

**PARLIAMENTARY SUPREMACY
JUDICIAL INDEPENDENCE.....**

**LATIMER HOUSE GUIDELINES FOR THE
COMMONWEALTH**

19 JUNE 1998

A Joint Colloquium on "*Parliamentary Supremacy and Judicial Independence...towards a Commonwealth Model*" was held at Latimer House in the United Kingdom, from 15 - 19 June 1998. Over 60 participants attended representing 20 Commonwealth countries and 3 overseas territories.

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 generous support of the Commonwealth Foundation, the Commonwealth Secretariat and the United Kingdom Foreign and Commonwealth Office.

The following Guidelines for the Commonwealth are a result of deliberations during the Colloquium and subsequent discussions. *The Guidelines were considered by Commonwealth Law Ministers in 1999 and were referred by them to Senior Officials who discussed the Guidelines at their meeting in London in November 2001. They "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 revisions of the provisions of the Guidelines relating to judicial appointment mechanisms and the control of funds (now incorporated into the text of this document), Senior Officials agreed that the Guidelines would be laid before Law Ministers at their meeting in November 2002. The Guidelines were also considered by the Law Ministers and Attorney Generals of Small Commonwealth Jurisdictions Meeting in May 2000, where the Guidelines were welcomed as "reflecting valuable and fundamental concepts".*

The sponsoring organisations have therefore made some refinements after further judicial consultation, since November 2001 in relation to II (1) and (2) of the Guidelines* and these have been incorporated in this document.

Explanatory footnotes have also been included in this document following the discussions which were held at the Commonwealth Law Conference in 1999 and the CMJA Edinburgh 2000 Conference.

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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;
- 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 rights¹. Merit and the capacity to perform public office regardless of disability should be the criteria of eligibility for appointment or election.

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.*

GUIDELINES

I PARLIAMENT AND THE JUDICIARY

- 1.** The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may² 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 foras 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

1. Judicial appointments

Jurisdictions should have an appropriate independent process in place for judicial

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.*

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 commission³.

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 tenure⁴.

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.⁵

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. Training⁶

A culture of judicial education should be developed.

³The 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.

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

⁵The 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

⁶This 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.

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 training⁷.

III PRESERVING THE INDEPENDENCE OF PARLIAMENTARIANS⁸

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 practices⁹;
- (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:

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 would 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.

- (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 PARLIAMENT¹⁰

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;

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.*

- (b) the Commonwealth Magistrates' and Judges' Association should be encouraged to complete its Model Code of Judicial Conduct now in development¹¹;
- (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.

V 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 Criticism¹²:
 - (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

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.

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.

VI THE LAW-MAKING PROCESS

1. 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 back benchers 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.

VII THE ROLE OF NON-JUDICIAL AND NON-PARLIAMENTARY INSTITUTIONS

1. The Commonwealth Statement on Freedom of Expression¹³ (annexed hereto) 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.

VIII MEASURES FOR IMPLEMENTATION AND MONITORING COMPLIANCE

These guidelines should be forwarded to the Commonwealth Secretariat for consideration by Law Ministers and Heads of Government¹⁴.

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 Coolom 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 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.

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.
