Terms of Reference

Title: Consultant Commonwealth (Review of Model Law on Electronic Evidence)

Organisational Section/Unit: Rule of Law Section, Governance and Peace Directorate, Commonwealth Secretariat

Duty Station: Home based

Proposed period: 15th March 2021 - 14th May 2021

Actual work time: 25 workdays in a period of 8 weeks

1. BACKGROUND:

The Governance and Peace Directorate (GPD) leads the Commonwealth Secretariat’s work on democracy, which includes promotion of the rule of law, separation of powers, democratic values, and good governance. Within GDP, Rule of Law Section is responsible for the delivery of a project titled: **Tackling Cyber Crime: Strengthening Legislation, Enforcement, and International Cooperation**, supported by the Government of the United Kingdom, through the Foreign, Commonwealth and Development Office.

The project aims to support implementation of the Commonwealth Cyber Declaration, agreed by Commonwealth Heads of Government at their meeting in London in April 2018. The Cyber Declaration committed Commonwealth Heads of Government to a cyberspace that supports economic and social development and rights online; to build the foundations of an effective national cybersecurity response; and to promote stability in cyberspace through international cooperation. Specifically, the Declaration committed Commonwealth member countries to use national contact points and other practical measures to enable cross-border access to digital evidence through mutually agreed channels to improve international cooperation to tackle cybercrime.

This project aims to influence the establishment in the Commonwealth of effective anti-cybercrime frameworks, i.e., laws, policies, institutions and practices that can be harnessed to combat the growing scourge of cybercrime. The project seeks to achieve this long-term goal through the following key objectives and outcomes:

1. Increased awareness in the Commonwealth of the risks and dangers posed by cybercrime and weak cybercrime-combating frameworks to (a) economic development; (b) democracy, peace and security; (c) human rights; and (d) the lives
of ordinary people, and especially the vulnerable communities and those not familiar with risks inherent on cyberspace;

2. Enhanced cybercrime-combating capacity in select Commonwealth countries; and

3. Strengthened pan-Commonwealth anti-cybercrime cooperation frameworks

These outcomes are designed to enable Commonwealth countries to realise the vision set out in the Commonwealth Cyber Declaration (CCD), which was endorsed by Member States in 2018. The CCD sets out a common vision for ensuring the internet remains free, open and inclusive across the Commonwealth.

The project will achieve this by strengthening the existing ‘Commonwealth Network of Contact Persons’ in criminal justice matters (the ‘CNCP’) through the appointment and training of focal points for electronic evidence. The project will also support amendment of the 2002 Commonwealth Model Law on Electronic Evidence.

2. PURPOSE OF THE ASSIGNMENT:

One of the core objectives of the cybercrime project is to reinforce international cooperation in criminal cases involving electronic evidence between Commonwealth member countries. In particular, the assignment will lead to completion of the revision of the 2002 Commonwealth Model Law on Electronic Evidence, development and update the 2019 recommendations for legislative and policy approaches to cross-border electronic evidence (factoring Covid-19 considerations). As a result of the outputs delivered by the consultancy, it is expected that modern standards and guidance for handling and presenting electronic evidence in court can be provided to Commonwealth countries, leading to more efficient and effective criminal trials.

3. SPECIFIC TASKS TO BE PERFORMED BY THE CONSULTANT:

Under the guidance of the Legal Adviser Law Development and the Legal Adviser Law Reform and Legislative Support Rule of Law Section, Commonwealth Secretariat, the consultant will:

a) Undertake a revision of the 2002 Commonwealth Model Law on Electronic Evidence;
b) Make outline proposals for Commonwealth guidance on policy and legislative approaches to cross-border electronic evidence; to be presented at the Commonwealth Law Minsters Meeting (Date TBD)
c) Attend and advise the expert working group meetings on electronic evidence (Dates TBD).
d) Present the revisions to the Model Law and policy and legislative approaches to cross border electronic evidence to Commonwealth Law Ministers.
e) Review of outcomes from the pilot project on Commonwealth Laws on electronic evidence.

A) Under task a), the consultant will review the recommendation report and Outcome paper of the September 2019 Expert Working Group on Electronic Evidence. The review will:
i) Assess the recommendations of the outcome paper of the Expert Working Group on Electronic Evidence to assess whether they are still applicable to, inter alia, issues of authentication of electronic evidence, application of the best evidence rule, the integrity of evidence, evidential standards, proof and admissibility of electronic evidence; and

ii) Include consideration of the approach to such issues in national laws of a range of Commonwealth member countries.

B) **Revisions of the Model Law**

Under task (b), the consultant will make revisions to the Model Law to be agreed by Commonwealth Law Ministers. The revision will:

i) Draw from the Model Law review paper and align with modern good practice approaches;

ii) Include amending the 2002 Model Law to ensure it remains fit for purpose. Proposed amendments may be structured in the form of different options;

iii) Take account of the increasing range, type and volume of electronic evidence relevant to legal proceedings;

iv) Consider the difference, between the admissibility and treatment of electronic evidence in civil, criminal or administrative proceedings; and

v) Consider national laws and relevant standards.

The model provisions produced will include:

1. A short introduction and background to the model provisions, including the history of the Commonwealth Model Bills on electronic evidence outlining developments in law and technology and the decision to revisit the law of electronic evidence;

2. Model provisions covering all areas necessary to comprehensively cover a modern approach to data protection, drawing from:
   a. The pre-existing Commonwealth Model Bills on electronic evidence and computer and computer related crime;
   b. The Outcomes Statement of the September 2019 meeting of the expert working group; and
   c. The background paper prepared for the September 2019 meeting.

3. Explanatory notes, commentary and alternative/optional provisions to accompany the model provisions, including context and references to international standards and other legal regimes as appropriate.

C) **Commonwealth Guidance on Legislative and Policy Approaches to Cross-Border Electronic Evidence Exchange**

Under task (c), the consultant will review the paper on “Secure Messaging” as commissioned during the pilot phase of the Commonwealth cyber programme and develop a draft policy paper for the development of Commonwealth guidance on legislative and/or policy approaches that Commonwealth member countries may adopt to obtaining, transmitting, securing, and presenting cross-border electronic criminal evidence in court. The paper will be presented to Commonwealth Law Ministers for their consideration. The draft will consider:
i) The most common ways in which cross-border electronic data and evidence arise in legal proceedings and the processes for acquiring it (including requests to countries and service providers, direct remote access, and relevant legal avenues such as mutual legal assistance);

ii) Make reference to relevant standards, such as ISO27037 and UNODC Practical Guides;

iii) Summarise the way in which the legal and policy frameworks of around 10 specified Commonwealth countries, selected to ensure regional representation across the Commonwealth, address the acquisition, transmission, and presentation of cross-border electronic evidence in court;

iv) Include country case studies to highlight examples of best practice;

v) Develop a framework to outline national procedures for sending and receiving cross-border electronic evidence;

vi) Outline general issues, as well as those reported by countries, in relation to integrity in the transmission of evidence, including with reference to mode of transmission used and the form in which electronic evidence is transmitted from one country to another;

vii) Discuss whether cross-border electronic evidence presents any admissibility or other legal issues in legal proceedings;

viii) Discuss possible points that might be included in national law or policy regarding the acquisition and transmission of cross-border electronic evidence, and in particular whether any specific provisions might be included in a revised Commonwealth Model Law on Electronic Evidence; and

ix) Reflect the possibility of exchange of cross-border electronic evidence through a mutually recognisable platform that may be used by a central authority and/or other institutions, drawing from information to be provided by the Secretariat and its other consultants.

In undertaking task (c), in particular parts (c)(iii), (iv) and (v), the Consultant will draw on information obtained from the interviews conducted with criminal justice officials in Commonwealth countries on relevant legal and policy frameworks, as well as operation in practice of arrangements for sending and receiving cross-border electronic evidence. The Secretariat will assist in the arrangement of the interviews if further evidence is required to support the policy paper.

**D) Expert Working Group:**

Under task (d), the consultant will attend and provide advice to an expert working group hybrid meeting held to review the revised provisions of the Commonwealth Model Law on Electronic Evidence and to consider legal requirements related to cross-border electronic evidence that should be included in the Guide. The consultant will attend a further expert working group hybrid meeting to present his/her revision of the Model Law and proposed recommendations for the Guide on “Legislative and policy approaches to cross-border electronic evidence exchange” The consultant will incorporate the recommendations of the Working Group into the final revised Model provisions.
4. **EXPECTED TANGIBLE AND MEASURABLE OUTPUT(S):**

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<th>Deliverable</th>
<th>Timeline</th>
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<tr>
<td>a. Annotated table of contents of the draft policy paper</td>
<td>15th March 2021</td>
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<td>b. First draft of model provisions and policy paper following comment from Commonwealth Secretariat</td>
<td>31st March 2021</td>
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<tr>
<td>c. Revised draft of model provisions and policy paper following comment from Commonwealth Secretariat</td>
<td>9th April 2021</td>
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<td>d. Final Model Provisions and policy paper</td>
<td>14th May 2021</td>
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5. **INDICATORS TO EVALUATE THE CONSULTANT’S PERFORMANCE**

All outputs shall be assessed in accordance with the following indicators:

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<th>Indicators</th>
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<tr>
<td>a, b, c and d</td>
<td>• Technical precision of the proposal&lt;br&gt;• Clear and policy-relevant analysis</td>
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<tr>
<td>a, b, c and d</td>
<td>• All Secretariat comments reflected appropriately&lt;br&gt;• Excellent English drafting style&lt;br&gt;• Political nuances fully considered&lt;br&gt;• Technical excellence.</td>
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6. **QUALIFICATIONS/EXPERTISE SOUGHT (REQUIRED EDUCATIONAL BACKGROUND, YEARS OF RELEVANT WORK EXPERIENCE, OTHER SPECIAL SKILLS OR KNOWLEDGE REQUIRED):**

1. Qualified lawyer in a Commonwealth jurisdiction. Advanced degree(s) in law, politics, social science, or international relations;
2. Minimum of 10 years of professional expertise in criminal justice and international cooperation in criminal matters, with a focus on electronic evidence;
3. Practical professional experience in provision of advice and training to justice system officials;
4. Proven ability to network and establish collaborative relationships with a variety of actors;
5. Proven ability to work well under pressure and meet strict deadlines;
6. Fluency in English;
7. Excellent organisational and evaluative skills;
8. Experience gained from work for international organisations is highly desirable.

7. **ADMINISTRATIVE ARRANGEMENTS:**

   The assigned tasks are to be performed by the appointed consultant on a remote basis through a total of 25 days’ work time.