



**COMMONWEALTH POLICY STUDIES UNIT: 18**

2005 Commonwealth Law Ministers' Meeting:  
Policy Brief

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## **Policy Brief for the Commonwealth Law Ministers' Meeting, 17-20 October, 2005, Accra, Ghana**

### **Executive Summary**

The 2005 Commonwealth Law Ministers meeting comes shortly after the United Nations Millennium Review Summit and just before the Commonwealth Heads of Government Meeting in Malta. Sandwiched between two very important meetings for the Commonwealth, the Law Ministers are in a unique position to draw lessons from the Millennium Review Summit and help set the agenda for future Commonwealth interventions particularly concerning development, security and human rights. The draft agenda for the Law Ministers meeting is illustrative of the importance placed on these issues, with several agenda items dealing directly with questions around terrorism, small arms and light weapons, international humanitarian law and human rights awareness and education. The Commonwealth is strategically placed to take up, and formulate strategies to assist Member States in effectively addressing these issues. The Law Ministers meeting presents an opportunity to further define, and develop Commonwealth approaches towards ensuring that the legal structures within the Commonwealth contribute to, and support, declared international goals for development, security and human rights.

### **Executive Summary**

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## **1 Status, representation, recent meetings**

The Commonwealth Law Ministers meeting takes place every three years, with the last meeting held in 2002 in St. Vincent and the Grenadines. The Law Ministers meetings are an important forum for advancing the vision and principles of the Commonwealth. The 2002 meeting for instance, was striking in the extent to which it advanced the principles set out by the Commonwealth Heads of Government in their Coolum Declaration of March 2002. In pursuit of the principles and values of the Commonwealth, the law must be clearly defined and appropriate strategies developed. The Law Ministers meetings provide an opportunity to do this.

This year's meeting is particularly important because it falls almost immediately after the conclusion of the United Nations Millennium Review Summit held in September, and just before the Commonwealth Heads of Government Meeting (CHOGM) to be held in November. At the UN Millennium Review Summit, particular focus was given to human rights and security issues. The United Nations Secretary-General's report, "*In larger freedom: towards development, security and human rights for all*" highlighted the importance of recognising the interconnectedness between development, security and human rights and the value of adopting a holistic approach in addressing global threats and challenges. The theme for this year's CHOGM is "Networking the Commonwealth for Development". Though this theme has a specific focus on bridging the digital divide in the Commonwealth, Heads will consider the many ways that the Commonwealth can network for development. The Law Ministers Meeting is uniquely placed to ensure that the global priorities highlighted by the UN Secretary-General, and discussed extensively by UN Member States at the UN Millennium Review Summit are taken up at the Commonwealth Heads of Government Meeting, for action by the Commonwealth.

## **2 Record for policy**

Virtually all Commonwealth countries share a similar legal system. As such, the Law Ministers play an influential role in shaping legal policy not only in their own countries but also, through dialogue and sharing, in other Commonwealth jurisdictions.

The impact of the Law Ministers meetings on legal development in the Commonwealth is manifested by the adoption of model laws, principles and guidelines, which set a standard that all Commonwealth countries can aspire to. Model laws include the Model Law against Money Laundering put before Law Ministers in Malaysia in 1996 and the Model Law on Freedom of Information, prepared by the Commonwealth Secretariat and based on the Commonwealth Freedom of Information Principles adopted in Trinidad and Tobago, 1999. The development of model legislation as a tool for setting legal standards within the Commonwealth has proved useful. For example, since the adoption of the Model Law on Freedom of Information there has been renewed interest in the area with Countries, for instance Uganda and Kenya currently developing their own Freedom of Information legislation.

The Law Ministers' Meetings shape legal policy within the Commonwealth because they provide a forum whereby Commonwealth Member states, through their legal representatives, are able to define and develop legal mechanisms to ensure the realisation of Commonwealth principles and values. For example, Law Ministers played a pivotal role in the development of

the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, launched in May 2004, which give further effect to the Commonwealth Harare Principles.

### **3 Agenda for 2005 meeting**

The provisional draft agenda, which will be confirmed or amended on the eve of the conference, is as follows:

#### **1 Issues for Ministerial Consideration**

- a. Towards good practice in juvenile justice policy in the Commonwealth
- b. Law reform agencies: Their role and effectiveness
- c. Developing legal education in the Commonwealth: Some current issues
- d. Guidelines for an independent regulatory framework for Commonwealth broadcasting organisations
- e. Constitutional developments in the Commonwealth
- f. Gender and human rights in the Commonwealth: Critical issues for action in the plan of action for gender equality 2005-2015
- g. Commonwealth landlocked States and the law of the sea
- h. Report on the proliferation of small arms and light weapons within the Commonwealth
- i. International humanitarian law
- j. Criminal defamation in the Commonwealth – a case for abolition
- k. Human rights education and awareness projects

#### **2 Recommendations from Senior Officials from Law Ministries (SOLM)**

- a. The Harare Scheme on Mutual Assistance in criminal matters: possible amendments to the scheme and discussion of interception of communications and related matters
- b. Civil recovery of criminal assets and terrorist property: Harare Scheme on Mutual Assistance and draft legislative provisions
- c. Proposal for the establishment of the Commonwealth network of contact persons
- d. Further initiatives in capacity building to combat terrorism
- e. Revised Commonwealth statement of basic principles for justice for victims of crime
- f. Model bill on the protection of personal information
- g. Revised model bill on competition
- h. Commonwealth action in the field of private international law
- i. Report on legal assistance for HIPC countries

#### **3 Roundtable discussions (updates on Commonwealth Secretariat activities)**

- a. Report of activities of the Commonwealth Secretariat in the Legal field
- b. Report on activities of the Human Rights Unit
- c. Co-operation with partner organisations – reports from partner organisations

## **4 Comments on Numbered Agenda Items**

### **1 Issues for Ministerial consideration**

#### **c. Legal education and the Commonwealth: Developing partnership between Government and Law Schools, and between Business and Law Schools**

Under this agenda item, Law Ministers are being asked to consider and set policy on how the Commonwealth might contribute to ways of ensuring the delivery of high quality legal education that also takes into account the diversity of Commonwealth Member states. Law Ministers are also being encouraged to explore how they may contribute to the Commonwealth's development of partnerships, particularly the nexus between research, business and industry to facilitate development and meet the specific needs of Member states.

The background paper on this issue developed by the Commonwealth Secretariat for this meeting highlights the fact that most law schools in the Commonwealth face similar challenges such as limited places available to study law, as well as limited financial resources, staff, legal and electronic resources and outdated law curricula. The challenge is to modernise the training of legal professionals, to ensure that they are fully equipped to respond to modern day requirements of the profession.

The background paper outlines some strategies that the Commonwealth law Ministers may approve to address the challenges highlighted in the previous paragraph. While these strategies are comprehensive, two key issues about the provision of legal education and encouraging partnerships need to be underscored. First, while the strategies identified by the Commonwealth Secretariat could go a long way towards improving access, provision of legal education should not be sought at the expense of quality. Alongside strategies to improve access, guidelines should be developed to ensure that minimum standards for the provision of legal education, particularly by alternative educational methods and establishments such as long-distance learning programmes, supported open learning programmes, and electronic courses maintain high standards of legal education.

Secondly, Law Ministers may wish to explore ways in which Commonwealth states may enhance collaboration in this area. Regional organisations have been growing in strength in the past decade, and increasingly regional cooperation is moving beyond the provision only of collective security and economic cooperation. Legal structures such as regional associations have been developed for example the East African Law Society. Such regional associations could be used to increase greater partnership as well as better access to legal education. Increased regional cooperation also presents an opportunity to establish regional centres for legal education – these regional centres could benefit from contributions from the Commonwealth Member States of that region, and provide specialised or relevant legal education courses to students from the region. A regional centre would also be cheaper than having one centre in each country.

#### **e. Constitutional developments in the Commonwealth**

The Commonwealth Secretariat is doing a lot of work in developing norms for Constitution making and Constitutional change. While this work is important, the Commonwealth Secretariat may also wish to consider ways in which Commonwealth Member States can

ensure full implementation of Constitutional provisions. There are instances where certain provisions of the Constitution are not implemented. In Uganda for example, the Ugandan Constitution recognises a right of information, but to date, almost 20 years since the Constitution came into force, the government is yet to pass the legislation necessary to give effect to that right, though there have been recent indications that the government is considering a right to information bill.

#### **h. Report on the Proliferation of small arms and light weapons in the Commonwealth**

The need to regulate and curb the proliferation of small arms and light weapons is high on the agenda of all States. The United Nations General Assembly has passed numerous resolutions on the issue, and in 2001, the UN adopted a Programme of Action to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects. The UN Secretary-Generals report *In Larger Freedom* urges UN Member states to negotiate and agree an internationally legally binding instrument to regulate marking and tracing by the 2006 review conference on the programme of action.

Commonwealth Heads of Government have previously raised concern about the proliferation of small arms, ammunition, and light weapons, which have contributed to the intensity and duration of armed conflict as well as international terrorism. At the 2003 CHOGM, Member states agreed to support further implementation of the UN programme of Action to prevent illicit production, trafficking and misuse of small arms. The *Aso Rock Commonwealth Declaration on Development and Democracy: Partnership for Peace and Prosperity* issued at the same meeting also committed Members to support “efforts to curb the illicit trade in small arms and light weapons”.

All Commonwealth Member states should adopt the International Code of Conduct on Arms Transfers. They should also participate fully in the UN Register of Conventional Arms Transfers. The Commonwealth Secretariat should develop common principles and guidelines, and provide technical support, for the implementation of regional and international obligations; the Secretariat should further facilitate the development and support of a Commonwealth position for an international instrument to regulate the marking and tracing of small arms and light weapons. Law Ministers should embrace the role that the Commonwealth Secretariat can play in the facilitation of further cooperation by states for a common approach and implementation of obligations to eradicate the proliferation and misuse of small arms and light weapons.

## **2 Recommendations from Senior Officials from Law Ministries (SOLM)**

### **d. Further initiatives in capacity building to combat terrorism**

Terrorism is a pan-Commonwealth problem that attacks the core values of the Commonwealth; it flourishes in environments of despair, humiliation, poverty, political oppression, extremism, human rights abuse, and weak State capacity to maintain law and order.

The Law Ministers at their 2002 meeting in St. Vincent and Grenadines mandated the Commonwealth Secretariat to assist Member countries to implement United Nations Security Council Resolution 1373 by carrying on with its programme of developing legislative

provisions on counter terrorism and training prosecutors and law enforcement officers. At this current meeting, Law Ministers are being asked to give effect to this by endorsing Commonwealth Secretariat initiatives in capacity building. These initiatives include limiting the abuse of technology, tracking and disrupting the movement of terrorists and preventing the abuse of travel documents, and the abuse of refugee systems.

Terrorism was one of the key issues discussed at the recently concluded UN Millennium Review Summit. The UN Secretary-General in his report, *In Larger Freedom*, recognised that terrorism is a threat requiring urgent action, and urges member states and civil society organisations to adopt a comprehensive strategy against terrorism. The strategy advocated in the report, *In Larger Freedom*, aims to dissuade people from resorting to terrorism or supporting it; denying terrorists access to funds and materials; deterring states from sponsoring terrorism; developing state capacity to defeat terrorism and defending human rights (Paragraph 88). The Secretary-General also raised the need to balance the protection of human rights with anti-terrorism strategies. He states, “We must never lose sight of our accountability to citizens all around the world. In our struggle against terrorism, we must never compromise human rights. When we do so, we facilitate achievement of one of the terrorist’s objectives” (*In Larger Freedom*: paragraph 94).

The Commonwealth Secretariat’s initiatives, for which approval from the Law Ministers is sought, need to strike a balance between the need for national security and the protection of human rights. The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism (UN Working Group on Terrorism 2002: para.26). Training enforcement officials and strengthening mechanisms to detect and prevent abuse of technology, abuse of travel documents and refugee systems would not work if the cost were to subject genuine travellers and refugees to unreasonable and extreme scrutiny and suspicion.

Indeed, Article 3 of the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment 1984, says that an individual should not be returned or extradited to another state where there are substantial grounds for believing that he/she would be in danger of being subjected to torture. In attempting to prevent abuse of refugee systems, Commonwealth law Ministers must balance legitimate state concerns with these minimum standards under international treaty and customary law.

Moreover, as Law Ministers further consider the proposals by the Commonwealth Secretariat, they are urged to consistently and constantly weigh proposed measures against the effect and impact on the full enjoyment of human rights guarantees by Commonwealth citizens. Anti-terror legislation should not be disproportionate or arbitrary; all Member states that are developing or amending existing legislation to combat terrorism should follow the Commonwealth Secretariat’s Model Legislative Provisions on Measures to Combat Terrorism, 2002.

#### **e. Revised Commonwealth Statement of Basic principles of Justice for Victims of Crime**

The development of Basic principles of Justice for Victims of Crime has been ongoing for some years now. At the 2002 meeting, Law Ministers considered the draft Commonwealth Statement of Basic principles of Justice for Victims of Crime, and referred it to the senior

officials for further consideration and refinement. The revised draft statement is being presented to the Law Ministers at this meeting for their further consideration and approval.

The place of victims of crime in the criminal justice system has gained recognition and importance over the last 20 years. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN General Assembly, Resolution 40/34 of 29<sup>th</sup> November 1985) recognises that victims need to access justice, and be treated fairly by all actors within the justice system. It also recognises that victims should be able to get assistance, and restitution or compensation for the harm suffered.

Within the Commonwealth, the United Kingdom published a victims' charter in 1990, and over the next twelve years passed measures, which increasingly recognised the role of the victim. This recognition for victims in the criminal justice process culminated in the publication of the UK Criminal Justice White Paper, "*Justice for All*" in 2002, which set out a long-term strategy to modernise the criminal justice system, and ensure "a better deal for victims and witnesses." Subsequently, legislation such as the Criminal Justice Act 2003, and sentencing guidelines have been passed as part of the implementation process.

Increased recognition of the victim, however, has brought some controversial issues to the fore. Do victims have rights, and if so, how does one identify or articulate them? What is the role of the victim in the criminal justice process? Should the victim be actively involved in, and influence the sentencing of offenders?

The draft statement of Basic principles of Justice for Victims of Crime before the Commonwealth Law Ministers appears to consider these concerns, by recognising the needs of victims, and articulating principles designed to ensure that the victims' experience with the criminal justice system does not further alienate them. It is accepted that the criminal justice system has traditionally sidelined victims; reforms intended to ensure that victims are compensated for their losses and that victims enjoy proper services within the criminal justice system, have been welcomed.

One concern recognised by the Law Ministers however, is the need to balance the interests of victims and the rights of the accused. The draft statement of Basic principles of Justice for Victims of Crime tries to maintain this balance but does not clearly define the extent of victim's rights. For instance, the draft principles recognise the possibility of admitting victim impact statements in serious crimes, for bail decisions, postponements, sentencing and restitution. Victim impact statements and their effect on sentencing practice has been the centre of debate around recognition of victim's rights. It has been argued that the admission of victim impact statements has resulted in harsher, and unjust punishments being meted out. Issuing harsher, unjust punishments causes concern, because they reflect a return to retribution and revenge against the offender by the victim. This is contrary to traditional common law sentencing principles, which emphasise that punishments should be proportional to the harm caused, and are meted out with the objective of ensuring law and order in the public interest rather than in the victim's interest.

The draft principles do not bind states to introduce VIS. They advise that all relevant fair trial practices should be taken account of. Law Ministers need to critically consider the impact of recognising procedural rights for victims on the right to a fair trial, and whether articulating such rights would ultimately erode the fundamental right to a fair trial.

### **3 Roundtable discussions (updates on Commonwealth Secretariat activities) a(vii). Implementation of International Environment instruments and policy development**

Law Ministers are being asked to consider the implementation of environmental conventions and how to transfer them into domestic law. They are also being asked to endorse capacity-building initiatives aimed at assisting small and developing states to implement provisions of environmental conventions.

At the 1999 CHOGM in Durban, South Africa, the Commonwealth Secretariat was mandated to extend assistance to Member countries to implement international conventions relating to global warming and biological diversity. In the 2002 and 2004 meetings of Law Ministers of small Commonwealth jurisdictions, the Commonwealth Secretariat was further requested to assist Member countries to implement the relevant environmental conventions and agreements. They were also asked to help build support for the laws that are needed to implement them to develop legislation on the protection of coastal resources; to regulate cruise ship waste disposal and management; and to encourage, as appropriate, collaboration at the regional level.

The Commonwealth Secretariat is developing several initiatives to meet this mandate. Initiatives include the sensitisation of Member countries to become state parties to relevant conventions, and developing comprehensive model legislation and regulations to guide Member states' implementation of international environmental instruments.

These initiatives are important and should be encouraged. Particularly, Law Ministers should support the development, not only of model legislation but also of policy which can be implemented before model legislation is adopted. These principles should include the development of state capacity to carry out independent environmental impact assessments before any projects are embarked upon. Strategies to implement model legislation, such as the phased implementation of legislation to take account of financial and other resource limitations, are also needed.

### **5 Interaction with other bodies**

The Commonwealth Law Ministers have in the past welcomed relevant Commonwealth Associations as observers. The collaboration has been increasing in recent times, with Commonwealth associations playing an active role in meetings of Senior Officials. The Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers Association and the Commonwealth Legal Education Association for example were actively involved in developing the Latimer House Guidelines. Such collaboration is important because it is founded on principles of citizen participation which are required for good governance.

This year the interaction between the Commonwealth Law Ministers and other bodies has gone even further. The Commonwealth Press Union has presented a paper for discussion by the Law Ministers advocating for the abolition of criminal defamation. The paper makes a strong case for the abolition of criminal defamation, and clearly demonstrates how criminalising defamation ultimately undermines Commonwealth principles and values. This trend for closer collaboration between Law Ministers and relevant bodies is very positive, but wider and greater interaction would help towards ensuring that the Commonwealth remains relevant not only to member states, but also to its 1.8 billion citizens.

## **6 Other Issues**

The issue of indigenous rights, which is not on the agenda of the Law Ministers meeting, requires urgent attention. Indigenous peoples play an invaluable role as stewards of ecological diversity and the retention and transfer of traditional knowledge, which are core to sustainable development. At the Lusaka summit in 1979, the Commonwealth Heads of Government made a commitment to pay ‘special attention’ to ‘indigenous minorities’ and to make ‘special provisions’ for ‘indigenous populations.’ While similar commitments have been fulfilled at the international level, the Commonwealth has failed to follow up on theirs. The Commonwealth is committed to human rights and to sustainable development, but it is silent on the rights of indigenous peoples.

It is distressing that Commonwealth States have continuously failed to recognise the existence of indigenous land use, occupancy and ownership, and have failed to accord appropriate legal status and legal rights to protect that use, occupancy and ownership. The failure to recognise indigenous land rights as a pan-Commonwealth problem means that an opportunity to share experiences, and develop Commonwealth responses is being lost.

Despite the lack of official recognition, the issue of indigenous land rights is increasingly being raised in various Commonwealth fora. The Kingstown Declaration on Land and Development adopted by the Law Ministers in 2002 recognised that land could be a source of life, livelihood and income. It stressed the importance of the role of Law Ministers in debating “the strong link between the use, access to, and ownership of land and development and poverty reduction”. A commitment was made to address the needs of ‘communities and groups’ which have been dispossessed of their lands; indeed, Ministers recognised ‘customary law’ relating to land. While the Commonwealth Secretariat’s paper, *Strategies for Enhancing Democracy by Eliminating Legal Barriers to Development* (prepared in advance of the Law Ministers meeting) refers to “*indigenous peoples* and women often lacking equitable and sufficient access to land (emphasis added)”, the use of the term ‘indigenous peoples’ was left out of the final text.

The Commonwealth Expert Group on Development and Democracy explored the link between development and land rights in the Manmohan Singh Report prepared for, and endorsed by the Commonwealth Heads at their meeting in Abuja, Nigeria 2003. It was recognised in Abuja that the indigenous perspective is an integral part of the debate on land and development; therefore the challenge for the Commonwealth to respond has been set. For their part, the Commonwealth Secretariat’s new Programme of Action focuses on indigenous peoples, women and land rights. Now Law Ministers need to take up the challenge; they must seriously

consider and develop practical solutions to address indigenous land rights. The Commonwealth Policy Studies Unit and the Commonwealth Lawyers Association are currently collaborating in this area and would be able to provide valuable information and assistance to Law Ministers.

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