The Commonwealth

Virtual Meeting of Senior Officials of Law Ministries (SOLM)

Meeting Paper

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Proposed work plan of the Commonwealth Civil Procedure Law Working Group

Paper by the Commonwealth Secretariat

Executive Summary

At their Meeting in October 2018, Senior Officials considered a paper on the reform in the Commonwealth of civil procedure laws, based on an analysis of the results of a short questionnaire sent by the Secretariat to Commonwealth attorneys general, chief justices and members of the Commonwealth Lawyers Association. In line with the focus of the new Commonwealth Office of Civil and Criminal Justice Reform, that paper identified a variety of issues and areas, ranging from case management and disclosure, to laws of evidence and interlocutory decisions and appeals, and provided recommendations for possible further work to support Commonwealth countries in civil procedure law reform for an efficient and effective justice system. Consequently, Senior Officials requested the Secretariat to establish an informal open-ended expert Working Group to propose activities and reforms.

At their Meeting in November 2019, Law Ministers asked the Secretariat to support the Working Group in developing a work plan for reform activities in selected priority areas of civil procedure law. This paper presents the work plan developed by the Working Group.

Senior Officials are invited to provide input on the areas identified, identify priorities among the activities contained in the proposed work plan and request a report of the Working Group's activities to be presented to Law Ministers at their next meeting.

Content

I. Introduction

1. At their meeting in October 2018, Senior Officials considered a paper on the reform of civil procedure laws in Commonwealth countries. The paper analysed the results of a short questionnaire on civil procedure law sent by the Secretariat to Commonwealth attorneys general, chief justices, and members of the Commonwealth Lawyers Association. In the areas of active case management, mediation, laws of evidence, disclosure and discovery, expert evidence, and interlocutory applications and appeals, the paper identified a range of different challenges experienced to different degrees across the Commonwealth. These problems, such as high costs, excessive delays, and burdensome complexity, impede the effective operation of justice systems, and equal access to justice for all.

2. Senior Officials noted that fair, transparent, and efficient civil procedure laws and rules and practice directions are an integral component of an effective civil dispute resolution system. They can also promote the Commonwealth's strategic goals of increasing intra-Commonwealth trade and investment. Senior Officials also noted that given the diversity of civil procedure laws across the Commonwealth, a 'one-size-fits-all' approach to addressing the challenge was not appropriate. Senior Officials recognised that Commonwealth countries could learn from each other by looking at how different countries have addressed key challenges in their civil procedure frameworks.

3. Issues that were flagged for consideration in the paper presented to Senior Officials at their meeting in 2018 included: the role of active case management, laws and rules of evidence, disclosure, expert evidence, and interlocutory applications. In addition to these topics, Senior Officials referred, during their meeting, to other issues including 'public access to court papers, the role of specialist courts and tribunals, the handling of small claims, ensuring compliance with rules by legal representatives, and how to address the interplay between mediation and litigation.'[1]

[1] 'Outcome Statement', Meeting of Senior Officials of Law Ministries (October 2018) para. 13.

4. Senior Officials indicated that there was significant interest in the topic and requested the Secretariat to establish an informal open-ended expert Working Group, with equitable geographic representation from across the Commonwealth, to identify a core group of civil procedure law and rules challenges commonly encountered, and propose potential solutions.

II. Commonwealth Civil Procedure Law Working Group

5. In response to the directions of Senior Officials, the Office of Civil and Criminal Justice Reform of the Commonwealth Secretariat invited interested member countries to nominate representatives to the Commonwealth Civil Procedure Law Working Group. Australia, The Bahamas, Canada, Cyprus, England and Wales, Eswatini, Fiji, Ghana, Malta, Scotland, St Lucia, St Vincent and the Grenadines, and Trinidad and Tobago nominated representatives.

6. Working remotely, members of the Working Group have shared their priorities for civil procedure law reform, considered areas that may usefully be addressed by the Working Group, and shared examples of national practice.

7. At their Meeting in November 2019, Law Ministers welcomed the establishment of the Working Group and endorsed the work of the Secretariat. Law Ministers directed the Secretariat to support the Working Group to develop a work plan for the consideration and development of proposals for the strengthening of select priority areas of civil procedure law, including: the use of mediation to resolve disputes; laws and rules of evidence; the disclosure and discovery process; expert evidence; and interlocutory or interim applications and appeals. Possible solutions mooted included options for the drafting of guidance, good practice, or model rules of civil procedure. Law Ministers also encouraged the expert Working Group to report on their work at the next Law Ministers Meeting.

8. The Commonwealth Civil Procedure Law Working Group has developed a work plan, attached as Annex 1. The work plan identifies the following as priority areas for reform, with the objective of improving access to, and the delivery of, justice in each area:

    1) Case Management
    2) E-Filing of Documents
    3) Mediation
    4) E-Discovery and E-Disclosure
    5) Laws of Evidence and Admissibility of Evidence.

III. Recommendations

9. Senior Officials may wish to:

a. provide advice and comments on the five (5) priority areas identified by the Working Group, including on whether there are other priority areas that should be considered;
b. identify priorities among the activities contained in the proposed work plan of the Commonwealth Civil Procedure Law Working Group; and
c. request a report of the Working Group's activities to be presented to Law Ministers at their next meeting.

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Annex 1

Commonwealth Civil Procedure Law Reform Working Group

Proposed Work Plan

Background to the Work Plan:

This draft Work Plan has been developed in consultation with the members of the Commonwealth Civil Procedure Law Reform Working Group. Working Group members have contributed ideas for action and shared examples of their own practice, regarding the priority areas identified by the Working Group.

Members of the Working Group shared resources available in their respective jurisdictions, which are presented under the heading 'Existing Resources'. These lists are not exhaustive and will be updated and expanded by the Working Group as it starts its work.

Identification and Selection of Priority Areas:

Following consultations with the Working Group and having received detailed proposals from participants, the Secretariat has identified key areas of law reform on which the Working Group can focus. These key areas received the most interest from members of the Working Group. They have also been selected for their general applicability to all Commonwealth member countries, their potential to provide workable outcomes for all member countries as a result of shared practice, and their feasibility in terms of the resources available to the Commonwealth Secretariat. The impact of the COVID-19 pandemic on the operation of courts and the work of the Secretariat has also been considered.

The activities below focus on conducting detailed research into the five selected priority areas and the sharing of good practice from all Commonwealth countries. These activities should produce the most useful and tangible results from the resources available and benefit the greatest number of member countries. It is hoped that the outputs of these activities will enable member countries to embark on their own civil procedure law reform in the relevant areas using the guidance and recommendations contained in these documents.

Once this Work Plan is confirmed by Senior Officials, research into the areas will draw from the initial proposals received by the Working Group. As directed by Commonwealth Law Ministers at their Meeting in October 2019, this Work Plan is presented for approval to Senior Officials of Commonwealth Law Ministries.

Each key area is briefly outlined below.

Priority Areas:

The key priority areas that have been identified by the Expert Working Group as being of particular importance are:

1) **Case management**
2) **E-filing of documents**
3) **Mediation**
4) **E-discovery and e-disclosure**
5) **Laws of evidence and admissibility of evidence**

1. Case Management

Relevance to the Working Group:

Case management is an issue which member countries across the Commonwealth have identified as a priority for civil procedure law reform. Particulars of this area relate not only to developing more active case management systems within countries, but also to developing electronic case management systems to help with current administrative burdens of existing paper-based systems. The benefits of work in this area include improvements in the workings and outcomes of court processes, ensuring that matters are dealt with efficiently and in a timely manner as documents could be shared more readily between relevant parties. Case management developments would also benefit from appropriate e-filing systems being put in place (addressed in more detail below) to assist with the storing of, and ease of access to, relevant legal documents.

The Proposed Activities recognise that different Commonwealth countries have access to different levels of resources and differing connectivity levels.

Proposed Activities:

Suggestions from members of the Working Group focused on the importance of developing case management systems, which reduced the administrative burden on courts and on litigants (including litigants in person). Particular suggestions included:

- Further research into good practices on case management in Commonwealth countries, including the use of courtroom technologies to benefit justice delivery. This proposal is one with respect to which there is likely to be a larger amount of data as courts across the Commonwealth have been forced to adapt their normal practices as a result of the COVID-19 pandemic. Research into the benefits and disadvantages of certain courtroom technologies, focusing on the impact on judges, lawyers and litigants, would help to inform member countries' strategic plans on strengthening their civil justice systems. There is an ongoing court transformation project being researched by the Commonwealth Secretariat, which may be able to provide assistance with further research in this area.

- The imposition by courts of compulsory mediation in civil cases or a strong encouragement to parties to mediate could help to address the problems associated with case backlogs as it would encourage the settlement of certain matters at an earlier stage of the legal process. The sharing of good practice and research into how such methods of alternative dispute resolution are used across the Commonwealth in this context could, for example, mean that compulsory non-litigious dispute resolution is introduced for certain issues, in order to reduce the strain on courts and case management. This could be particularly beneficial to those member countries whose access to the internet or developing courtroom technologies may be limited. It would also reduce dispute resolution costs. This issue is explored in more depth under 'Mediation', below.

Proposed Output:

A Commonwealth Good Practice Guide on Case Management. This could cover a selection of topics regarding case management from all Commonwealth countries and provide a resource

for how countries can adapt and strengthen their own systems. This could include active case management and electronic case management, and even extend to e-filing (see below).

Existing Resources from the Working Group:

- 'Access to Civil & Family Justice: A Roadmap for Change' (Final Report of the Action Committee on Access to Justice in Civil and Family Matters, Canada, October 2013).
- 'Class Actions: Objectives, Experiences and Reforms' (Final Report of the Law Commission of Ontario's class action reform project, Canada, July 2019).
- A two-year, one-judge civil case management pilot project taking place in Ontario, Canada, which began on 1 February 2019. Here the assigned case management judge will preside over all pre-trial hearings, conferences and the trial, allowing maximum familiarity by the same judicial officer with the issues in dispute. The programme will be evaluated at the end of the two years.
- The Canadian Judicial Council, which has highlighted the rise of case management as an issue, has demanded ethical and practical guidance for judges.
- Federal Court of Australia Central Practice Note: National Court Framework and Case Management (CPN-1). This includes the overall case management model for Australian federal courts.
- In Australia, special provisions apply for Native Title litigation: specific case management considerations can be found in the Native Title Practice Note (NT-1) of the Federal Court.
- The Federal Court of Australia Class Actions Practice Note (GPN-CA) has recently been amended to provide for enhanced case management in class action matters.
- Case Management Handbook, Law Council of Australia/Federal Court of Australia, 2014, Chapter 7.

Existing Commonwealth Resources:

- Indira Nicole Demeritte-Francis, 'The role of technology within the Court of Appeal of the Commonwealth of the Bahamas' [2010] 36 Commonwealth Law Bulletin 3.
- Louraine C. Arkfeld, 'Life as a Wired Judge: Reflections on the Use of Technology by Courts' [2006] 27 Commonwealth Law Bulletin 3.
- Louise Meagher, 'Information management and interpretation and translation services at the Supreme Court of Canada' [2010] 36 Commonwealth Law Bulletin 3.
- Michael Sayers, 'Law reform: in the Commonwealth, in small states and in the Caribbean' [2009] 35 Commonwealth Law Bulletin 1.
- Justice Jean Permanand CMT, SC, 'Law reform challenges and opportunities for smaller law reform agencies' [2005] 31 Commonwealth Law Bulletin 3.
- Michael Sayers, 'Law reform across the Commonwealth: A new voice' [2005] 31 Commonwealth Law Bulletin 1.
- Sue Farran and Edward R. Hill, 'Making waves and breaking the mould in civil procedure in the Pacific: The new civil procedure rules of Vanuatu' [2002] 28 Commonwealth Law Bulletin 2.

2. E-Filing of Documents

Relevance to the Working Group:

Many Commonwealth countries are adopting e-filing systems to reduce costs and delays and to improve document retrieval and the storage of case documentation. In general terms, e-filing enables:

(a) litigants, Judges and other relevant stakeholders to view online full texts of all filed documents;
(b) litigants and/or their lawyers to file case documents from their offices or homes, reducing the costs of postage, messenger services or travel;
(c) litigants to receive an automatic verification and communication immediately after the filing of relevant documents/pleadings;
(d) automatic, cost-effective and secure storage, which reduces paper document storage needs; and
(e) cost effective and easier access to information.

Proposed Activities:

- To research into the electronic filing systems that are in use across the Commonwealth, and to highlight good practice. This research can then be used to assist member countries to adopt or reform their own court filing practices. This assistance could take the form of recommendations and research papers focusing on good practice across the Commonwealth, which could form the basis of future schemes to be implemented in member countries.

Proposed Output:

The Working Group will have input into a research paper that will focus on current e-filing systems in place across the Commonwealth. Alternatively, this issue could be fused with Case Management (above) and form part of a larger and more substantial Good Practice Guide on Case Management.

Existing Resources from the Working Group:

- The Judicial Department in Fiji is working towards introducing electronic filing systems, however the rules have not yet been reformed with regards to electronic filing.
- In the province of Quebec, Canada, the Code of Civil Procedure, adopted in 2014 and in force as of 2016, expressly encourages the use of 'appropriate technological means' available to the court and the parties, including holding hearings and examinations electronically, as well as e-filing where court capacity exists.
- Quebec courts' Les Plumitifs is a public register which brings together judicial files in civil and criminal matters across Quebec. These electronic court files are accessible for free at courthouses, or with a fee through online access.
- The Federal Court of Canada embraced e-trials in its 2014-2019 Strategic Plan, and launched a pilot project to transition to electronic courtrooms. In July 2019 the Federal Court began an electronic process model for immigration proceedings in the Toronto region, to test and validate reliable models and rules for electronic proceedings.

- The Canadian Federal Department of Justice conducted a survey of its provincial counterparts on e-trial facilities, and the results showed that very few government counsel had participated in true e-trials (i.e. where the evidence is displayed electronically). It concluded that there is an appetite for e-trials from the bench and the bar, but very few courtrooms are properly equipped for them.

Existing Commonwealth Resources:

- Agnes Actie, 'The role of technology and e-filing: the ECSC (Eastern Caribbean Supreme Court) experience' [2010] 36 Commonwealth Law Bulletin 3.
- Thompson S. H. Teo and Poh Kam Wong, 'Implementing Electronic Filing of Tax Returns: Insights from the Singapore Experience' [2005] 7 Commonwealth Law Bulletin 2.

3. Mediation

Relevance to the Working Group:

As this is an Expert Working Group on civil procedure law reform, research into good practice will be limited to mediation in commercial and other civil disputes. Analysis is going to be undertaken on the benefits and disadvantages of adopting rules of procedure that either give power to Judges to recommend/encourage mediation or require mandatory mediation as a key step in the resolution of most (and certainly not all) civil disputes. Proponents of mediation argue that mediation, including as a mandatory part of civil litigation:

(a) offers remedies, which are not available to parties whose dispute is resolved through litigation, i.e., unlike litigation, in mediation there is no outright winner and no outright loser;
(b) results in fewer cases in courts - reducing backlogs that currently clog most justice systems, including in the Commonwealth;
(c) reduces costs of resolving disputes for parties as well as costs to the public purse;
(d) increases access to justice – in part because mediation reduces the costs of dispute resolution, making it easier for parties with limited means to use the justice system;
(e) results in quicker resolution of disputes; and
(f) increases the chance of the parties to the dispute maintaining future relationships, which is an important consideration for small Commonwealth countries.

On the other hand, commentators have noted that mediation may in some instances adversely affect litigants' rights to a fair hearing and that introducing it as part of dispute resolution processes may increase rather than reduce costs and worsen delays.

Proposed Activities:

- It is proposed to commission research into the different mediation models that have been adopted or are being considered for adoption in select Commonwealth countries and to produce a report, the contents of which should benefit member countries in their efforts to strengthen their civil justice systems. The Office of Civil and Criminal Justice Reform has commissioned a paper, which looks at the effect and scope of the Singapore Mediation Convention (which came into effect in 2019). The Convention puts in place a process for companies to more easily enforce agreements reached via mediation in countries which are party to the Convention. The paper will be circulated to the Expert Working Group in due course.

- Research into the effectiveness of mandatory mediation models across the Commonwealth would help to gather evidence on good practice, which could then be shared with member countries. This would help countries assess whether the introduction of compulsory mediation or giving Judges power to encourage the use of mediation would assist with effective case management (above) including in commercial or administrative disputes and help to reduce cost, delay and complexity.

Proposed Output:

The proposed output is a Commonwealth Guide to Mediation. This could be used to share experiences of member countries, and provide recommendations, which could be used by member countries to develop and implement strategies on the harnessing of mediation to reduce costs, delays and complexity of civil proceedings.

Existing Resources from the Working Group:

- In Fiji there is a growing trend that after cases are filed in courts, the parties can request that their cases be referred for mediation, and these often end in settlement. However, there are no existing rules for mediation.
- Independent Review by Scottish Mediation: 'Bringing Mediation into the Mainstream in Civil Justice in Scotland', June 2019: https://www.scottishmediation.org.uk/wp-content/uploads/2019/06/Bringing-Mediation-into-the-Mainstream-in-Civil-Jutsice-In-Scotland.pdf
- Analysis by Scottish Government: 'Mediation in civil justice: international evidence review' June 2019: https://www.gov.scot/publications/international-evidence-review-mediation-civil-justice/
- Report by Scottish Parliament's Justice Committee: 'I won't see you in court: alternative dispute resolution in Scotland" October 2018: https://digitalpublications.parliament.scot/Committees/Report/J/2018/10/1/I-won-t-see-you-in-court--alternative-dispute-resolution-in-Scotland#Introduction
- Nicky McWilliam and Alexandra Grey, '*Court-Referred Alternative Dispute Resolution: Perceptions of Members of the Judiciary*', The Australian Institute of Judicial Administration (October 2017) at page 57. This study into the perceptions of members of the Australian judiciary reported that court-referred mediation can be conducted and supported by legal policy, court structure, hearings, and culture, in almost every type or subject matter of case.
- The Australian *Civil Dispute Resolution Act 2011* (Cth) prescribes pre-action steps to resolve the dispute that parties must undertake before commencing proceedings.
- Australia's National Mediator Accreditation System (including the Practice and Approval Standards for mediators).
- Law Council of Australia: Ethical Guidelines for Mediators; Guidelines for Lawyers in Mediations; Guidelines for Parties in Mediations (all 2018).

Existing Commonwealth Resources:

- Leonardo V. P. de Oliveira and Carolyn Beckwith, 'Is there a need to regulate mediation? The English and Welsh case study' [2016] 42 Commonwealth Law Bulletin 3.
- Shyam Kishore, 'The Evolving Concepts of Neutrality and Impartiality in Mediation' [2006] 32 Commonwealth Law Bulletin 2.

4. E-Discovery and E-Disclosure

Relevance to the Working Group:

The majority of documents and information used in litigation is created electronically, including the vast majority of communications. Consequently, the gathering, review and disclosure of electronically stored information (ESI) is becoming an increasingly important part of dispute resolution. Electronic disclosure for those jurisdictions that have introduced relevant rules of procedure has introduced costs and complexity arising from the process of identifying, preserving, collecting, filtering, reviewing and disclosing ESI. The COVID-19 pandemic has accelerated efforts in many jurisdictions to adopt new rules that enable the use of technology to facilitate e-discovery and e-disclosure. All Commonwealth countries will inevitably need to consider how best to provide for e-discovery and e-disclosure while minimising costs and complexity.

Proposed Activities:

- To commission a research paper into how e-discovery and e-disclosure systems are being enabled in the senior courts of different Commonwealth countries and to share with other countries how these could be adopted into their respective jurisdictions.

Proposed Output:

The Working Group will contribute to a research paper that could be linked to the output proposed under the Case Management theme, and either form part of a larger (and broader) Case Management Good Practice Guide or result in subject-specific research papers. It is recognised that not all countries across the Commonwealth use or have access to e-discovery methods, so research into this developing area may be important for future developments within all Commonwealth jurisdictions.

Existing Resources from the Working Group:

- A pilot project on disclosure run by the UK Ministry of Justice within the UK business and property courts.
- Several Canadian jurisdictions have incorporated e-discovery principles into their civil procedure rules or court directives (e.g. rules building on the Sedona Principles have been incorporated into the Ontario Rules of Civil Procedure since 2010).
- The Uniform Law Conference of Canada had a working group which proposed harmonised e-discovery rules across Canada. To date, no jurisdiction has adopted the ULCC eDiscovery Uniform Rules.
- The Canadian Federal Department of Justice has instituted measures to support litigation teams in meeting e-discovery obligations and made investments in this regard, notably tools and training related to the Department's adaptation of the Electronic Document Reference Model. It is working towards the development of a National Litigation Readiness Standard. A report on initial work is contained in the 2018 Audit of E-Discovery and Litigation Readiness.
- The Canadian Federal Department of Justice also co-chairs a Federal, Provincial, Territorial Working Group on e-Discovery.
- Specific provisions relating to discovery in Australia can be found in: Technology and the Court Practice Note (GPN-Tech); Central Practice Note: National Court Framework and Case Management (CPN-1); Federal Court Rules 2011.

Existing Commonwealth Resources:

- S Mason, *Electronic Evidence: Disclosure, Discovery and Admissibility* (London: Butterworths, 2007).

5. Civil procedure law rules on evidence

Relevance to the Working Group:

The law on evidence and rules of procedure on evidence in civil proceedings is an area that has witnessed substantial changes over the years across the Commonwealth. In an effort to reduce undue costs, complexity and delays, some countries have introduced new legislation and rules setting out new powers to be exercised by Judges to control evidence. Rules on the admissibility and weight of hearsay evidence are no longer standard across the Commonwealth. Equally, the meaning of documentary evidence has changed, leading to new rules extending this term from traditional hard-copy, paper-based documents to electronic and automated documentary evidence. This area of law is important in part because principles and rules of evidence have an impact on the real and perceived fairness of proceedings.

Proposed Activities:

It is proposed to undertake research that can be used to identify the laws and rules of evidence in the Commonwealth and the changes required to promote, among others, the goal of increasing intra-Commonwealth trade to £2 trillion by 2030, including through effective civil dispute resolution systems.

Research focusing on each Commonwealth country could result in a report that highlights key findings, including the following:

(a) the main sources of the rules of evidence that regulate civil proceedings;
(b) discovery/disclosure obligations of parties to civil litigation, the role of the courts in evidence-taking, and the procedures for obtaining evidence from adverse parties and third parties;
(c) the rules of evidence regarding the burden and standard of proof in civil proceedings;
(d) the grounds upon which challenges can be made to the admissibility of evidence;
(e) the discretion, if any, held by courts to exclude the admission of evidence that is otherwise admissible;
(f) the issue of oral evidence and/or written statements or affidavits for witnesses of fact and the requirements thereof, including rules on cross-examination and re-examination;
(g) immunity of suit for witnesses for statements made in court and the issue of payments to witnesses for giving evidence;
(h) rules on the certification of the authenticity of documents to be submitted in evidence;
(i) rules on compelling unwilling witnesses, hostile witnesses and appointment of expert witnesses;
(j) rules on obtaining witnesses or documentary evidence abroad and admissibility thereof as evidence;
(k) rules on the use of the giving of evidence via video-link, video-conferencing and/or taking of depositions via the same;

(l) rules on the taking of witness statements/affidavits in support of foreign litigation;
(m) international treaties to which the country is party, such as the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention);
(n) the Central Authority designated to receive letters of request to secure evidence from a person in the country.

Proposed Output:

The Working Group, assisted by a consultant, will provide inputs from members' jurisdictions into a paper on one or more of the proposed research areas outlined above. The information, which could be secured through a survey, would be stored and made available to all member countries.

Existing Resources from the Working Group:

- Extensive work has been carried out in Australia to make evidence laws uniform across multiple jurisdictions.

Existing Commonwealth Resources:

- Stephen Oluwaseun Oke, 'The Nigerian law on the admissibility of illegally obtained evidence: a step further in reform' [2014] 40 Commonwealth Law Bulletin 1.
- Christopher Yaw Nyinevi and Maame Efua Addadzi-Koom, 'To admit or not to admit: a comparative constitutional perspective on illegally obtained evidence in Ghana' [2016] 42 Commonwealth Law Bulletin 4.
- *Report of Expert Working Group on Evidence* (2001). Commonwealth Expert Group on Modernisation of the Law of Evidence.
- The Hague Convention on the Taking of Evidence Abroad - Explanatory documentation prepared for Commonwealth jurisdictions (Commonwealth Secretariat, 1985).