003, the Commonwealth Heads of Government fully endorsed the recommendations of the Commonwealth Principles. The communiqué indeed acknowledged that judicial independence and delivery of efficient justice services were important for maintaining the balance of power between the Executive, Legislature and Judiciary. This has given a new impetus for member states to provide an effective framework for the implementation of the Commonwealth's fundamental values, whilst still taking into account national laws and customs.

It is my expectation that these Principles will be widely disseminated in all Commonwealth member states.

**Dr P.M. Maduna, MP**

**Minister for Justice and Constitutional Development, South Africa**



## FOREWORD

By the Commonwealth Lawyers' Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Parliamentary Association

In their Communiqué of December 2003, Commonwealth Heads of Government re-affirmed their commitment to the fundamental principles of the Commonwealth and “endorsed the recommendations of their Law Ministers on Commonwealth Principles on the accountability of and relationship between the three branches of Government. They acknowledged that judicial independence and delivery of efficient justice services were important for maintaining the balance of power between the Executive, Legislature and Judiciary”. Their endorsement confirms the value of co-operation between the Commonwealth professional organisations, the Commonwealth Secretariat and Commonwealth Law Ministers in the promotion of the fundamental political values of the Commonwealth.

In June 1998 a group of distinguished Parliamentarians, judges, lawyers and legal academics joined together at Latimer House in Buckinghamshire, United Kingdom, at a Colloquium on Parliamentary Sovereignty and Judicial Independence within the Commonwealth. The Colloquium was sponsored by, the Commonwealth Lawyers' Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Parliamentary Association with the support of the Commonwealth Foundation, the Commonwealth Secretariat and the United Kingdom Foreign and Commonwealth Office.

The gathering was inspired by the formal recognition by Commonwealth Law Ministers in 1996 of the importance of the role played by judges and lawyers in “healthy democracy” and by a meeting in February 1997 of the Heads of Government of 18 Commonwealth African countries which sought to evaluate the state of democracy in Africa. The object of the Colloquium was to draft guidelines which would provide an operational manual of good practice with regard to the commitments contained in the Harare Declaration and Millbrook Plan of Action and which would to be implemented in every Commonwealth country.

The product of the Colloquium, The Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence, were placed before Commonwealth Law Ministers at their meeting in Port of Spain in May 1999. They asked Senior Officials to study The Guidelines and report to the next Law Ministers Meeting.

Events in the Commonwealth following the publication of The Guidelines confirmed the need to analyse the core issues at stake in protecting judicial and parliamentary independence, in scrutinising the delicate relationship between the branches of government and in recognising the part to be played in civil society by non-governmental organisations in achieving those ends.

The Guidelines were approved by the CLEA members at their 1998 Conference in Ocho Rios and were supported at later CLEA meetings held in Malaysia, South Africa, Sri Lanka and the United Kingdom.

In September 1999, the principles underlying The Guidelines were debated by judges and lawyers at a session on judicial independence held at the Commonwealth Law Conference in Kuala Lumpur. In September 2000, a meeting of Commonwealth Chief Justices commended them for consideration by Heads of Government in a statement issued at the Triennial Conference of the Commonwealth Magistrates' and Judges' Association, held in Edinburgh. The statement was subsequently endorsed by Chief Justices from 31 Commonwealth countries. In February 2001, the Pacific Island Chief Justices endorsed the Edinburgh statement and expressed support for the efforts of the sponsoring organisations.

In November 2001, Senior Officials meeting in London "noted that the principles of good governance and judicial independence had been clearly endorsed by Commonwealth Heads of Government and welcomed the general thrust of the declaration of those principles in The Guidelines". Subject to refinement of the text in a number of respects including those in relation to judicial appointments, they agreed that the Guidelines would be laid before Law Ministers at their next meeting.

At their Meeting in St Vincent and the Grenadines in November 2002, Law Ministers gave detailed consideration to The Guidelines, which had been refined by a working group consisting of the sponsoring associations and the Commonwealth Secretariat. Ministers fully endorsed the importance of the issues involved in the document and "hoped that it would be possible for Commonwealth Heads of Government to agree a statement of principles which could assist reflection on these issues". They invited the Commonwealth Secretary-General to convene a small group of Law Ministers to work with the Commonwealth Secretariat in order to refine and develop principles based on The Guidelines for submission to Heads of Government.

The resulting text was approved by Law Ministers and placed on the agenda of the 2003 Heads of Government Meeting in Abuja. The Principles were endorsed in paragraph 8 of the Abuja Communiqué. Thus Heads of Government have recognised the valuable work undertaken by the Commonwealth parliamentary, legal and judicial associations to further the commitments made in the Harare Declaration



and Millbrook Plan of Action in the promotion of good governance, fundamental human rights, the rule of law and the independence of the judiciary.

In the view of our associations, the implementation of the Principles is essential for the realisation of the legitimate aspirations of all the peoples of the Commonwealth.

**Mr Colin Nicholls, QC**  
**President**  
**Commonwealth Lawyers' Association**

**Prof. David McQuoid-Mason**  
**President**  
**Commonwealth Legal Education Association**

**Rt Hon. Lord Hope of Craighead**  
**President**  
**Commonwealth Magistrates' and Judges' Association**

**Hon. Denis Marshall, QSO**  
**Secretary-General**  
**Commonwealth Parliamentary Association**



# **COMMONWEALTH PRINCIPLES ON THE ACCOUNTABILITY OF AND THE RELATIONSHIP BETWEEN THE THREE BRANCHES OF GOVERNMENT**

Commonwealth Heads of Government warmly welcome the contribution made by the Commonwealth Parliamentary Association and the legal profession of the Commonwealth represented by the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association to further the Commonwealth Harare Principles.

They acknowledge the value of the work of these Associations to develop the Latimer House Guidelines and resolve, in the spirit of those Guidelines, to adopt the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government.

## **OBJECTIVE**

The objective of these Principles is to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values.

### **I) The Three Branches of Government**

Each Commonwealth country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

### **II) Parliament and the Judiciary**

(a) Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand.

(b) Judiciaries and parliaments should fulfill their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.

### **III) Independence of Parliamentarians**

(a) Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference.

(b) Criminal and defamation laws should not be used to restrict legitimate criticism of Parliament; the offence of contempt of parliament should be narrowly drawn and reporting of the proceedings of parliament should not be unduly restricted by narrow application of the defence of qualified privilege.

### **IV) Independence of the Judiciary**

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.

To secure these aims:

(a) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:

equality of opportunity for all who are eligible for judicial office;

appointment on merit; and

that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination;

(b) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place;

(c) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought;

(d) Interaction, if any, between the executive and the judiciary should not compromise judicial independence.

Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.

Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public. Superior Court decisions should be published and accessible to the public and be given in a timely manner.

An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary.

## **V) Public Office Holders**

(a) Merit and proven integrity, should be the criteria of eligibility for appointment to public office;

(b) Subject to (a), measures may be taken, where possible and appropriate, to ensure that the holders of all public offices generally reflect the composition of the community in terms of gender, ethnicity, social and religious groups and regional balance.

## **VI) Ethical Governance**

Ministers, Members of Parliament, judicial officers and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.

## **VII) Accountability Mechanisms**

(a) Executive Accountability to Parliament

Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of all public business.

Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to Parliament.

(b) Judicial Accountability

Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.

In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.

The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.

### (c) Judicial review

Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice.

## **VIII) The law-making process**

In order to enhance the effectiveness of law making as an essential element of the good governance agenda:

There should be adequate parliamentary examination of proposed legislation;

Where appropriate, opportunity should be given for public input into the legislative process;

Parliaments should, where relevant, be given the opportunity to consider international instruments or regional conventions agreed to by governments.

## **IX) Oversight of Government**

The promotion of zero-tolerance for corruption is vital to good governance. A transparent and accountable government, together with freedom of expression, encourages the full participation of its citizens in the democratic process.

Steps which may be taken to encourage public sector accountability include:

(a) The establishment of scrutiny bodies and mechanisms to oversee Government, enhances public confidence in the integrity and acceptability of government's activities. Independent bodies such as Public Accounts Committees, Ombudsmen, Human Rights Commissions, Auditors-General, Anti-corruption commissions, Information Commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues. Govern-

ments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances,

(b) Government's transparency and accountability is promoted by an independent and vibrant media which is responsible, objective and impartial and which is protected by law in its freedom to report and comment upon public affairs.

## **X) Civil Society**

Parliaments and governments should recognise the role that civil society plays in the implementation of the Commonwealth's fundamental values and should strive for a constructive relationship with civil society to ensure that there is broader opportunity for lawful participation in the democratic process.





# ANNEX

## PARLIAMENTARY SUPREMACY

## JUDICIAL INDEPENDENCE...

## LATIMER HOUSE GUIDELINES FOR THE COMMONWEALTH

**19 JUNE 1998**

*Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles.*

### **PREAMBLE**

RECALLING the renewed commitment at the 1997 Commonwealth Heads of Government Meeting at Edinburgh to the Harare Principles and the Millbrook Commonwealth Action Programme and, in particular, the pledge in paragraph 9 of the Harare Declaration to work for the protection and promotion of the fundamental political values of the Commonwealth:

- Democracy;
- Democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary;
- Just and honest government;
- Fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief, and
- Equality for women, so that they may exercise their full and equal rights.

Representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association meeting at Latimer House in the United Kingdom from 15 to 19 June 1998:

HAVE RESOLVED to adopt the following Principles and Guidelines and propose them for consideration by the Commonwealth Heads of Government Meeting and for effective implementation by member countries of the Commonwealth.

## **PRINCIPLES**

The successful implementation of these Guidelines calls for a commitment, made in the utmost good faith, of the relevant national institutions, in particular the executive, parliament and the judiciary, to the essential principles of good governance, fundamental human rights and the rule of law, including the independence of the judiciary, so that the legitimate aspirations of all the peoples of the Commonwealth should be met.

Each institution must exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by the other institutions.

It is recognised that the special circumstances of small and/or under-resourced jurisdictions may require adaptation of these Guidelines.

It is recognised that redress of gender imbalance is essential to accomplish full and equal rights in society and to achieve true human rights<sup>1</sup>. Merit and the capacity to perform public office regardless of disability should be the criteria of eligibility for appointment or election.

## **GUIDELINES**

### **I) PARLIAMENT AND THE JUDICIARY**

1. The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may<sup>2</sup> be constructive and purposive in the interpretation of legislation, but must not usurp Parliament's legislative function. Courts should have the power to declare legislation to be unconstitutional and of no legal effect. However, there may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the legislature to take remedial legislative measures.

2. Commonwealth parliaments should take speedy and effective steps to implement their countries' international human rights obligations by enacting appropriate human rights legislation. Special legislation (such as equal opportunity laws) is required to extend the protection of fundamental rights to the private sphere. Where domestic incorporation has not occurred, international instruments should be applied to aid interpretation.

3. Judges should adopt a generous and purposive approach in interpreting a Bill of Rights. This is particularly important in countries which are in the process of building democratic traditions. Judges have a vital part to play in developing and maintaining a vibrant human rights environment throughout the Commonwealth.

4. International law and, in particular, human rights jurisprudence can greatly assist domestic courts in interpreting a Bill of Rights. It also can help expand the scope of a Bill of Rights making it more meaningful and effective.

5. While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.

6. People should have easy and unhindered access to courts, particularly to enforce their fundamental rights. Any existing procedural obstacles to access to justice should be removed.

7. People should also be made aware of, and have access to, other important fora for human rights dispute resolution, particularly Human Rights Commissions, Offices of the Ombudsman and mechanisms for alternative dispute resolution.

8. Everyone, especially judges, parliamentarians and lawyers, should have access to human rights education.

## **II) PRESERVING JUDICIAL INDEPENDENCE**

### **I. Judicial appointments**

Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission<sup>3</sup>.

The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.

Judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination.

Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure<sup>4</sup>.

Judicial vacancies should be advertised.

## 2. Funding

Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.<sup>5</sup>

Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary.

As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.

## 3. Training<sup>6</sup>

A culture of judicial education should be developed.

Training should be organised, systematic and ongoing and under the control of an adequately funded judicial body.

Judicial training should include the teaching of the law, judicial skills and the social context including ethnic and gender issues.

The curriculum should be controlled by judicial officers who should have the assistance of lay specialists.

For jurisdictions without adequate training facilities, access to facilities in other jurisdictions should be provided.

Courses in judicial education should be offered to practising lawyers as part of their ongoing professional development training<sup>7</sup>.

## **III) PRESERVING THE INDEPENDENCE OF PARLIAMENTARIANS<sup>8</sup>**

1. Article 9 of the Bill of Rights 1688 is re-affirmed. This article provides:

“That the Freedom of Speech and Debates or Proceedings in Parlyement ought not to be impeached or questioned in any court or place out of Parlyement.”

2. Security of members during their parliamentary term is fundamental to parliamentary independence and therefore:

- (a) the expulsion of members from parliament as a penalty for leaving their parties (floor-crossing) should be viewed as a possible infringement of members' independence; anti-defection measures may be necessary in some jurisdictions to deal with corrupt practices<sup>9</sup>;
- (b) laws allowing for the recall of members during their elected term should be viewed with caution, as a potential threat to the independence of members;
- (c) the cessation of membership of a political party of itself should not lead to the loss of a member's seat.

3. In the discharge of their functions, members should be free from improper pressures and accordingly:

- (a) the criminal law and the use of defamation proceedings are not appropriate mechanisms for restricting legitimate criticism of the government or the parliament;
- (b) the defence of qualified privilege with respect to reports of parliamentary proceedings should be drawn as broadly as possible to permit full public reporting and discussion of public affairs;
- (c) the offence of contempt of parliament should be drawn as narrowly as possible.

#### **IV) WOMEN IN PARLIAMENT<sup>10</sup>**

1. To improve the numbers of women members in Commonwealth parliaments, the role of women within political parties should be enhanced, including the appointment of more women to executive roles within political parties.

2. Pro-active searches for potential candidates should be undertaken by political parties.

3. Political parties in nations with proportional representation should be required to ensure an adequate gender balance on their respective lists of candidates for election. Women, where relevant, should be included in the top part of the candidates lists of political parties. Parties should be called upon publicly to declare the degree of representation of women on their lists and to defend any failure to maintain adequate representation.

4. Where there is no proportional representation, candidate search and/or selection committees of political parties should be gender-balanced as should representation at political conventions and this should be facilitated by political parties by way of amendment to party constitutions; women should be put forward for safe seats.

5. Women should be elected to parliament through regular electoral processes. The provision of reservations for women in national constitutions, whilst useful, tends to be insufficient for securing adequate and long-term representation by women.

6. Men should work in partnership with women to redress constraints on women entering parliament. True gender balance requires the oppositional element of the inclusion of men in the process of dialogue and remedial action to address the necessary inclusion of both genders in all aspects of public life.

## **V) JUDICIAL AND PARLIAMENTARY ETHICS**

### **1. Judicial Ethics**

- (a) A Code of Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges;
- (b) the Commonwealth Magistrates' and Judges' Association should be encouraged to complete its Model Code of Judicial Conduct now in development<sup>11</sup>;
- (c) the Association should also serve as a repository of codes of judicial conduct developed by Commonwealth judiciaries, which will serve as a resource for other jurisdictions.

### **2. Parliamentary Ethics**

- (a) Conflict of interest guidelines and codes of conduct should require full disclosure by ministers and members of their financial and business interests;
- (b) members of parliament should have privileged access to advice from statutorily-established Ethics Advisors;
- (c) whilst responsive to the needs of society and recognising minority views in society, members of parliament should avoid excessive influence of lobbyists and special interest groups.

## **VI) ACCOUNTABILITY MECHANISMS**

### **1. Judicial Accountability**

- (a) Discipline:
  - (i) In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal. Grounds for removal of a judge should be limited to:
    - (A) inability to perform judicial duties and
    - (B) serious misconduct.
  - (ii) In all other matters, the process should be conducted by the chief judge

of the courts;

(iii) Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private, by the chief judge.

(b) Public Criticism<sup>12</sup>:

(i) Legitimate public criticism of judicial performance is a means of ensuring accountability;

(ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.

## 2. Executive Accountability

(a) Accountability of the Executive to Parliament

Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to parliament. These should include:

(i) a committee structure appropriate to the size of parliament, adequately resourced and with the power to summon witnesses, including ministers. Governments should be required to announce publicly, within a defined time period, their responses to committee reports;

(ii) standing orders should provide appropriate opportunities for members to question ministers and full debate on legislative proposals;

(iii) the public accounts should be independently audited by the Auditor General who is responsible to and must report directly to parliament;

(iv) the chair of the Public Accounts Committee should normally be an opposition member;

(v) offices of the Ombudsman, Human Rights Commissions and Access to Information Commissioners should report regularly to parliament.

(b) Judicial Review

Commonwealth governments should endorse and implement the principles of judicial review enshrined in the Lusaka Statement on Government under the Law.

## VII) THE LAW-MAKING PROCESS

I. Women should be involved in the work of national law commissions in the law-making process. Ongoing assessment of legislation is essential so as to create a more gender-balanced society. Gender-neutral language should be used in the drafting and use of legislation.

2. Procedures for the preliminary examination of issues in proposed legislation should be adopted and published so that:

- (a) there is public exposure of issues, papers and consultation on major reforms including, where possible, a draft bill;
- (b) standing orders provide a delay of some days between introduction and debate to enable public comment unless suspended by consent or a significantly high percentage vote of the chamber, and
- (c) major legislation can be referred to a select committee allowing for the detailed examination of such legislation and the taking of evidence from members of the public.

3. Model standing orders protecting members' rights and privileges and permitting the incorporation of variations, to take local circumstances into account, should be drafted and published.

4. Parliament should be serviced by a professional staff independent of the regular public service.

5. Adequate resources to government and non-government backbenchers should be provided to improve parliamentary input and should include provision for:

- (a) training of new members;
- (b) secretarial, office, library and research facilities;
- (c) drafting assistance including private members' bills.

6. An all-party committee of members of parliament should review and administer parliament's budget which should not be subject to amendment by the executive.

7. Appropriate legislation should incorporate international human rights instruments to assist in interpretation and to ensure that ministers certify compliance with such instruments, on introduction of the legislation.

8. It is recommended that "sunset" legislation (for the expiry of all subordinate legislation not renewed) should be enacted subject to power to extend the life of such legislation.

## **VIII) THE ROLE OF NON-JUDICIAL AND NON-PARLIAMENTARY INSTITUTIONS**

1. The Commonwealth Statement on Freedom of Expression<sup>13</sup> provides essential guarantees to which all Commonwealth countries should subscribe.



2. The Executive must refrain from all measures directed at inhibiting the freedom of the press, including indirect methods such as the misuse of official advertising.
3. An independent, organised legal profession is an essential component in the protection of the rule of law.
4. Adequate legal aid schemes should be provided for poor and disadvantaged litigants, including public interest advocates.
5. Legal professional organisations should assist in the provision, through pro bono schemes, of access to justice for the impecunious.
6. The executive must refrain from obstructing the functioning of an independent legal profession by such means as withholding licensing of professional bodies.
7. Human Rights Commissions, Offices of the Ombudsman and Access to Information Commissioners can play a key role in enhancing public awareness of good governance and rule of law issues, and adequate funding and resources should be made available to enable them to discharge these functions. Parliament should accept responsibility in this regard.

Such institutions should be empowered to provide access to alternative dispute-resolution mechanisms.

## **IX) MEASURES FOR IMPLEMENTATION AND MONITORING COMPLIANCE**

These guidelines should be forwarded to the Commonwealth Secretariat for consideration by Law Ministers and Heads of Government<sup>14</sup>.

If these Guidelines are adopted, an effective monitoring procedure, which might include a Standing Committee, should be devised under which all Commonwealth jurisdictions accept an obligation to report on their compliance with these Guidelines.

Consideration of these reports should form a regular part of the Meetings of Law Ministers and of Heads of Government.

### **End Notes**

1. The final paragraph does not refer expressly to other forms of discrimination, e.g. on ethnic or religious grounds. There are a number of approaches to the redress of existing imbalances, such as selection based on "merit with bias", i.e. where, for example, if two applicants are of equal merit, the bias should be to appoint a woman where there exists gender imbalance.

2. It has been suggested that judges "shall" have a duty to adopt a constructive and purposive approach to the interpretation of legislation, particularly in a human rights context, as indicated in paragraph 3.

3. The Guidelines clearly recognise that, in certain jurisdictions, appropriate mechanisms for judicial appointments not involving a judicial service commission are in place. However, such commissions exist in many jurisdictions, though their composition differs. There are arguments for and against a majority of senior judges and in favour of strong representation of other branches of the legal profession, members of parliament and of civil society in general.

4. The making of non-permanent judicial appointments by the executive without security of tenure remains controversial in a number of jurisdictions.

5. The provision of adequate funding for the judiciary must be a very high priority in order to uphold the rule of law, to ensure that good governance and democracy are sustained and to provide for the effective and efficient administration of justice. However, it is acknowledged that a shortfall in anticipated national income might lead to budgetary constraints.

Finance ministries are urged to engage in appropriate consultations in order to set realistic and sustainable budgets which parliaments should approve to ensure adequate funds are available.

6. This is an area where the sponsoring associations can play a cost-effective role in co-operation with the Commonwealth Secretariat. Resources need to be provided in order to support the judiciary in the promotion of the rule of law and good governance.

7. The drafters of the Guidelines did not wish by this provision to impinge on either the independence of the judiciary or the independence of the legal profession. However, in many jurisdictions throughout the Commonwealth, magistrates and judges are given no formal training on commencement of their duties. It was felt that appointees to the bench would benefit from some training prior to appointment in order to make them more aware of the duties and obligations of judicial officers and aid their passage to the bench.

8. It has been observed that the Guidelines are silent about the elected composition of the popular chamber. In a number of jurisdictions, nominated members may have a decisive influence on the outcome of a vote. If properly used, however, the power of nomination may be used to redress, for example, gender imbalance and to ensure representation of ethnic or religious minorities. The role of non-elected senates or upper chambers must also be considered in this context.

9. There remains controversy about the balance to be struck between anti-floor-crossing measures as a barrier against corruption and the potential threat to the independence of MPs.

10. The emphasis on gender balance is not intended to imply that there are not other issues of equity in representation which need to be considered. Parliament should reflect the composition of the community which it represents in terms of ethnicity, social and religious groups and regional balance. Some countries have experimented with regulation of national political parties to ensure, for example, that their support is not confined to one regional or ethnic group, a notion which would be profoundly hostile to the political culture in other jurisdictions.

11. Following discussion of the Guidelines, it has been accepted by the Working Group that a "uniform" Model Code of Judicial Conduct is inappropriate. Judicial Officers in each country should develop, adopt and periodically review codes of ethics and conduct appropriate to their jurisdiction. The CMJA will promote that process in its programmes and will serve as a repository for such codes when adopted.

12. In certain jurisdictions, the corruption of the judiciary is acknowledged as a real problem. The recommendations contained in the Guidelines are entirely consistent with the Framework for Commonwealth Principles in Promoting Good Governance and Combating Corruption approved by CHOGM in Durban in 1999. There is some support for the creation of a Judicial Ombudsman who may receive complaints from the public regarding the conduct of judges.

13. Since the Guidelines were drafted, the draft Statement on Freedom of Expression has been subject to further consideration and the reference should take account of the new developments. The Commonwealth Heads of Government, in the Coolum Declaration of 5 March 2002, included a commitment to freedom of expression: "We stand united in: our commitment to democracy, the rule of law, good governance, freedom of expression and the protection of human rights...."

14. Under active consideration is the creation of a monitoring procedure outside official Commonwealth processes. This initially may involve an "annual report" on the implementation of the Guidelines in all Commonwealth jurisdictions, noting "good" and "bad" practice.



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