

# CMJA NEWS

The Newsletter of the Commonwealth Magistrates' and Judges' Association

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## EDITORIAL

On 14th March, we celebrated Commonwealth Day and it would be nice to know how you celebrated important Commonwealth event, especially in the year when the Head of the Commonwealth will be celebrating her 90th Birthday. Below you will find the Commonwealth Day Message from Her Majesty. This year the Commonwealth theme is "An Inclusive Commonwealth".

Her Majesty mentions the Commonwealth Heads of Government Meeting (CHOGM) which took place in Malta in November. The CMJA Secretary General was invited to speak on Women in Leadership in the Judiciary at the first ever **Women's Forum** which was held in the wings of the CHOGM. The overall Theme for the Forum was: "**Women Ahead: Be All that you can**". This event which attracted over 400 participants from all regions of the Commonwealth was a good example of the Commonwealth Secretariat involving the whole Commonwealth family. Participants came from all walks of life (professions, civil society organisations, the media as well as government, parliament and the judiciary) and the discussions were vibrant and hard-hitting. A full report was included in the Gender Section News which was circulated in February. A copy of the Concluding Statement is available at: [http://thecommonwealth.org/sites/default/files/news-items/documents/CHOGM%20Women's%20Forum%20Outcome\\_1.pdf](http://thecommonwealth.org/sites/default/files/news-items/documents/CHOGM%20Women's%20Forum%20Outcome_1.pdf)

Of course, the main news from the Commonwealth Heads of Government Meeting was the appointment of the new **Secretary General for the Commonwealth** who is due to take up the post on 1 April 2016. Baroness Patricia Scotland of Ashal PC QC, was born in Dominica, studied law at

London University and qualified as an English barrister at Middle Temple. She was Attorney General for England and Wales between 2007-2010 and Attorney General for Northern Ireland before devolution when she became Advocate General of Northern Ireland. The CMJA is looking forward to working in partnership with the new Secretary General to advance the Commonwealth fundamental values.

Prior to the CHOGM, the CMJA together with the CLA, CJA and Commonwealth Social Workers Association put together a presentation on "**Freedom of Expression: Rights and Responsibilities**" at the meeting of Civil Society Organisations and the Commonwealth of the Whole (Senior Officials of the Commonwealth). The paper is attached for information. The CMJA also contributed to the Commonwealth Human Rights Initiative (CHRI) report on "**Civil Society and the Commonwealth: Reaching for Partnership**" which was launched at the CHOGM. The report is set against a backdrop of the closing space being given to civil society globally and in the Commonwealth in particular. Whilst the Commonwealth Charter and other Commonwealth Declarations stresses the importance of civil society in upholding the values of democracy in the Commonwealth, the report notes that civil society is still an underused resource not only at the level of the Commonwealth Secretariat but in Commonwealth countries as well.

In December 2015, the CMJA Secretary General and the CMJA Regional Vice President participated in the fourth and final consultation by the Commonwealth Secretariat's Rule of Law Division on the "**Model Law on Judicial Services Commissions**", which took place in the Cayman Islands. The CMJA is deeply grateful to the Chief Justice of the Cayman Islands and to the

judiciary for their assistance in the organisation of this consultation which builds on the work already undertaken by the CMJA (together with the Commonwealth Lawyers Association and Commonwealth Legal Education Association on judicial appointments). In addition, the consultation with judicial officers and members of Judicial and Legal Service Commissions in the Caribbean has led to the CMJA looking into the State of Judicial Independence in the Overseas Dependent Territories with a view to assisting judiciaries in these jurisdictions.

In December 2015, the CMJA was invited to send a representative to the **International Commission of Jurists (ICJ) Forum for Judges and Lawyers on accountability mechanisms and procedures for judicial involvement in human rights violations, corruption and**

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**other serious misconduct.** Former Director of Studies, Hon. Keith Hollis attended the meeting on behalf of the CMJA. He subsequently also made a written submission to the Forum as did a number of other organisations who also participated.

In January 2016, the Commonwealth Secretariat and CMJA ran a training workshop in Guyana on domestic violence issues.

In February the CMJA Secretary General was invited to participate in a needs assessment mission to **Bangladesh**, led by the Director of the Rule of Law Division, Mrs Katalaina Sapolu and Justice Section, Legal Advisor, Mr Mark Guthrie. The aim of the Mission was to examine how Bangladesh was dealing with the implementation of the 16th Amendment to the Constitution (see below) and how it would be complying with the Commonwealth fundamental values in any implementation of this amendment.

In January the CMJA, CLA, CLEA and CPA, as members of the Latimer House Working Group, were all delighted to receive copies of the long-awaited **Latimer House Toolkit**, produced by the Good Offices Section of the Commonwealth Secretariat with the assistance of the CLA, CLEA, CMJA and CPA and in particular the CMJA Secretary General, Dr Peter

Slinn (representing the CLA and CLEA) and Keith Hollis (the CMJA former Director of Studies). The Latimer House Working Group is currently considering ways of rolling out the Toolkit with the assistance of the Commonwealth Secretariat. The aim of the Toolkit is to provide assistance to parliamentarians, the judiciary and other stakeholders across the executive, parliamentary, judicial, and legal sectors of government in achieving compliance with the Principles and to address any gaps which may exist in the implementation of the Commonwealth fundamental values in Commonwealth countries

The CMJA continues to monitor judicial independence issues across the Commonwealth. The CMJA has continued to work with other members of the NGO support Group to advance the independence of the Judiciary, lawyers and prosecutors through the UN Human Rights Council and to support the UN Special Rapporteur on the Independence of Judges and Lawyers. The Group now has around 12 organisations working together in a network to ensure that the independence of legal and judicial professions is protected and promoted. We work together when there are issues that concern all of us. Following consultation with the CMJA Secretariat and other members of the Group, the CMJA agreed in early March to endorse an oral

statement, which was presented on 18 March 2016, during the General debate of the Human Rights Council Meeting under Item 6 (Universal Periodic Review Outcomes). The CMJA has also supported the report by the International Bar Association Human Rights Initiative (IBAHRI) on the "Role of the UPR in advancing human rights in the administration of justice". A copy of the Report is available on the IBAHRI's website: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=ff3c19e5-3d38-46be-8d9c-b74f39c1ff60>.

Of course, the CMJA secretariat and Steering Committee have been working hard preparing for the CMJA's forthcoming **Annual Conference being held in Georgetown Guyana from 18-23 September 2016**.

**REGISTER NOW FOR THIS  
IMPORTANT EVENT IN THE  
CMJA CALENDAR**

This is a unique opportunity to visit the Land of Many Waters and experience the diversity of cultures in Guyana, the wonderful flora (including the gigantic lily) and fauna (unique to South America) of this beautiful country. There is still time to register and book your accommodation! The theme of the Conference is: "The Judiciary as Guarantors of the Rule of Law".

## COMMONWEALTH DAY MESSAGE



*by Her Majesty The Queen, Head of the Commonwealth and CMJA Patron*

Wherever we live in the Commonwealth, we can always benefit from being open to the ideas encouragement of those around us. Each of us can also make a positive difference in the lives others by being willing to contribute and offer support.

This is an essential ingredient of belonging to the Commonwealth: the willingness to share, to exchange and to act for the common good. By including others, drawing on collective

insights, knowledge and resources, and thinking and working together, we lay the foundations of a harmonious and progressive society. The greater the diversity of those included in such a shared enterprise, the greater the gains. Each of us has cause to celebrate the sense of belonging expressed in our 2016 theme: 'An Inclusive Commonwealth'.

Our recognition of this value, and the wisdom of mutual respect for each other, is set out in the Commonwealth Charter. Its opening words, "We the people of the Commonwealth" convey the conviction that individuals, as well as governments, build and shape our success.

Being inclusive and accepting diversity goes far deeper than accepting differences at face value being tolerant. True celebration of the dignity of each person, and the value of their uniqueness contribution,

involves reaching out, recognising and embracing their individual identity.

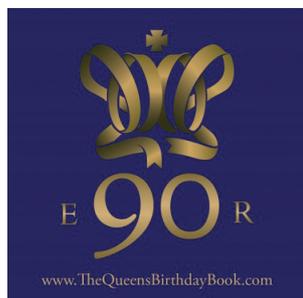
At the recent Commonwealth Heads of Government Meeting, there were forums for women, youth, business and civil society. These forums were a place for reflection on how to contribute collectively to achieving positive global change, for which the Commonwealth is widely respected.

Today, and in the year ahead, the theme 'An Inclusive Commonwealth' is an inspiration for us all.

Let us give it practical effect by supporting those in need and those who feel excluded in all walks of life. By doing so, we will continue to build a truly representative Commonwealth community.

Elizabeth R.  
14 March 2016

## CELEBRATING THE QUEEN'S 90TH BIRTHDAY - THE QUEEN'S BIRTHDAY BOOK



As this year marks Her Majesty The Queen's 90th Birthday, we are delighted to be working with The Online Book Company who have provided a wonderful Online Book for people from all around the world to wish The Queen a very Happy 90th Birthday. This book is free and open to use for you to send your personal birthday wishes to Her Majesty.

Why not place your own personal messaging wishing the Queen a Happy Birthday by clicking on: [www.TheQueensBirthdayBook.com](http://www.TheQueensBirthdayBook.com)

In addition, you can purchase an **Exclusive Commemorative Medal** for only £19.95 Profits from every medal purchased will be donated to the many charities of whom The Queen is patron including the CMJA. In keeping with the oldest traditions of royal commemoratives, each medal is an impressively large 61mm in diameter and minted in solid Bronze – allowing each and every detail of sculptor Philip Nathan's intricate design to be realised. The depiction of The Queen on horseback, long associated with only the most significant of royal events is in contrast to the medal obverse which portrays Her Majesty in a more contemporary 'three quarter' profile.



PLEASE LEAVE A LOVELY BIRTHDAY MESSAGE FOR THE QUEEN AND SUPPORT US BY PURCHASING A COMMEMORATIVE MEDAL

## JUDICIAL INDEPENDENCE ISSUES

### BANGLADESH

In September 2014, the Bangladesh parliament passed the 16th Amendment to the Constitution which abolishes the role of the Judicial Supreme Council for the removal of judges and places the responsibility for removal in the hands of Parliament. The 16th Amendment to the Bangladesh Constitution amends Article 96 which now states that:

*(1) Subject to the other provisions of this article, a Judge shall hold office until he attains the age of sixty-seven years.*

*(2) A Judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of proved misbehaviour or incapacity.*

*(3) Parliament may by law regulate the procedure in relation to a resolution under clause (2) and for investigation and proof of the misbehaviour or incapacity of a Judge.*

*(4) A Judge may resign his office by writing under his hand addressed to the President.*

Whilst provision is made that there should be 2/3rds majority, the current Parliament is composed mainly of Parliamentarians from the Government party as the Opposition decided to boycott the last elections so they have a 2/3rds majority. The effect of the amendment was to abolish the Supreme Judicial Council which was responsible for matters of judicial discipline and ultimately the removal of judges. The council was composed of the Chief Justice and the two next senior judges. The Bangladesh government is currently drafting a law to implement the 16th amendment but there is concern that it will not be compliant with the Commonwealth fundamental values and in particular the Commonwealth (Latimer House) Principles. The CMJA is keeping a watching brief on developments.

### BOTSWANA

In the November Newsletter we reported that four High Court Judges—Key Dingake, Modiri Letsididi, Mercy Garekwe and Ranier Busang—had been suspended in September 2015 in Botswana. They were four judges amongst 12 who had petitioned the President of Botswana for the removal of the Chief Justice after the Chief Justice reported them to the police for illegally receiving housing allowances. A tribunal was set up to impeach the four judges. The four judges challenged the decision to set up the tribunal as being unconstitutional and unlawful. However they lost their case in January 2016. The four justices are now in the midst of an appeal of the decision with the help of the Law Society of Botswana (LSB), which has applied to be admitted as amicus Curiae “so that it may draw the court's attention to matters of law and fact which the court may otherwise not draw its attention” according to the Law Society of Botswana (LSB) Executive Secretary Tebogo Moipolai. The LSB intends to present the initial suspension of the Judges as invalid because it directly affects the public perception of the judges in negative way, they will also argue for the right for the Judges to petition their employer. Furthermore, the LSB has said that the selective suspension of the four Judges undermines judicial independence for the other eight judges who may now owe the executive and may act favorably to the government's intentions.

In addition, there is currently a dispute between the President of Botswana and the Judicial Services Commission as to their recommendation that the President appoint Omphemetse Motumise as a High Court Judge. The LSB and Motumise have appealed this decision under the grounds of the constitutional clause stating the president should be “acting in accordance with the advice of the Judicial Service Commission.”

### GHANA

A disciplinary committee appointed by Chief Justice Georgina Wood has removed 23 judges who were implicated in the country's biggest judicial scandal last year when Journalist Anas Aremeyaw released undercover footage which caught the judges in the act of soliciting bribes. In addition, on 16 March

2016, it was reported that 19 judicial staff were removed from office for receiving bribes. This has not helped the current situation where the Judiciary has revealed that there are more than 59,000 pending cases before the courts. Whilst there have been a number of judicial reforms including Civil, High and Circuit Court Procedures, Court of Appeal Judge, Justice Samuel Marful-Sau recently called on judges to be more proactive and hardworking to clear the backlog.

## **INDIA**

In early October 2015 the Supreme Court of India struck down a constitutional amendment that would have created the National Judicial Appointments Commission (NJAC) which would have changed the way Supreme Court and High Court Judges would be selected. The idea was to replace the existing Collegium system by which the three most senior Supreme Court judges appoints the judges for the Supreme Court and High Court. The NJAC would have created a separate commission which would include the Chief Justice of India, the Law Minister, two Supreme Court justices, and two laypersons chosen by a collegium of the Prime Minister, the Chief Justice, and the leader of the largest opposition party. The NJAC act was seen as a bipartisan effort that Attorney General Mukul Rohatgi described as the “will of the people”, but that the Supreme Court saw as the independence of the judiciary being dealt a “devastating blow by making it extremely fragile.”

## **Lesotho**

In February 2016, the former South African Justice Ian Gordon Farlam replaced the President of the Court of Appeal of Lesotho Justice Kananelo Mosito due to the investigation concerning allegations of tax evasion by Justice Mosito. Justice Mosito has been accused of evading taxes for twenty years while employed in a law firm and while on the bench. Justice Mosito claims that the accusations are motivated by malice and therefore illegal and has pointed out that there are a number of other judges and lawyers who may be guilty of the same tax avoidance but who have not been pursued by the authorities. He also wants the courts to rule on whether a tribunal may consider alleged offences committed before his appointment. In

Justice Mosito's view a tribunal could only take into account behaviour after appointment.

## **MALAYSIA**

On the 1 December 2015, the Malaysian Parliament proposed National Security Council Bill 2015 and was tabled in the Parliament. On 3 December 2015 the bill was passed. The bill is still unclear and has given excessive powers to the Prime Minister in a newly created statutory body called the National Security Council. The ICJ stated that: “The vote took place despite repeated calls from Malaysian civil society, opposition lawmakers, and human rights advocates to delay consideration to allow for extensive debate and adequate consultations on the draft legislation.” The Malaysian Bar Council has expressed their concern about the sharp erosion of civil liberties under this law. It gives wide-ranging powers to the National Security Council and especially the Prime Minister, who under this Bill will have the authority to declare martial law without the King's consent. Any area of any size can be declared a “security zone” by the PM, and within this zone security forces can arrest anyone without warrant.

These inordinate powers come following the accusations of corruption against the Prime Minister. It is alleged that millions of dollars have been deposited since 2011 into the Prime Minister's private account. In January 2016, the Malaysia Attorney General cleared the Prime Minister of wrongdoing, declaring that US\$68 Million was a donation from the Saudi Royal Family. However, a recent report in the Wall Street Journal states that an investigation has found that there is over US\$1 Billion that has been deposited. The Prime Minister and Government also stands accused of increasing the discrimination against non-Muslims. Former Federal Court of Appeal Judge, Justice Mohd Hishamudin Mohd Yunus has expressed concern over some recent judgments by the Federal Court, which shows the reluctance by the judiciary to adjudicate on the side of fundamental liberties citing the case involving the Herald Catholic weekly regarding the use of the word Allah, the Azmi Sharom sedition case, the Nur Juzaili Mohd Khamis transgender case and the hudud challenge by Gerakan, as some examples. The lawyer and author, Zahid Ibrahim, in

his recent book: “Assalamu Alakum: Observations On The Islamisation Of Malaysia”, published in 2015, has indicated that the increasing islamisation of Malaysia is being used as a tool by politicians to secure power and erode the fundamental rights of Malaysians as well as increasing the discrimination against non-Malays.

## **MALDIVES**

The Commonwealth Human Rights Initiative (CHRI) have released a report from their fact finding mission to the Maldives ([http://www.humanrightsinitiative.org/download/1456297508CHRI\\_Fact%20Finding%20Mission%20to%20the%20Maldives\\_2015-16.pdf](http://www.humanrightsinitiative.org/download/1456297508CHRI_Fact%20Finding%20Mission%20to%20the%20Maldives_2015-16.pdf)). Their mission confirms that the independence of the judiciary in the Maldives is extremely fragile and has become increasingly politicized and partisan. This is highlighted by the Judicial Services Commission (JSC) in the Maldives suspending Ahmed Latheef, a top magistrate in the Maldives, without releasing details regarding the complaint filed against him. This suspension and other disciplinary actions by the JSC have come under scrutiny because of the political composition of the Commission. More recently the Commonwealth Ministerial Action Group has urged the government to reform and implement the separation of powers. However, the current President Abdulla Yameen Abdul Gayoom has said the country will accept the criticism of global organisations but will go down its own path.

## **NAURU**

The government of New Zealand has made it clear that it has no plans to reinstate their aid funding to the justice sector of Nauru. This is due to the Nauru government's continuing disregard of the rule of law, which among other things include arresting and deporting opposition leaders, and more recently increased the fee for candidates wanting to run for office from one hundred to two Australian thousand dollars. Candidates must also quit any public service jobs three months before elections, which only further hinders some candidates' participation in elections.

## PAPUA NEW GUINEA

The anti-corruption taskforce headed by Matthew Damaru and his deputy Timothy Gitua have been prevented from further using a private law firm and an Australian barrister in order to prosecute the Prime Minister of Papua New Guinea Peter O'Neill. There has been a warrant issued by a District Court for the arrest of Prime Minister O'Neill since 2014. The Prime Minister had obtained a court order to prevent the warrant from being carried out. The Supreme Court of Papua New Guinea had ordered Damaru and Gitua to get approval from the Attorney General to use the law firm and the barrister. However the Attorney General can't approve this as he is also under investigation for abuse of office. Therefore, the Attorney General referred them to the Secretary of the Department of Justice who told them that the request to use an outside law firm must come from the Police Commissioner for whom they work. It is understood that the Police Commissioner does not support the task force and has attempted to break it up and so far has only agreed to the taskforce using the Public Solicitor of PNG. Damaru and Gitua plan to go back to the Supreme Court and try to challenge this command and to be able to use the private law firm in Australia.

## RWANDA

On 29 February 2016 the Rwandan Ministry of Justice withdrew its declaration that gives the Rwandan citizens the right to petition the African Court of Human and Peoples' Rights. This comes in the wake of the court case against Victoire Ingabire, chairwoman of the opposition alliance, who was imprisoned for genocide crimes on 30 September 2012. After losing in the Supreme Court and exhausting the appeal system in Rwanda she appealed to the African Court of Human and Peoples Rights. Her case was set to be heard on 4 March 2016, but the decision by the Rwandan Government means she can no longer appeal to this court. The Rwandan Ministry of Justice justified their actions by saying that they withdrew because "Convicted genocide figures secured a right to be heard by the Honorable Court." The Ministry actions were taken following the absconding of former Senator, Stanley Safari who had been convicted

in Rwanda of numerous counts of murder and genocide. Following conviction he fled the court and then petitioned the African Court of Human and People's Rights for his case to be heard before them. The Rwandan Government does not want anyone convicted of genocide to have the right of further appeal to a regional court.

## SOUTH AFRICA

In March 2016, the Supreme Court of Appeal (SCA) held the government responsible for the illegally allowing Sudanese President Omar al-Bashir to escape South Africa last June when he came to visit an African Union summit in June 2016. President Omar al-Bashir is the subject of an ICC warrant for war crimes and crimes against humanity and genocide. The SCA found that the Government of South Africa misled the Supreme Court assisted President Al Bashir to flee the country. Whilst this is a landmark decision, it is unlikely that the people responsible will be charged or held to account. There have also been calls in South Africa for their withdrawal from the ICC Treaty, which has been echoed by others governments in Africa.

## SWAZILAND

The Swaziland High Court have been hearing the case on the constitutionality of the new Sedition and Subversive Activities and Suppression of Terrorism Acts. This Act has been brought to the Supreme Court by protestors who were arrested for speaking and protesting at events and charged with sedition, subversion and/or terrorism, who believe that the law infringes on their right to freedom of speech. They have been arguing that the definitions of sedition, subversion and terrorism are too broad. Also they are claiming that the power of the Attorney General and Ministry of Justice to be able to declare an organisation a terrorist organisation impedes on their ability to get a fair and just trial.

## UN HUMAN RIGHTS COUNCIL PRESENTATION

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The following presentation was made by Phillip Tahmindjis at the UN Human Rights Council's 31st Session on 18 March 2016.

*"Mr President,  
The International Bar Association's Human Rights Institute (IBAHRi) released this week its report on the 'Role of the UPR in advancing human rights in the administration of justice'. The report assesses more than 38,000 recommendations made between 2008 and 2014 for references to the legal profession.*

*The report's key findings include:*

*UPR recommendations still insufficiently address the role of judges, lawyers and prosecutors, or the threats they face, as extensively documented by the Special Rapporteur on the Independence of Judges and Lawyers. Significantly, these recommendations often make no reference to relevant UN standards.*

*Recommendations relating to the independence of judges are often too vague to be an effective response to the shortcomings of any given jurisdiction. Serious issues in the appointment and removal of judges are mostly ignored.*

*The independence of lawyers was considered in fewer than 100 of the 38,000 UPR recommendations.*

*Prosecutorial independence is addressed in less than 10 per cent of the recommendations calling upon States to effectively investigate or prosecute rights violations.*

*Guarantees for legal professionals' rights to freedom of expression, assembly and association are barely addressed. This fails to reflect the key role that self-governing organisations of legal professionals should play in upholding human rights and the rule of law, the independence of the legal profession and law reform processes.*

*As international organisations of legal professionals, we foster the engagement of the legal profession in UN human rights mechanisms and in monitoring the implementation of UPR recommendations.*

*We call upon the Human Rights Council, as well as States, to ensure that in the third cycle of the UPR, the role of judges, lawyers, and prosecutors receives the heightened attention that it is due, as recognised by the UN Basic Principles on the independence of the judiciary, the UN Basic Principles on the role of lawyers and the UN Guidelines on the role of prosecutors.*

*Thank you, Mr President"*

## WORKSHOP ON DOMESTIC VIOLENCE ISSUES - GUYANA

The CMJA Director of Programmes, Judge Shamim Qureshi, along with Chief Justice Margaret Ramsay-Hale (Turks and Caicos Islands), Magistrate Kirsty-Ann Gunn (Cayman Islands) and Mr Mark Guthrie (Rule of Law Division, Commonwealth Secretariat) undertook separate training of police prosecutors and magistrates in Guyana on domestic violence issues. We are grateful to the Commonwealth Secretariat for their support of this training. The opening was attended by the President of Guyana and Chancellor Carl Singh, Head of the Guyanese Judiciary and attracted wide publicity. According to the report in the Kaieteur News Online:

*"President Granger told the gathering which included high ranking judicial officers from the Commonwealth that while it will take time to undo decades of a culture of criminal violence, the removal of inequalities, both in the home and in the state, is a start. "It is a prerequisite for happy homes and a gentler Guyana."*

In the detailed statement to the participants, the President said that domestic violence is a result of "a complex interplay of cultural, psychological and social factors which have combined to create an imbalance of power between parties in a relationship."

This imbalance, he said, is what can lead to domination and abuse is at the root of domestic violence.

He went on to suggest that the violence in society had its roots in domestic violence. He went on to say: "Domestic violence should not

*be seen or defined as simply a set of abusive behaviour: at the root of domestic violence is the real perceived inequality and subordination of women (and children) which extends beyond the individual or family to the wider society... Any campaign to eradicate domestic violence, therefore, must aim at nothing less than changing the deep-seated cultural attitudes and behaviour that have been learnt."*

Chancellor Singh, the Chancellor of the Judiciary stated that education of the young in society should be seen as a key step in fighting domestic violence. He noted that children who are exposed to domestic violence may suffer from mental health issues later in their lives due to the cumulative effects of abuse. He further emphasised that there should be a shift away from the punishment of offenders to a system where gain is created through education.

The seminar provided the ideal opportunity for judicial officers, prosecutors and other stakeholders to discuss how to deal with domestic violence issues.

## FREEDOM OF EXPRESSION IN THE COMMONWEALTH: RIGHTS AND RESPONSIBILITIES



CHOGM  
Malta 2015

*The following is the joint paper presented by the Commonwealth Lawyers Association (CLA); Commonwealth Journalists Association (CJA); Commonwealth Magistrates' and Judges' Association (CMJA); and the Commonwealth Organisation for Social Workers (COSW) to the Committee of the Whole meeting in London on 20 October 2015.*

Freedom of Expression is recognised by the United Nations as a fundamental Human Right. A strong, well-trained, independent, and responsible media, supported by civil society is essential to human development and democratic societies.

The Commonwealth Charter enshrines freedom of expression as one of the core values and principles of the Commonwealth and commits the people of the Commonwealth 'to peaceful, open dialogue and the free flow of information, including through a free and responsible media.' <http://thecommonwealth.org/our-charter>

In upholding the commitment by Heads of State to the Charter, we request that the committee consider the current concerns, and the future, for freedom of expression in the Commonwealth under the following headings:

1. The current state of media: the pace of change and potential risks;
2. Commonwealth pledges to professional media workers: the law and support systems;
3. Accessibility to all in a secure environment.
4. Recommendations.

### 1. The Current State of Media: the Pace of Change and Potential Risks

Regrettably the pledges by Heads of Government are often forgotten between summits. At this year's heads of government meeting in Malta, we urge the Commonwealth leaders to demonstrate that they recognise the importance of their previous commitment to freedom of expression as enshrined in the Commonwealth Charter.

We urge them to support the work of drawing up guidelines for "good practice" to be shared with the governments of the Commonwealth with the goal of achieving an enabling environment for all forms of media for the benefit of all citizens of the Commonwealth.

We ask the committee to acknowledge, in keeping with the United Nations Plan of Action on the Safety of Journalists and the Issue of Impunity, that freedom of expression applies not only to professional journalists but also to the wider community of those who use and disseminate information available from all sources for informed decision making; it should also be upheld, in the workings of the legal systems and for civil society groups which support citizens who use modern media tools such as the internet and social media channels.

A balance needs to be found to ensure that both professional media persons and private individuals are able to provide free commentary and to exchange ideas and information with an underlying system of law and civil society which supports freedom of expression rather than constraining it.

We request that the committee considers giving active support for the further education programmes required for the use of social media, for both youth and adults, to address the increasing risk to vulnerable citizens (particularly young people) who may be “groomed” or enticed into acts of terrorism or other illegal activities through pressure exerted on social media and the internet and noting the increased risk posed by all forms of cybercrime.

We urge COW to consider the rapid growth of social media in the Commonwealth community, and the ability of a professional, free, media to inform, empower, and educate for the positive good\*.

#### Examples

\*to inform and disseminate real-time information: Nigerian Elections <https://twitter.com/search?q=Nigeria%20Electgions&src=typd>

## 2. Commonwealth pledges to professional media workers.

Heads of Government have often pledged to promote freedom of expression. Thus, in their 2013 communique they stated:

*“Heads of Government reaffirmed their commitment to peaceful, open dialogue and the free flow of information, including through a free and responsible media, and to enhancing democratic traditions and strengthening democratic processes... Heads noted that social media had introduced a new dimension and agreed to share best practices within the Commonwealth to respond to the resultant opportunities and challenges. They also affirmed that the same rights and responsibilities that people have offline must also be protected online, in particular freedom of expression, in accordance with Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.”*

*Reference: Commonwealth Heads of Government meeting 2013: Final Communique*

[http://thecommonwealth.org/sites/default/files/events/documents/CHOGM%202013%20Communique\\_0.pdf](http://thecommonwealth.org/sites/default/files/events/documents/CHOGM%202013%20Communique_0.pdf)

For good governance, transparency and accountability, central planks of the Commonwealth Charter, freedom of expression is essential. Unfortunately, in many Commonwealth countries, media workers are still threatened, arrested, and killed by forces that fear exposure of crimes and malpractice. The existing legal frameworks in which freedom of expression is exercised\* may now be outdated or unsuitable for the modern environment but remain the only laws available to many Commonwealth states.

We believe further work is necessary in this area by reviewing laws pertaining to the freedom of expression and considering appropriate reforms for the improvement of relevance to the modern day tools available to both professional journalists and the wider public. We propose an extended joint study (subject to the availability of funding) by the undersigned groups and in further consultation with additional civil society groups, for completion prior to the Law Minister's meeting in 2016.

\*Examples: Scandalising the Court - *Dooharika v The Director of Public Prosecutions* <https://www.jcpc.uk/cases/docs/jcpc-2012-0058-judgment.pdf>

*Human Rights Lawyer Karpal Singh [deceased] prosecuted under the Sedition Act* <http://www.themalaysianinsider.com/malaysia/article/karpal-found-guilty-of-sedition>

## 3. Accessibility to all in a safe environment

If the Commonwealth is to be seen as a credible international organisation taking the lead on global issues it needs to demonstrate that it gives priority to freedom of expression as a basic human rights. The threats to freedom of expression have intensified with the expansion of digital journalism and social media.

\*\*For example, lawyers who defend their clients accused under laws

related to free speech are regularly threatened, or killed in the course of the work.

\*\*Example:

*“Lawyer defending academic in blasphemy case is killed”*

<http://www.universityworldnews.com/article.php?story=20140510074716863>

Free speech is widely undermined through the use of anti-terrorism, blasphemy and other laws, as an expedient way to stifle dissent. As a result of this pressure many journalists are resorting to self-censorship in order to protect their families and livelihoods, pushing the dissemination of information and dissenting opinions into underground channels. Controlled licensing of newspapers and publishers often further inhibits the ability of a free press. We believe that the proposal contained in the Trans-Pacific Partnership [https://en.wikipedia.org/wiki/Trans-Pacific\\_Partnership](https://en.wikipedia.org/wiki/Trans-Pacific_Partnership) and the Trans-Atlantic Trade and Investment Partnership (TTIP) <http://ec.europa.eu/trade/policy/in-focus/ttip/negotiations>, for a significant increase in the power of private corporations and for limitations on the ability of national and local governments to pursue appropriate social policies pose a threat to freedom of expression, democracy, accountability and human rights.

## 4. Recommendations

1. We request that Heads of Government mandate law ministers to consider the preparation of model laws and to devise a set of good practices to be adopted by Commonwealth Member States for the protection of freedom of expression, in consultation with civil society stakeholders. This mandate should include the introduction of measures to protect professional journalists from unjust prosecution in respect of their legitimate professional activities;

2. The reform of existing laws which unnecessarily curb freedom of expression in the context of the relevance of such laws in a rapidly changing technical and security environment;

3. Consider additional measures to counter the increasing problem of the risk (with emphasis on youth) of “grooming” through social media and

the internet for the purpose of inciting acts of hatred, acts of terrorism, and abuse and to assist civil society to combat this through increased education programmes;

4. Recognise the contribution of a free and professional media, to assist and promote informed decision-making through the provision to the public of fair and high-quality news and information in an professional and unbiased manner;

5. Recognise and strengthen the support provided by civil society groups dealing with legal and social issues surrounding freedom of information.

### In Summary

We urge Commonwealth leaders in Malta to set an example by announcing measures to strengthen and promote freedom of expression. A bold and free press and electronic media serve to bolster good governance and a healthy democracy – values shared by all Commonwealth governments and peoples. The Committee is urged to endorse and progress the commitment to freedom of expression embodied in 2013 communique and to support the implementation of the recommendations contained in this paper.

## ICJ FORUM FOR JUDGES AND LAWYERS ON JUDICIAL ACCOUNTABILITY

The following report was submitted by Keith Hollis on behalf of the CMJA to the International Commission of Jurists following his attendance at this Forum in December

### 1. GENERAL

i. I attended this forum on behalf of the Commonwealth Magistrates' and Judges' Association and, as invited, put forward some additional points to those that were raised orally, with some specific recommendations. I hope that they are helpful to the ICJ in this valuable work.

ii. I would like also to thank the ICJ for the excellent arrangements for the Forum, and for the opportunities that it presented. I have been working

on the matters that were discussed for much of my professional career both as a practising lawyer, then as a judge, and now again as a lawyer. I would be happy to contribute further to the preparation of the proposed Practitioner's Guide, if it is felt that I can be of assistance.

iii. I emphasise the overarching principle of judicial independence, a principle which cannot be repeated too often, at the same time stressing that such independence is not an independence for the judge to do what he or she likes but independence to decide the cases before the court independently, assessing the evidence and applying the law, without pressure from outside the court room.

iv. Judicial independence does not imply a lack of accountability - Judicial Officers should act properly and in accordance with their office and there has to be procedures in place, and due process, to discipline them appropriately when they are found not to have done so.

v. When referring to "judicial accountability" we should be referring to anyone who carries out a judicial function, and not just senior judiciary with a high profile. Judges and Magistrates (both lay and professional) are the obvious examples, but in many jurisdictions specialised judges are given different titles. I would urge the use of the overriding title of "Judicial Officer" to apply to anyone carrying out a judicial function.

vi. I am of the strong view, borne out by experience, that a great deal can be achieved in fighting corruption by a number of, often relatively modest, steps. These are designed to minimise the opportunity for temptation to be put in the way of the judicial officer and strengthen his or her ability to resist such temptation when it arises. One minor lapse, perhaps early in a career, can snowball into a serious problem, partly as a result of an individual being confident that he or she can "get away with it", and partly because it leaves that individual more vulnerable to blackmail over future conduct. I conclude this paper with a list of some such steps. There will be many others, depending on the jurisdiction and the particular problems within that jurisdiction.

## 2. COMPOSITION AND CHARACTER OF ACCOUNTABILITY BODIES:

i. It is impossible to be prescriptive about such bodies, so much depends upon the history and specific constitutional arrangements of particular jurisdictions.

ii. Having said that the first judicial oversight body in all jurisdictions (and not I believe mentioned as such in the forum), is the local appeal system. Most jurisdictions have two levels of appeal, sometimes more, and these can be most effective at sifting out cases where a Judicial Officer has been partial or for some reason has misconducted a trial in some way.

**Recommendation: *appeal systems should be easy to access and themselves competently and impartially run***

iii. It is now generally accepted that there should be codes of conduct or behaviour for Judicial Officers. There should be structures that keep these regularly under review. There has to be some body that oversees such reviews. This can be the same body as has responsibility for determining breaches of the code and applying appropriate sanctions (especially in jurisdictions where resources are scarce). I would question the need for any other body, except in those serious cases where there is a particular need for a body focussing on corruption or human rights breaches in administration generally and which needs to include the judicial process. These were fully discussed at the Forum.

iv. There has to be judicial involvement in such bodies, but I would urge that they include judicial officers from all appropriate levels, if only for ad hoc purposes, and not just those from the senior judiciary. There are many advantages in including junior judicial officers, and their involvement can help promote better conduct at all levels (from the top, not wanting to be seen to be acting badly by their juniors, and from the bottom, seeing good example and learning how to behave). Many countries have associations of judges of different levels, who could nominate members. Such associations should be encouraged as they help promote collegiality. The whole should ideally be led by a senior judge of proven integrity, perhaps in retirement (especially where such human

resources are scarce). It should also include a degree of lay involvement, possibly through senior legislators, or elsewhere from society. Its mandate and powers should be clearly defined. It is difficult to be prescriptive about the methods of selection of members of accountability bodies, but the process should be akin (although not the same) as that for senior judges. Appointments should be for fixed terms only.

**Recommendations:**

- *There should be codes of conduct, ethics and behaviour which are kept under regular review;*
- *there should be an oversight body with responsibility for those reviews and also for determination of breaches of the code and the application of appropriate sanctions;*
- *there should be clear due process in the oversight body's work;*
- *the body should be led by a senior judge of proven integrity but include members from all levels of Judicial Officer as well as lay involvement, possibly through senior retired legislators;*
- *members of such bodies should only serve for a fixed term;*
- *to help promote collegiality amongst judicial officers, there should be encouragement to the formation of and participation in, associations of judicial officers.*

v. The importance of the independence of the bar and of prosecution authorities is crucial. Corrupt behaviour is above all criminal behaviour and prosecution authorities should be able to investigate, charge, and pursue such matters independently. In countries where there the problem is especially bad there may be a need for "special measures" to enable this to happen, especially by way of security, which may involve external funding or other help. This is an area where overseas good governance aid programmes could give significant assistance. I have not pursued these issues further as, although much could be said, they appear to be outside the remit of the Forum and I believe have been considered in previous ICJ documents.

vi. I would reiterate the point made, by myself and others in Geneva, that consideration needs in time to be given to the role of those administering over what may be referred to as "traditional" dispute resolution systems, which are common in many of the less developed parts of the world.

**3. SITUATIONS OF TRANSITION, CRISIS, OR PERVASIVE CORRUPTION**

i. Participation at the Forum was well representative of jurisdictions in different stages and positions. What was demonstrated in common was the need to preserve in difficult times men and women who, when times improved, could form the cadre of a new judicial body, perhaps after mass removal and reappointment, although such a drastic course may not always be necessary. Such men and women may well be found amongst junior judges and magistrates who, during difficult times, were better able to "keep their heads down" and not have to make too many compromises. This is a difficult area: for example could one even contemplate the reappointment of a Judicial Officer who authorised or condoned torture? It is in such circumstances that truth commissions can have a powerful role: giving the Judicial Officer an opportunity to face and admit what he or she has done and explain the context, and hence attain the opportunity for redemption. The success of South Africa in this area is a powerful precedent.

**Recommendations:**

- *that following a drastic civil crisis involving the judiciary, junior judicial officers are considered as a potential pool of talent for rebuilding the judiciary at all levels;*
- *that during such crises, such efforts as can be made to protect the judiciary, are made. These may include senior members being given sanctuary and support outside the jurisdiction.*

ii. Because circumstances are likely to differ so greatly between countries in such situations it is impossible to be prescriptive, but I suggest that it would be most helpful for the ICJ to have available an on line index of the special mechanisms that have been used at different times and places,

possibly including a commentary on the respective advantages and disadvantages that came to light.

**Recommendation: *that the ICJ (or similar independent body) prepare and nurture an online register of special mechanisms and procedures that can be used in exceptional circumstances, with an accompanying commentary.***

iii. A clear role for international accountability mechanisms is difficult to identify. There are in existence numerous international statements of good intent, sometimes even entered into by parties who have become notorious for corrupt behaviour. There are larger questions as to how far dealings with countries in breach of such statements should be affected by those breaches. I am firmly of the view that issues of corruption and accountability have to be addressed as locally as possible. However there may be advantages in regional programmes, for example in judicial education (I have experience of such, especially in east Africa, which I believe have been useful).

iv. As well as this the use of judicial officers from other countries, although in the same region, to help re-establish the rule of law in a country so affected, could be most useful, and is not uncommon in parts of Africa

v. The development of social media and the ability of Judicial Officers in different jurisdictions to build contact and friendships can be most useful in reducing judicial isolation (and thus vulnerability). Such contact can enable Judicial Officers to seek advice and support outside their own jurisdictions at times when this is needed, and even in the most serious cases enable international "alarm bells" to be sounded to bring about international support and pressure.

**Recommendations:**

- *Judicial Officers should be encouraged to join and participate in international associations of judicial officers;*
- *international and regional contacts between Judicial Officers should be promoted;*
- *opportunities for Judicial Officers to move between countries in the same region should be explored.*

#### 4. PARTICULAR CONSIDERATIONS IN DEVELOPING COUNTRIES

i. Central to what is needed is the development of “collegiality” amongst Judicial Officers, so that there is a developed sense that if one judicial officer succumbs then he or she is betraying his country and “letting down” and tainting colleagues by bringing disgrace to the whole system.

ii. This should be accompanied by a degree of transparency in judicial matters. The press should be free to comment on judicial matters without being threatened with contempt of court or similar steps. There is a particular problem of a lack of resources to give proper administrative support to the judiciary. An uncorrupt judiciary is completely undermined when administrative support is corrupt (e.g. files being lost, cases not listed, witnesses not summonsed).

##### Recommendations:

- *have systems and institutions in place that (a) promote collegiality amongst the judiciary and (b) encourage transparency and openness;*
- *there should be proper restrictions on the ability of courts to prevent free comment on, and criticism of, court proceedings and judicial affairs;*
- *all support should be given to ensuring that court administration is adequately resourced and managed to minimise the opportunities for corruption.*

#### 5. POWERS, PROCEDURES AND LIMITATIONS

i. Any accountability mechanism has to be governed by due process. If one is talking about criminal proceedings then in theory at least such process should be in existence. What may be missing is the will or ability to apply that process.

ii. In other respects, as well as the questions identified in the Forum programme, issues of the burden and standard of proof have to be considered, and the different procedures that may be followed in accusatorial or inquisitorial jurisdictions. Although I come from a common

law, accusatorial, background I can see advantages in accountability mechanisms in matters of judicial behaviour being of an inquisitorial nature (contra where criminal proceedings are involved), but there must be clear procedural rights for the Judicial Officer involved - the unjust accusation against an honest Judicial Officer can be as damaging as a just one.

iii. I have already considered publicity and transparency. Judicial immunity should only be available in the most limited of circumstances, for actions carried out by the Judicial Officer when acting in a judicial capacity, save insofar as there may be a breach of the relevant code of behaviour. There should be no immunity for actions not taken in a judicial capacity.

iv. Neither should transparency include judges commenting on social media on cases (and it seems that this is not as general or acceptable a practice in Kenya as was thought at the Forum).

v. Selective enforcement for improper reasons is a huge issue and I feel can only be addressed by the complete independence of prosecution authorities or any other body charged with investigatory duties, with review procedures where appropriate. These should include review opportunities within the appeal system to consider sentences that may be unduly lenient.

##### Recommendations:

- *any accountability mechanism should be governed by a transparent due process in its procedures;*
- *there should be proper consideration for any accountability system of burden and standard of proof, with an appeals process judicial immunity should be strictly limited;*
- *judicial officers should not comment on cases on social media. There should be a trustworthy press office in place to deal with questions and comments from the press;*
- *there should be appeal systems place to review sentences which may be unduly lenient.*

#### 6. SOME CONCLUDING RECOMMENDATIONS FOR BETTER ACCOUNTABILITY IN PRACTICE

i. As above.

ii. All Judicial Officers should have compulsory training on anti-corruption issues and the promotion of professionalism and integrity, both on appointment and at regular intervals.

iii. Judicial Officers should have available judicial mentors from appointment or an alternative and accepted procedure by which they can confidently and confidentially report or discuss potentially corrupt approaches.

iv. listing of cases should be controlled by Judicial Officers and, except where particular specialism is required, done on a random basis.

v. there should be proper supervision of files and the promotion of professionalism amongst court administrators.

vi. there should be clear rules of court giving Judicial Officers powers to refuse unnecessary adjournments and ensure that trials are carried out expeditiously.

vii. there should be strict time limits on the production of reserved judgements, with time being made available to Judicial Officer's to ensure that such judgements are not delayed, with sanctions on the Judicial Officer who fails to comply.

viii. Judicial Officers should be adequately remunerated, with proper pension provision. Payment of remuneration.

Keith Hollis

## MEET OUR MEMBERS

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### JUDGE NATSAI MANYARARA



I was appointed a fee-paid Judge of the First-tier Tribunal (United Kingdom), assigned to the Social Entitlement Chamber (SEC) to exercise the Social Security and Child Support jurisdiction within that Chamber by The Lord High Chancellor (The Rt. Hon Chris Grayling MP) in April 2013, on the recommendation of the Judicial Appointments Commission (JAC).

I also sit in the Immigration and Asylum Chamber (IAC) of the First-tier Tribunal, where I hear Human

Rights appeals, as well as appeals concerning the Geneva Convention relating to the status of Refugees. Both of the jurisdictions that I sit in involve the United Kingdom's international obligations concerning some of the most vulnerable members of society and I have a deep awareness of the diversity of the communities which the courts and tribunals serve in relation to understanding differing needs. I strongly believe that Courts and Tribunals play a vital role in upholding the Rule of Law and maintaining the health of a democratic society. I am guided by this principle in executing my judicial functions. I am also authorised to undertake overseas training of judges, having been certified as an International Training Judge by the International Committee of the Judicial College (UK). As Hon. Treasurer of the Commonwealth in England Barristers' Association ('CEBA') (UK), I work with the judiciary in various countries of the Commonwealth. The objects of the association are to promote the rule of law, the independence of the

judiciary, and the freedom of the legal profession in the countries of the Commonwealth. I am also one of the founders of a Legal Institute which will provide sector specific training for the judiciary, arbitrators, practitioners and academics in the southern African region. Alongside my part-time judicial duties, I am an established Barrister with experience in all courts, up to and including the United Kingdom Supreme Court. I am a Governor of two schools within the Harris Federation of Schools established by the Rt. Hon. The Lord Harris, as a result of my commitment to achievement and success in education, and a profound belief that every child deserves a good education. My interests outside of the law include travelling, classical and jazz music, as well as fine art and design (I am an artist and have held private exhibitions of my work in the past).

**If you want to feature in our Meet Our Members Section, kindly send us 500 words about yourself and photograph.**

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## NEW MEMBERS

We are delighted to welcome as new members to the CMJA the following:

### AUSTRALIA

Ms Tanya Fong Lim  
Justice Terence William Sheahan

### CANADA

Ms Karen Valentine  
Judge Lorna Dyck

### ENGLAND & WALES

Mr Hehir Christopher  
Judge Jonathan Cooper  
Mr Robert Gerald Walters  
Mr Tony Baumgartner  
Mr Nawal Kumrai  
Justice Anup-Singh Choudry  
Dr Marcia Persaud  
Judge Kalyani Kaul QC

### GAMBIA

Mr Simeon Abi

### KENYA

Miss Eva Wambugu

### MONSERRAT

Mr Avantha Wickramasooriya

### TRINIDAD & TOBAGO

Ms Eleanor Donaldson- Honeywell

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## DIARY OF EVENTS

### 18-23 SEPTEMBER CMJA CONFERENCE

**"The Judiciary as the Guarantors of the Rule of Law"**  
Georgetown, Guyana-  
Details now available on the CMJA's conference website:  
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### MARCH 2017

Commonwealth Law Conference  
*"Thriving in a global world: building on the rule of law"*  
Melbourne, Australia  
Further information is available from [www.commonwealthlawconference.org](http://www.commonwealthlawconference.org)

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## FEEDBACK / CONTRIBUTIONS

We welcome feedback and contributions. Please send these to:  
CMJA, Uganda House, 58-59 Trafalgar Square, London  
Email: [kbrewer@cmja.org](mailto:kbrewer@cmja.org)

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