COMMONWEALTH HUMAN RIGHTS INITIATIVE

# MECHANISMS OF THE COMMONWEALTH TO ADDRESS VIOLATIONS OF COMMONWEALTH VALUES – THREE PART SERIES

## PAPER THREE: THE COMMONWEALTH MINISTERIAL ACTION GROUP (CMAG)

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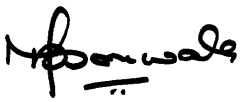

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# PREFACE

This paper is part of a three paper series which is dedicated to mechanisms in the Commonwealth that can support human rights compliance. The series includes an overview of – Secretary General's Good-Offices, Commonwealth Ministerial Action Group and Human Rights Unit. The papers seek to elucidate the functioning of the mechanisms and highlight the need for a Commonwealth Commissioner for Human Rights.

At the Commonwealth Heads of Government Meeting (CHOGM) in Perth in 2011, the Eminent Persons Group (EPG) recommended the appointment of a Commissioner for Democracy, the Rule of Law and Human Rights. By the end of 2012, the Heads had approved various EPG recommendations but the recommendation relating to the creation of a Commissioner was dropped since no consensus could be reached.

However, events since the 2011 CHOGM in Perth, make it clearer than ever that the Commonwealth must consider, and this time agree, to create an independent specialist who can monitor, investigate and advise on human rights. Human rights standards in the Commonwealth have continued to be a cause for alarm, despite implementation of reforms - efforts intended to address the Commonwealth's oft criticised lack of response to violations of its values. After well reasoned reports and impressive sounding changes were put in place, to say that hopes of real commitment to core values have been dashed would be to say too little.

CHRI's report to the Commonwealth Heads of Government in 2013 calls for the appointment of a Commissioner for Human Rights. The call is based on the fact that Commonwealth's existing mechanisms are inadequate to hold Members States to account over their human rights records – as illustrated in the present series of papers. A full time independent expert with functions that will compliment that of existing Commonwealth mechanisms will effectively assist Member states comply with Commonwealth Values and rebuild the confidence of its people and ensure a renewed, relevant and sustainable Commonwealth.

# THE COMMONWEALTH MINISTERIAL ACTION GROUP (CMAG)

The Commonwealth Ministerial Action Group (CMAG) is a group comprising a representative of the Commonwealth's Chairperson-in-Office and a rotating group of foreign ministers from eight Commonwealth countries. The Secretary-General convenes CMAG and it was established in 1995 by the Millbrook Plan on the Harare Declaration to "deal with serious or persistent violations of the principles contained in that Declaration".[1] In order to do this the Millbrook Plan stated that CMAG would be mandated to "assess the nature of the infringement and recommend measures for collective Commonwealth action aimed at the speedy restoration of democracy and constitutional rule".[2] Although CMAG was endowed with the power to respond to violations of Commonwealth values — including human rights — it chose to focus, in its early years, on addressing situations where democratically elected governments were under threat.[3]

**Harare Declaration**

The Harare Declaration, frequently referred to as the Commonwealth's "mission statement", was laid down by the Commonwealth Heads of Government at the conclusion of their biennial meeting in 1991.[4] The Declaration defines the core values of the Commonwealth and espouses protection and promotion of "democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government; [and] fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief".[5]

Between 1995 and 2002, CMAG concentrated on situations in Fiji, The Gambia, Nigeria, Pakistan, Sierra Leone, the Solomon Islands and Zimbabwe. With the exception of Zimbabwe, all these states came before CMAG because democracy was threatened. Human rights issues were rarely raised and when they were, discussions were confined to political rights.[6] CMAG, however, did discuss human rights violations in Zimbabwe. Between May 2000 and Zimbabwe's suspension from the Commonwealth Councils in March 2002, CMAG expressed concern at a number of human rights violations in Zimbabwe including "continued violence, occupation of property, actions against the freedom and independence of the media and political intimidation".[7] In March of 2001, CMAG

[1] Millbrook Commonwealth Action Programme on the Harare Declaration (1995): http://thecommonwealth.org/sites/default/files/history-items/documents/millbrook%20declaration.pdf as on 19 November 2013.
[2] Ibid.
[3] Duxbury Alison (2003), "Reviewing the Commonwealth's Rights Record: From Recognition to Realisation", *South African Journal on Human Rights* vol 19, pp. 655-656.
[4] Duxbury, A (1997), "Rejuvenating the Commonwealth: the Human Rights Remedy", 46 *International and Comparative Law Quarterly* 344, p. 355.
[5] Commonwealth Heads of Government (1991), *Final Communiqué*: Harare: http://www.thecommonwealth.org/document/181889/34293/35468/35773/harare.htm as on 11 July 2011. See paras 13, 15, 18, 17.
[6] Please see CMAG statements issued between 1995 and 2002: http://secretariat.thecommonwealth.org/Internal/190945/190842/141670/list_of_meetings/ as on 19 November 2013.
[7] Commonwealth Ministerial Action Group Concluding Statement of 17th Meeting, 20 December 2001.

established a Commonwealth Ministerial Mission, comprised of the foreign ministers of Barbados, Australia and Nigeria that was tasked with visiting Zimbabwe to "conduct consultations with the Zimbabwe government, convey its concerns and offer any appropriate Commonwealth assistance".[8] In 2002, Zimbabwe was suspended from the Councils of the Commonwealth for a year. Since 2003, Zimbabwe has not been discussed in detail by CMAG owing to Zimbabwe's decision to withdraw from the Commonwealth.

In order to "review the role of the Commonwealth and advise on how best it could respond to the challenges of the new century" a High Level Review Group was established in 1999.[9] In their report, the High Level Review Group clarified the procedures CMAG should apply in response to concerns about severe or persistent violations of the Harare Principles, not related to an unconstitutional democratic overthrow. These procedures noted that "CMAG would examine a case of perceived violation of the Harare Principles once such Good Offices activities have been exhausted."[10] The report further noted that "CMAG might consider applying a similar but differentiated and flexible set of steps as those outlined in the Millbrook Commonwealth Action Programme",[11] clearly illustrating CMAG's obligations to all Commonwealth values. However CMAG continued to focus its attention primarily on situations where militaries sought to overthrow democratically elected governments.[12]

During the period between Zimbabwe's decision to leave the Commonwealth in 2003 and CHOGM in 2011, CMAG only considered situations in three countries (Fiji, the Solomon Islands and Pakistan) and CMAG placed all these three countries on its agenda because of challenges to democracy. The statements issued by CMAG during this period focussed primarily on these countries' violations of democratic principles, threats to democratic institutions and elections. No mention of human rights was made in these reports, till September 2005, when CMAG inserted a brief reference, calling upon "the Government of Pakistan to continue and intensify progress in fostering a sustainable and inclusive political culture, improving democratic governance, strengthening political and oversight institutions, supporting local governments, protecting human rights, respecting media freedoms and improving the position of women and minorities".[13] Subsequent to this, human rights issues appeared in statements about Fiji and Pakistan in a haphazard fashion. Sometimes brief mention was made of human rights concerns in CMAG's statements; at other times there was no mention at all. When CMAG did identify human rights issues in its statements on Fiji and Pakistan between 2005 and 2011, it focussed almost exclusively on threats to political rights such as those to freedom of expression and association and the arbitrary detention of individuals. One exception to this focus was in a statement on Pakistan in September 2006, where CMAG noted "the Government of Pakistan's commitment to safeguard the rights of women and minorities".[14]

[8]Commonwealth Ministerial Action Group Concluding Statement of 15th Meeting, 19-29 March 2001.
[9] Commonwealth Heads of Government Meeting Durban, South Africa, 12-15 November 1999: http://secretariat.thecommonwealth.org/press/34580/34582/34694/commonwealth_heads_of_government_meeting_durban_s.htm as on 19 November 2013.
[10] Commonwealth High Level Review Group, "Report by the Commonwealth High Level Review Group to Commonwealth Heads of Government", Coolum, Australia, 2002, as adopted by Heads of Government at their meeting in Coolum on 3 March 2002: http://www.chogm2002.org/pub/statements/hlrg.html as on 19 November 2013.
[11] Ibid.
[12] Commonwealth Eminent Persons Group, *A Commonwealth of the People: Time for Urgent Reform*, (2011), p. 36.
[13]Commonwealth Ministerial Action Group Concluding Statement of 26th Meeting, 17 September 2005.
[14]Commonwealth Ministerial Action Group Concluding Statement of 27th Meeting, 23 September 2006.

CMAG's narrow interpretation of its mandate, heavy emphasis on addressing threats to democracy to the exclusion of human rights issues and selectivity in terms of identifying which countries to focus on, has significantly impeded the extent to which it has been effective at protecting human rights within the Commonwealth.[15] Its selective approach may be attributed to two factors: till 2011 there were no criteria or guidelines to determine what amounted to a "serious or persistent violation of Commonwealth values". This meant that CMAG had little assistance in terms of whether or not to address a particular situation. Secondly, CMAG's selective approach was compounded by the fact that CMAG is a political body, comprised of political (not legal or independent) figures.[16] CMAG's selective approach is apparent from the fact that it only focused on three countries between 2002 and 2011, despite innumerable human rights abuses perpetrated throughout the Commonwealth during this period that warranted consideration. Just a few examples of situations that CMAG could have examined include the serious human rights abuses perpetrated during the Sri Lankan civil war, the widespread reports of limitations on freedom of expression and the commission of torture by state security officials in Uganda and the violation of the rights of sexual minorities in a number of Commonwealth countries including Uganda and Malawi. With respect to the last situation, Michael Kirby (a member of the EPG) has alleged that by not taking action on this issue CMAG makes the Commonwealth "look spineless, ineffective, irrelevant and even lifeless".[17]

A further limitation on the Commonwealth's ability to enforce its values comes from the fact that CMAG has a very limited array of responses that it can deploy against violations to Commonwealth values. It can condemn actions taken by countries in its bi-annual statement and suspend the member country from the Commonwealth. A country may be suspended from the Councils of the Commonwealth, whereby it is excluded from participating in ministerial level meetings. Or it may take on "full suspension." Full suspension entails suspension from all Commonwealth meetings, and technical assistance may also be withdrawn, if there is insufficient progress.[18] CMAG has only ever suspended countries where democracy has been at issue. It has never suspended a country purely for reasons of ongoing human rights violations, deterioration of human rights situations or failing to respond to human rights violations.

The countries that CMAG has suspended to date are Sierra Leone (from 1997 to 1998), Pakistan (from 1999 to 2004 and 2007 to 2008), Fiji (from 2000 to 2001 and from 2006 till date) and Zimbabwe (from 2002 till it withdrew voluntarily from the Commonwealth in 2003). It also approved the Commonwealth Heads of Government's decision to suspend Nigeria in 1995. In theory, once it has suspended a country, CMAG seeks to assist it to live up to the Commonwealth values and thus resume full membership. However, the extent to which it has engaged with suspended countries and helped them to adhere to Commonwealth values has varied. The fact that CMAG does not have comprehensive engagement processes to assist suspended states and the fact that it does not possess more graduated, nuanced responses to address situations where human rights violations are concerning, but fall short of warranting the suspension of a member country, inhibits CMAG's effectiveness at protecting human rights.

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[15] Duxbury, Alison (2003), "Reviewing the Commonwealth's Rights Record: From Recognition to Realisation", *South African Journal on Human Rights* vol 19, p. 656.
[16] Banerji, A., "A Commonwealth of Nations: A Force for Democracy in the 21st Century", *The Round Table* 97(399) (December 2008), 816.
[17] Kirby, Michael, "The Commonwealth of Nations Today: Historical Anachronism or Focus for Universal Values", *Commonwealth Law Bulletin* (March 2011), 59.
[18] Cooper, Daisy, Seddon, David, Sheehy, Tim, "Review of the Commonwealth Ministerial Action Group: On the Side of the People?", Commonwealth Advisory Bureau (2011) 3.

There are two final issues that have hindered CMAG's effectiveness at protecting human rights. First, it has very limited methods to attain information about human rights violations in member states as it lacks a permanent monitoring or investigative body. This limitation is exacerbated through the lack of formal channels, whereby CMAG can solicit information from credible civil society sources. Second, for the most part, CMAG only meets twice a year which means its response to situations are rarely, if ever, immediate. There are provisions to call for special and extraordinary meetings of CMAG, but these have been exercised on only a handful of occasions.

The numerous problems with CMAG's ability to respond effectively to violations of Commonwealth values attracted significant attention immediately prior to the 2011 CHOGM. An array of groups and organisations expressed concerns with CMAG's effectiveness including the EPG,[19] the Commonwealth Advisory Bureau[20] and the Royal Commonwealth Society.[21] Even the Secretary-General, Kamalesh Sharma, acknowledged that: "There is a general sense among our Commonwealth Heads of Government that more is needed of CMAG. While it may not be just to say that CMAG lacks teeth, it does need the will and the capacity to look beyond 'unconstitutionality', at the other values that are open to serious violation, within constitutionally elected governments."[22]

As a self-correcting measure, CMAG issued guidelines for its own functioning in 2011. The guidelines included establishing clearer procedures and timelines for referring issues to CMAG, such as providing the Secretary-General with criteria to consider when determining whether there has been a "serious or persistent violation of Commonwealth values".[23] They also stressed the importance of engagement with member countries that come before CMAG,[24] and expressly included the following:

> [i]n circumstances where the violation of Commonwealth values is, in the Secretary-General's opinion, particularly serious and requires an urgent response, or poses a significant imminent threat to citizens, or where there is an imperative for CMAG to act immediately to ensure it is in step with developments and international reactions, the Secretary-General, in consultation with the Chair of CMAG, should call an extraordinary meeting of CMAG as soon as possible to brief members on the situation and allow appropriate consideration by members.[25]

Further, the 2011 guidelines affirmed CMAG's role in setting its own agenda and ability to discuss any matter raised by CMAG members regardless of whether the Secretary-General has first considered the issue.[26]

To some extent, the 2011 reforms provide CMAG with a path to improve its ability to protect human rights. As noted above, the criteria put forth for assessing what constitutes "a serious or persistent

[19] Commonwealth Eminent Persons Group, "A Commonwealth of the People: Time for Urgent Reform", (2011).
[20] Cooper, Daisy, Seddon, David, Sheehy, Tim, "Review of the Commonwealth Ministerial Action Group: On the Side of the People?", Commonwealth Advisory Bureau (2011).
[21] Royal Commonwealth Society, "Celebrating Sixty Years of the Commonwealth: Past, Present and Future" (2009), 80; Bennett, Joanna, Sriskandarajah, Dhananjayan and Ware, Zoe, "Common What? Emerging Findings of the Commonwealth Conversation", Royal Commonwealth Society (November 2009), pp. 22-23.
[22] Sharma, Kamalesh, "Roundtable Centenary Conference: Democracy and the Commonwealth", 23 June 2010:: http://secretariat.thecommonwealth.org/speech/191183/176911/225342/sg_round_table_democracy_and_the_commonwealth.htm as on 19 November 2013.
[23] "Strengthening the Role of the Commonwealth Ministerial Action Group (CMAG)", Report of CMAG as adopted by Heads of Government at their meeting in Perth, 2011, pp. 7-15.
[24] Ibid, p. 6.
[25] Ibid, p. 11.
[26] Ibid, p. 10.

violation of Commonwealth values" are relatively narrow, and focussed on political values, but they did offer hope that there would be a broader and more objective approach to determining what issues come before CMAG. Further, the details regarding extraordinary meetings suggest that CMAG may be more willing to respond to urgent crises.

There are, however, reasons to remain concerned about CMAG's ability to respond effectively to human rights abuses. First, in the two years since the adoption of the changes, despite various egregious violations of the newly adopted Charter, CMAG chose not to look beyond issues concerning unconstitutional challenges to governments and only placed two countries on its agenda: Fiji and the Maldives. While CMAG made some cursory references to human rights issues that exist in Fiji, both states are on CMAG's agenda primarily because of election and democracy concerns. This selective approach to their mandate means that innumerable human rights abuses perpetrated throughout the Commonwealth have not resulted in formal consideration and reporting by CMAG. Examples of human rights violations that have not made it to CMAG's agenda, following the reform process, include: continued impunity regarding credible allegations of war crimes committed by both sides in Sri Lanka's civil war; widespread reports of limitations on fundamental freedoms and the commission of torture by state security officials in Uganda; continuing constriction of constitutional guarantees in Swaziland; and authoritarianism and the state policy of discrimination against sexual minorities coupled with open presidential threats to behead homosexuals in The Gambia.[27]

Thus, the extent to which the reforms have assisted CMAG to overcome its history of interpreting its mandate narrowly and being selective about which situations it addresses is questionable. Further, CMAG has chosen to ignore many situations where gross violations of Commonwealth values have occurred. Perhaps the most significant example of this has been its failure to place Sri Lanka formally on its agenda despite the ongoing human rights abuses there. Finally, the reforms have not addressed the problems concerning CMAG's lack of investigative and monitoring powers, its limited range of responses or the fact that it is not a permanent body that can continuously and systematically identify and respond to violations of Commonwealth values.

[27] The Gambia voluntarily withdrew from the Commonwealth in October 2013.