

Commonwealth Guide to Case Management

CONCEPT NOTE

1. OVERVIEW

The Commonwealth is a voluntary association of 56 countries with a combined population of 2.2 billion. Thirty-one Commonwealth members are classified as small states with populations under 1.5 million, and 25 members are small island developing countries.

At their meeting in Nassau in October 2017, Commonwealth Law Ministers and Senior Officials discussed the contribution that modern technology could make to good governance, promoting the rule of law, and increasing access to justice. Law Ministers shared experiences and national initiatives from their countries and focused on “the use of technology across the justice process, including in the preparation of legislation; the use of video and teleconference systems in court proceedings; police, prosecution and court case management systems; e-filing and documentation; legal and digital identity; and in enabling more effective communication with and between law enforcement and justice institutions.”¹

Referring to shared challenges in law and technology, including the initial costs of investment in technological solutions, Law Ministers proposed that “small and developing countries may be assisted in this regard by the sharing of best practice and solutions from across the Commonwealth, and by the development of standardized technologies.” Some Ministers also noted that “in addition to investment in technology, changes in legislation may be one means by which technological solutions could be promoted.”²

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. The paper identified a variety of issues 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.

Commonwealth Law Ministers and Senior Officials, at their meeting in February 2021, considered the proposed work plan of the Commonwealth Civil Procedure Law Reform Working Group (Working Group) and agreed with the areas of action identified in that plan. Identified areas include case management, e-discovery and e-disclosure, laws and admissibility of evidence and e-filing of documents. The proposed output is a **Commonwealth Guide to Case Management**.

¹ Outcome Statement, Commonwealth Law Ministers Meeting 2017.

² Outcome Statement, Commonwealth Law Ministers Meeting 2019.

Well-designed case management systems support the numerous activities required to facilitate effective management of court proceedings, and promote smoother, more efficient execution and coordination of administrative operations, leading to increased productivity. Moreover, digitalising the procedures could impose procedural standardisation and compliance with procedural laws that result in fewer exceptions to be managed and considerable cost savings.

The Commonwealth Guide to Case Management will aid the adoption of improved case management systems across the Commonwealth by disseminating Commonwealth best practices and promoting principles of good case management and the use of technology, law, and procedure. A rigorous data collection process, wherein all stakeholders' experiences of technology in civil litigation during the Covid-19 pandemic is considered, will inform the Guide.

The Office of Civil and Criminal Justice Reform, in partnership with the Working Group, intends to develop this Guide. The members of the Working Group will provide materials and information from their jurisdictions to be referenced in the Guide.

2. THE OBJECTIVES OF THE COMMONWEALTH GUIDE TO CASE MANAGEMENT

The objective of the Commonwealth Guide to Case Management is to provide information, tools, and best practices that member countries can consider while developing their case management process. To this end, the Guide seeks to:

- Explore comparative approaches to civil procedure rules on case management, e-filing, e-discovery, and the use of technology, and identify best practices from their advantages or disadvantages.
- Identify common underlying philosophies of Commonwealth civil procedure laws, despite their diversity, and share best practices that could guide actors and enable just outcomes.
- Assist countries to address the burdens of paper-based systems by developing fit-for purpose case management systems, including electronic case management systems, where applicable.
- Provide suggestions to improve the workings and outcomes of court processes, and in so doing, assist with the just, efficient, and timely disposition of cases.
- Assist with examining case management systems to remove superfluous procedural steps and reduce the administrative burden on courts and litigants.
- Promote flexibility in case management systems to identify and respond to different case types and party characteristics.
- Inform member countries' strategic plans on strengthening their civil justice systems by researching the benefits and disadvantages of certain courtroom technologies, focusing on the impact on judges, lawyers, and litigants.
- Develop principles of the law of procedure and evidence for effective case management.
- Increase transparency by facilitating access to information, securing legal documents, and reducing opportunities for corruption within the system.

While the majority of our Commonwealth member countries' legal systems are founded on English common law,³ it is not possible to create a one-size-fits-all approach to addressing challenges in civil procedure, due to the diversity of civil procedure laws across the Commonwealth, as well as differences in resourcing capacity, technological capacity, and infrastructure. The Guide will focus on supporting justice systems to identify the features of their own local reality, in order to determine which improvements will work in their context.

3. SUGGESTED CHAPTERS

The following Chapters are proposed to be included in the Guide:

1) Case Management Systems

Case management is an issue that member countries across the Commonwealth have identified as a priority for civil procedure law reform. Robust case management systems can structure the workflow of courts, offering pre-established courses of action to execute proceedings.

It is envisaged that the Guide will highlight the scope of case management tools and techniques that are available to courts and practitioners to potentially facilitate the inexpensive and efficient resolution of proceedings before courts. By collating and distilling the experience of litigants, practitioners and judges, the Guide aims to examine the benefits and drawbacks of existing case management systems and practices in different Commonwealth contexts and sharing best practices from across the Commonwealth.

2) Law and Procedure Reform, including Rules on Evidence

Existing case management practices can be optimised through substantive and procedural reforms aimed at achieving just outcomes and reducing the costs, delays, and complexities of civil proceedings. The law on evidence and rules of procedure on evidence in civil proceedings is an area that has witnessed substantial changes over the years. For example, 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. To reduce undue costs, complexity, and delays, some countries have introduced new legislation and rules, setting out novel powers to be exercised by judges to control evidence in litigation.

The Guide will seek to address common legal and legal policy questions (Section 4, below) with respect to the procedural rules governing case management. In addition to exploring the aforementioned legislations, the Commonwealth Guide to Case Management will share good practice from members' jurisdictions to develop principles of law of evidence for effective case management.

³ Note that a small number of member countries' legal systems are not founded on or applied in conjunction with English common law.

3) Transformation through Technology

While technology is transforming the administration of justice, it is important to note that technology should not be an end in itself; but a means to an end; that is, technology is a tool that should be used to increase access to justice. The technology solutions under consideration in this section may not be appropriate in every member state due to the unique nature of the justice system and supporting infrastructure in that country.

Electronic Filing of Documents

E-filing systems assist with the administrative burdens of existing paper-based systems by reducing costs and delays and by improving document retrieval and storage of case documentation. It not only enables real-time verification and communication, but it is also more cost-effective and increases access to information.

The Guide will examine the electronic filing systems that are in use across the Commonwealth, highlight good practices, and provide recommendations, which could in turn assist member countries seeking to reform their own court filing practices.

Electronic Discovery and Electronic Disclosure

The majority of documents and information used in litigation is created electronically, including the bulk 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 increased complexity due to 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.

The Commonwealth Guide to Case Management will consider how best to provide for e-discovery and e-disclosure while minimising costs and complexity. It will evaluate how e-discovery and e-disclosure systems are being enabled in the courts of different Commonwealth countries and how these could potentially be adopted by other Commonwealth member jurisdictions.

Justice Technologies of the Future

Certain technologies suggest the potential to not only improve existing practices, but to create new practices and transform the way justice administrations deliver services. When the rules of procedure and other relevant regulations are accessed in a computerised system that regulates the proceedings and that determines what is and is not allowed, technology becomes the principal form of guidance for all those interacting with the case management system.

The COVID-19 pandemic has led to the rapid adoption of technology to keep courts functioning and has provided many opportunities to observe whether, given the technical disparities among justice participants, technology-mediated proceedings in fact increase access to justice and improve justice systems.

In the administration of justice, however, technology is not an end in itself. The application of technology may obstruct the administration of justice, including by impeding access to justice by disadvantaged populations. Through rigorous data collection from all stakeholders within the justice system, the role of specific technologies in justice administration and case management must be examined critically to determine if such technologies result in increased access to justice.

The Guide will share experiences of technological standards, architecture, and functionalities that may reduce complexities in case management systems and courts in general across the Commonwealth, always taking into account the unique institutional and technological ecosystems of individual jurisdictions and the needs of citizens.

4) Recommendations

Recognising the distinct needs, capacities and histories of the various jurisdictions and court systems in the Commonwealth, this concluding chapter of the Case Management resource will provide suggestions of good practice. It will highlight the importance of training for various stakeholders within the justice system. General recommendations on creating an enabling environment for case management transformation for governments and justice ministries should also be included.

4. LEGAL POLICY QUESTIONS TO CONSIDER WHILE DEVELOPING THE GUIDE

In developing the Guide, it is important to consider the following:

- How can active judicial case management reconcile the efficient advancement of litigation with judicial impartiality?
- What are the impacts of differing levels of formality in procedural rules on the rights of parties?
- What principles should guide access to digitized court records, or access to virtual courtrooms, or exclusion of witnesses from certain parts of virtual hearings? How should the privacy and safety concerns of individuals be accommodated in this analysis? How should risks that the electronic process may be used by others in ways going against good legal governance be mitigated?
- Are there procedural rules or practices that have become obsolete or would benefit from reconsideration (requirements for formal orders; restrictions on forms of service; geographic restrictions on where, within a jurisdiction, proceedings take place)?
- What procedural rules might be used to encourage cooperative behaviour that facilitate the forward progress of civil litigation (i.e., cost consequences for failure to reach agreement on timetables or insisting on personal attendances for simple procedural matters that could be decided by telephone or in writing)?
- Do virtual hearings require new or revised rules of professional ethics?
- How do procedural rules and technologically-mediated court proceedings account and accommodate for unconscious biases; are they inclusive and accessible?
- How should it be determined whether a matter can or should be heard virtually, in-person or a combination of the two?

- How should access to justice be facilitated with respect to those who do not have access to technology or for whom technology exacerbates power imbalances; and how can the risks of barriers flowing from technology barriers be mitigated?
- How should best practices accommodate the differing complexity of matters, for example a complex commercial matter as opposed to a simple property dispute or small claims matter?
