

CHRI 2013 REPORT

THE MISSING LINK

A COMMONWEALTH COMMISSIONER FOR HUMAN RIGHTS



CHRI

Commonwealth Human Rights Initiative

working for the practical realisation of human rights in the countries of the Commonwealth

Commonwealth Human Rights Initiative

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-governmental organisation, mandated to ensure the practical realisation of human rights in the countries of the Commonwealth. In 1987, several Commonwealth professional associations founded CHRI. They believed that while the Commonwealth provided member countries a shared set of values and legal principles from which to work and provided a forum within which to promote human rights, there was little focus on the issues of human rights within the Commonwealth.

The objectives of CHRI are to promote awareness of and adherence to the Commonwealth Harare Principles, the Commonwealth Charter, the Universal Declaration of Human Rights and other internationally recognised human rights instruments, as well as domestic instruments supporting human rights in Commonwealth member states.

Through its reports and periodic investigations, CHRI continually draws attention to progress and setbacks to human rights in Commonwealth countries. In advocating for approaches and measures to prevent human rights abuses, CHRI addresses the Commonwealth Secretariat, member governments and civil society associations. Through its public education programmes, policy dialogues, comparative research, advocacy and networking, CHRI's aim is to act as a catalyst for reform.

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*Commonwealth Journalists Association, Commonwealth Legal Education Association, Commonwealth Parliamentary Association and Commonwealth Broadcasting Association.



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FOREWORD

In 2013, the Commonwealth finds itself in a crisis of conscience. 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. This was referred to the Secretary-General and the Commonwealth Ministerial Action Group (CMAG) for further consideration. The Secretary-General and CMAG reported back to a Foreign Ministers' Meeting in September 2012. In October 2012, Commonwealth Foreign Ministers completed their review of referred recommendations by reporting on their findings to Heads of Government. A Commissioner was not on the Foreign Ministers list of accepted proposals that went to the Heads of Government. By the end of 2012, the Heads of Government had approved various EPG recommendations but the recommendation relating to the creation of a Commissioner was not one of them. The Commissioner recommendation was dropped since no consensus could be reached. We are informed that the matter is dead, off the table and cannot be considered further. However, events over the last two years, between CHOGMs, makes it clearer than ever that the Commonwealth must once again consider, and this time agree, to create an independent specialist who can monitor, investigate and advise on human rights.

During the two years since the Perth meeting, human rights standards in the Commonwealth have continued to be a cause for alarm, despite implementation of reform 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. Credible allegations of war crimes in Sri Lanka remain unpunished, while civil society is stifled and the rule of law undermined; State security officials in Uganda are accused of torture and limiting fundamental freedoms; and the authoritarian State policy in Swaziland weighs down on the rights of its people. These are only a few illustrations of many worrying practices that continue across the organisation, showing that countries that should be on CMAG's watch list have got a free pass and those that should be on CMAG's agenda have been assisted in avoiding accountability for past actions. Reform efforts have not assisted CMAG to fulfil its potential and neither have they positively impacted the contribution of the Secretary-General to the Commonwealth.

The recent controversy surrounding the Secretary-General commissioning legal opinions on the impeachment of the Chief Justice of Sri Lanka, and then withholding these opinions from CMAG, despite their requests to see the documents, demonstrates that the Secretary-General is effectively not held to account by any government or body, which should worry every Member State. Moreover, this lack of accountability is crippling for CMAG's efforts to uphold Commonwealth values. It would be a worrying development if the decision not to disclose the opinions was based on the knowledge that the content – confirmation of a breach of Commonwealth democratic values – would necessitate action by CMAG, undermining the Good Offices of the Secretary-General. Ensuring an appropriate separation of the Commonwealth's powers, would, rather than providing complete autonomy to the Secretary-General, aid CMAG to carry out its functions effectively. The creation of an independent expert tasked with investigating, reporting and advising CMAG on violations of Commonwealth values would be one such way to achieve this.

During each CHOGM, we have seen a new commitment to promoting and protecting human rights. Nonetheless, deeds have not followed words. Experience shows that in the absence of an independent entity, able to keep human rights under review, the promise of a renewed Commonwealth will not be fulfilled. Now, more than ever before, CHRI sees value in the appointment of a Commonwealth Commissioner for Human Rights and urges Member States to review it afresh. The Commonwealth today needs an independent Commissioner for Human Rights to rebuild the confidence of its people in the value of the Commonwealth and to fill the gap between promise and practice.



Yashpal Ghai

Chair, Commonwealth Human Rights Initiative
New Delhi, 2013

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Maja Daruwala

Director, Commonwealth Human Rights Initiative

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EXECUTIVE SUMMARY

In 2013, the Commonwealth finds itself in a crisis of conscience. This crisis has been building slowly. In response the Eminent Persons Group (EPG) was created in 2009 “to build a stronger, more resilient and progressive Commonwealth and make it relevant to its times and people in the future”. Several of the EPG’s recommendations were put in place between the 2011 and 2013 biennial Heads of State meetings. A Commonwealth Charter consolidating the Heads of Governments’ commitment to human rights was adopted, the Secretary-General’s Good Offices role was strengthened and the mandate of the Commonwealth Ministerial Action Group (CMAG) was enhanced. However, the EPG’s recommendation to appoint a Commissioner for Democracy, the Rule of Law and Human Rights was dropped because Member States could not reach a consensus on how to respond to this recommendation.

In the interim, since 2011, human rights standards in the Commonwealth continue to be a cause for alarm. Countries that should be on CMAG’s watch list have got a free pass and those that ought to be on CMAG’s agenda have been assisted in avoiding accountability for past actions. There has never been a greater need for an independent expert to better advise Commonwealth mechanisms on human rights issues.

Despite the EPG prompted reform efforts; Commonwealth mechanisms continue to be insufficient for responding to human rights violations. Since the reforms, CMAG’s potential has remained unfulfilled and it continues to interpret its mandate narrowly – choosing to focus on threats to democracy – to the exclusion of human rights issues. Moreover, the need for a politically neutral independent advisor to CMAG was made apparent recently when the Secretary-General withheld legal opinions on the impeachment of the Sri Lankan Chief Justice from CMAG – The Commonwealth’s mechanism mandated to respond when Commonwealth values are threatened. This demonstrated a lack of cooperation which will cripple the Commonwealth’s ability to uphold its values. The Secretary-General, in practice, remains largely unaccountable and his approach to behind the scenes diplomacy has allowed human rights abusers to repeatedly violate Commonwealth values while the Commonwealth looks on silently. This conflict between quiet diplomacy and the need to denounce human rights violations has not been addressed by the reform process. The Human Rights Unit (HRU), the only Commonwealth body dedicated exclusively to addressing human rights on a full-time basis is mandated to both promote and protect human rights within all Commonwealth Member States. The HRU however, does not have the capacity or capability to monitor or investigate human rights abuses and in its work continues to be captive to the political currents of the Secretariat.

In sum, the Commonwealth has not been able to hold its Member States to their collective core human rights commitments because its current mechanisms are not adequate for protecting human rights and it does not use the mechanisms it has to optimum effect. Experience shows that in the absence of an independent entity able to keep human rights under review the promise of the new Charter, adopted in March 2013, will remain unfulfilled.

Despite the evident necessity for a Commonwealth Commissioner for Human Rights, several unmeritorious arguments have blocked its creation, hindering the operationalisation of the Charter. One objection was that the Commonwealth should focus on development rather than human rights. In fact, human rights and development are inextricably linked. Sustainable development – that does not exacerbate inequality and marginalisation – can only flourish in countries where human rights are protected. By applying a rights-based approach to development, a Commissioner would enhance the development goals of the Commonwealth.

Another argument against the creation of a Commissioner is that it would create financial burdens for the Commonwealth. However, the benefits of a Commissioner, in terms of reputation, visibility and effectiveness far outweigh any cost implications.

Moreover, some States have also contended that establishing a Commissioner would provide an excuse for interference in the domestic affairs of a State. It is now well established that when governments oppress their people, the sovereignty versus outside interference argument has no legitimacy. Add to this the fact that when States join an international association that has values they open themselves up to being questioned about those values and it becomes apparent that a Commissioner would by no means illegitimately interfere in domestic affairs.

A further objection to a Commissioner was that it would be a duplication of the functions of the Secretary-General and CMAG. The Commonwealth Human Rights Initiative calls for the establishment of a Commonwealth Commissioner for Human Rights, who would not be a replication of what is already present in the Commonwealth but a much needed complement that will help the Commonwealth live up to its new Charter. A Commonwealth Commissioner would be a full-time specialist, independent from the Commonwealth Secretariat and equipped with suitable infrastructure and a mandate that would enable review of a Member State's human rights compliance. Such a mechanism would reduce the onerous responsibilities the reform process placed upon the Secretary-General, enabling him to focus on his core functions. A Commissioner mandated to monitor and investigate human rights abuses would have the expertise and facilities to ensure that CMAG was given an early warning of human rights violations and would also advise on the range of options available to CMAG in order to positively affect country situations.

In this manner, a Commissioner entrusted to provide politically neutral country information would facilitate the adoption of transparent procedures and would make obvious the Commonwealth's commitment to human rights and thereby the inherent dignity of its citizens. This would in turn lend to reviving the relevance of the Commonwealth to its people and to the international community. Moreover, a Commonwealth Human Rights Commissioner who can be easily accessed by, and communicate with, citizens of the Commonwealth would go some way to addressing the isolation of the Commonwealth from its people.

The hosting of CHOGM in Sri Lanka, a country the United Nations High Commissioner for Human Rights has described as "heading in an increasingly authoritarian direction", has led to a credibility crisis regarding the Commonwealth's response to human rights abuse in the first year of the Charter's existence. The Commonwealth must counter this by demonstrating that it has the will and machinery to fiercely protect its values. At a time of global financial crisis and widespread growing demand for people's participation in their own democracies, the Commonwealth needs to assure itself of the financial support of member governments. Vitally important for this is the belief of the citizens of those countries in the organisation's relevance to their lives. Without a Commissioner to aid the coming alive of Commonwealth values in people's lives, this appears unattainable.

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Background to the Recommendation for a Commonwealth Commissioner

For over four decades the Commonwealth has expressed its commitment to democracy, the rule of law, human rights, development, peace and cooperation.¹ These values are elaborately described in numerous declarations, statements and communiqués² and make up the heart of the Commonwealth. The promotion, protection and realisation of human rights is the Commonwealth's stated *raison d'être*³ but there remains an alarming difference between promise and practice. A process of reforms was undertaken in response, yet today the gap remains.

The need for systematic and functional reform that would see the Commonwealth more active in the protection of its core values and more relevant to its population of over two billion people⁴ has been pointed out, repeatedly, from within both official and non-governmental quarters.⁵ David Miliband, former UK Foreign Minister, stated it succinctly: "The truth about values is that unless you defend them and advance them you'll find them rolled back."⁶ In a poll conducted by the Royal Commonwealth Society, 83 per cent of all people surveyed believed the Commonwealth was "in desperate need of a makeover".⁷ The Commonwealth Policy Studies Unit also called for reform of the Commonwealth's mechanisms and recommended greater focus on enhancing the Commonwealth's capacity to monitor Member States' adherence to political values and shame them when they transgress.⁸

To address these longstanding criticisms the 2009 Trinidad and Tobago Commonwealth Heads of Government Meeting (CHOGM) established the Eminent Persons Group (EPG).⁹ The EPG was tasked with providing advice on how "to build a stronger, more resilient and progressive Commonwealth and to make it relevant to its times and to its people in the future".¹⁰ The EPG recognised that championing human rights was central to the revitalisation and relevance of the Commonwealth brand.¹¹ It noted that the organisation had failed to effectively promote and protect its brand for far too long.¹² The EPG attributed this discrepancy to the lack of an investigative and advisory mechanism that would ensure that the Commonwealth Ministerial Action Group (CMAG) was appropriately apprised of serious or persistent violations of human rights within the Commonwealth.¹³ This absence was appropriately referred to as the Commonwealth's "significant gap".¹⁴

Commissioner Process at Perth

The EPG presented its recommendations to Heads of Government at the 2011 CHOGM in Perth, Australia. Following a day of discussions, Australia's Prime Minister revealed that the recommendation for a Commonwealth Charter had been accepted.¹⁵ Unfortunately, the recommendation to establish a Commissioner for Democracy, the Rule of Law and Human Rights did not receive a similarly rapid and positive response. Instead the proposal, along with other recommendations that did not benefit from consensus in Perth, was referred to the Chairman of the Commonwealth Ministerial Action Group (CMAG) and the Secretary-General for further consideration.¹⁶

In October 2012, Commonwealth Foreign Ministers reviewed the referred recommendations and reported back to Heads of Government. A Commissioner was not on the Foreign Ministers list of accepted proposals. By the end of 2012 the Heads of Government had approved various EPG recommendations but the recommendation relating to the creation of a Commissioner was not one of them.¹⁷

While the proposal for a Commissioner for Democracy, the Rule of Law and Human Rights has not officially been rejected, the proposal will not be the subject of further consideration unless there is a renewed interest in it from Commonwealth States

Building a Stronger Commonwealth

Sensing that the Commonwealth was in danger of losing touch with its *raison d'être*, in 2009 the Commonwealth Heads of Government established, an Eminent Person's Group (EPG) to "undertake an examination of options for reform" through which the Commonwealth could transform itself into a global body with renewed relevance for the twenty-first century.¹⁸ Also up for self-review was the Commonwealth Ministerial Action Group (CMAG), a body which has the power to suspend or eject members of the Commonwealth if they seriously or persistently violate the principles of the Harare Declaration. However, CMAG has chosen to interpret its mandate narrowly, meaning that it has only suspended Member States which experienced unconstitutional overthrow of government, and has not taken to task those regimes that consistently violate the human rights of their populations.

To fill this "significant gap" through the championing of values the EPG made various recommendations. Between the 2011 and 2013 CHOGMs a number of these EPG recommendations were put in place: The Charter was adopted; the Secretary-General's Good Offices role was strengthened;¹⁹ and in parallel, the mandate of the Commonwealth Ministerial Action Group was amended.²⁰ However, an essential link in the chain of renewal was missed – the creation of a Commissioner.

What's in a Name?

The decision by the EPG to name their proposed Commissioner a Commissioner for Democracy, the Rule of Law and Human Rights goes some way to explain the rejection of the proposal. The inclusion of the wider ambit of rule of law appears to have been done to soften the focus on the presence of someone mandated to monitor human rights compliance, but it also proved to be an easy target for those against the Commissioner, as traditionally there were working mechanisms within the association able to address deficits in the rule of law and governance. The merit of a Commissioner arises if the individual can be seen as a source of dedicated expert advice. Currently, aside from the Human Rights Unit – which focuses on promotional rather than protective activities – the Commonwealth does not have a body, or an individual, that is dedicated solely to the protection of human rights. CMAG receives its human rights advice from the Secretary-General who is a diplomat – not an expert on human rights – and who has various other duties to distract attention from human rights compliance. Therefore, a Commissioner for Human Rights would add value to existing Commonwealth mechanisms by being a specific resource for a specific problem. CHRI thus diverges from the recommendation of the EPG, and advocates for a Commissioner tasked solely with the protection of human rights.

Current Commonwealth Mechanisms for Responding to Human Rights Violations



Looking around the Commonwealth today there is little evidence that its existing mechanisms: CMAG, the Secretary-General and the Secretariat's Human Rights Unit are sufficient to deliver interventions capable of demonstrating the association's dedication to put itself on the global map as a value-based entity. Neither has it been demonstrated that the Commonwealth can put erring Member States on a road to observance of the new Charter.

Commonwealth Ministerial Action Group

Despite reforms to CMAG's mandate²¹ aimed at improving the Commonwealth's response to serious or persistent violations of human rights, CMAG's potential has remained unfulfilled. CMAG continues to interpret its mandate narrowly, with a heavy emphasis on addressing threats to democracy, to the exclusion of human rights issues. Despite various egregious violations of the newly adopted Charter

only two countries, Fiji and Maldives, have appeared on CMAG's agenda in the two years since reforms were initiated.²²

The Charter and CMAG's recommendations affirm that human rights are a fundamental value of the Commonwealth,²³ therefore CMAG is obligated to act as a "custodian" of these values.²⁴ However, while some cursory references to human rights issues were made regarding Fiji and Maldives, both states came on to CMAG's agenda primarily because of election and democracy concerns.²⁵ This selective approach to their mandate has meant 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 on 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;²⁶ widespread reports of limitations on fundamental freedoms and the commission of torture by state security officials in Uganda;²⁷ continuing constriction of constitutional guarantees in Swaziland;²⁸ and authoritarianism and the state policy of discrimination against sexual minorities coupled with open presidential threats to behead homosexuals in The Gambia.²⁹

Concerning discrimination against sexual minorities, Justice Michael Kirby (a member of the EPG) observed that by not taking action on this issue CMAG makes the Commonwealth "look spineless, ineffective, irrelevant and even lifeless".³⁰ Therefore, the extent to which the reforms helped CMAG overcome its history of reluctance to hold countries accountable for grave human rights breaches, is at best questionable, and at worst negligible. A Commissioner for Human Rights could ensure that CMAG was fully informed of human rights violations and the range of options available to address the situation positively.

Secretary-General

Independent of CMAG, as well as in tandem with it, the Secretary-General has always had a uniquely powerful role to play – if he so chooses – in addressing human rights concerns. The 1995 Millbrook Commonwealth Action Plan on the Harare Declaration declared that "[w]here a member country is perceived to be clearly in violation of the Harare Commonwealth Declaration and particularly in the event of an unconstitutional overthrow of a democratically elected government appropriate steps should be taken" including the "immediate public expression by the Secretary-General of the Commonwealth's collective disapproval of any such infringement of the Harare principles".³²

Why the Time is Right for a Commonwealth Commissioner for Human Rights

- In the two years since the Commonwealth committed itself to reform neither CMAG nor the Secretary-General's office have lived up to expectations. Commonwealth mechanisms remain insufficient for responding to human rights abuses.
- Experience shows that in the absence of an independent entity able to keep human rights under review the promise of the new Charter, adopted in March 2013, will not be fulfilled.
- The recent controversy surrounding the Secretary-General withholding material information from CMAG demonstrates a lack of cooperation towards a common objective, which will cripple the Commonwealth's ability to uphold its values. CMAG needs independent expert advice, now more than ever.
- Hosting CHOGM in Sri Lanka, a country the United Nations High Commissioner for Human Rights has described as "heading in an increasingly authoritarian direction",³¹ has led to a credibility crisis regarding the Commonwealth's response to human rights abuse. The Commonwealth must counter this by demonstrating that it has the will and machinery to fiercely protect its values.
- At a time of global financial crisis and widespread growing demand for people's participation in their own democracies the Commonwealth needs to assure itself of the financial support of its member governments. Vitally important for this is the belief of the citizens of those countries in the organisation's relevance to their lives. It is essential that contributors do not regard the Commonwealth as a drain on resources, without having a corresponding benefit. In the absence of a Commissioner to aid the coming alive of Commonwealth values, securing assured funding and support seems unattainable.

The 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 1991.³³ 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".³⁴

However, the limited extent to which the current Secretary-General has protected human rights, or spoken out decrying them, has been widely criticised.³⁵ A leaked memo from the Commonwealth Secretariat revealed that the Secretariat was of the view that it "has no explicitly defined mandate to speak publicly on human rights"³⁶ and that "such crude megaphone diplomacy would be simply counterproductive – we'd rather proffer a helping hand".³⁷ Taking cognizance of this, the EPG report emphasised that "[s]ilence should not be an option".³⁸

Nonetheless, the Secretariat's reluctance to make public statements when the Charter's values are violated is on-going and justified on the grounds that public statements may prejudice the Secretary-General's Good Offices. Since Good Offices are by nature behind-the-scenes activities, the vigour and worth of this "quiet diplomacy" can only be guessed at. The operations of the Good Offices remain cloaked in secrecy. There is no public website presenting a list of the countries where the Good Offices are currently deployed, nor is information available about when the Good Offices are deployed, what activities are undertaken or what progress has been made in countries receiving the Good Offices. This lack of information makes it difficult, if not impossible, to assess their effectiveness and to hold the Secretary-General to account. In fact, both the EPG and the Commonwealth Advisory Bureau feared that "the Commonwealth's bias towards behind-the-scenes diplomacy has allowed abusers "to continue to violate Commonwealth values".³⁹ Yet, the reform process has not addressed this conflict between the Good Offices and public denunciation. A Commissioner, mandated to speak out on human rights, would rectify the current appearance of inaction.

The Commonwealth Charter

In 2012, the Commonwealth adopted the Commonwealth Charter which clarifies, consolidates and elaborates upon the association's fundamental values. The Charter affirms the commitment of Commonwealth Member States to the principles of human rights and the obligations contained in relevant international instruments.

Overview of the Provisions and Values that are Affirmed in the Charter:

- I Democracy
- II Human Rights
- III International Peace and Security
- IV Tolerance, Respect and Understanding
- V Freedom of Expression
- VI Separation of Powers
- VII Rule of Law
- VIII Good Governance
- IX Sustainable Development
- X Protecting the Environment
- XI Access to Health, Education, Food and Shelter
- XII Gender and Equality
- XIII Importance of Young People in the Commonwealth
- XIV Recognition of the Needs of Small States
- XV Recognition of the Needs of Vulnerable States
- XVI The Role of Civil Society

Human Rights Unit

Within the Secretariat it is only the Human Rights Unit (HRU) that addresses human rights issues on a full-time basis. Its earlier mandate to promote human rights within the Commonwealth was expanded in 2002 to include the protection of human rights.⁴⁰ This gave it the power to provide advice on human rights issues to the Secretary-General and CMAG. Currently however, there is little reporting on the exercise of this power and it is not clear how much its views are filtered, what weight its advice carries or how much it is heeded. In fact, there is little evidence to suggest that the HRU has had any major impact on CMAG's decision-making. What is clear however is that its capacity was not enhanced to fulfil this new purpose, that the renewal did not give it monitoring or investigative capabilities nor is it independent of the political currents and more powerful interests within the Secretariat. An appropriately resourced independent Commissioner for Human Rights, mandated to monitor and investigate human rights abuses would have the expertise and facilities to ensure timely advice that could not easily be ignored.

In sum, the Commonwealth has not been able to hold its Member States to the commitments contained in the Charter because its current mechanisms are inadequate to protect human rights and it does not use the mechanisms it already has to optimum effect. To revive the association, the Commonwealth's human rights brand needs to be built and subsequently protected; but reform efforts have been unable to achieve this.



The Test for the Reform Efforts: Sri Lanka

Potentially influenced by the Secretary-General's silence, the operation of the Secretary-General's Good Offices and the fact that Sri Lanka would be hosting CHOGM, Sri Lanka remained notably absent from CMAG's agenda, despite credible allegations of violations of the Charter—namely on-going restrictions on civil liberties, intolerance for dissent, intimidation of the media and inaction in the face of extremist attacks against minorities.⁴¹ Sri Lanka continued to evade CMAG's agenda even after the impeachment of its Chief Justice. The illegality of the impeachment was declared by the country's own Supreme Court and confirmed in a leaked legal opinion by an international expert that additionally noted that it had violated the Commonwealth's Latimer House Principles.⁴² These principles require all countries to have an independent judiciary free from any interference by the executive.⁴³ Hence this absolute infraction should have triggered immediate action by CMAG.⁴⁴

The Venue Controversy

At the 2011 CHOGM in Perth, the Commonwealth re-confirmed that Sri Lanka would be the venue of choice to host the 2013 Heads of Government meeting.⁴⁵ Sri Lanka was due to host CHOGM in 2011, however, in order to keep the human rights situation under review it was decided that the hosting of CHOGM would be deferred till 2013.⁴⁶ After credible allegations of war crimes emerged publicly, supported by no less than the United Nations Secretary General's Expert Panel,⁴⁷ a controversy broke out about the suitability of Sri Lanka to host CHOGM at all. The decision to host CHOGM in Sri Lanka attracted severe criticism from several quarters,⁴⁸ Canada announced that their Prime Minister will boycott CHOGM⁴⁹ and certain civil society organisations advocated for a boycott.⁵⁰ All this signified the unsuitability of Sri Lanka to host the first meeting after the adoption of the Charter.

CMAG however, did not act. Instead, at a critical moment, CMAG appeared paralysed in the shadow of the Secretary-General's Good Offices and Sri Lanka's acceptance of some minimal "technical assistance".⁵¹ Arguably, the fact that the Secretary-General chose to withhold the legal opinions from CMAG, denied it the opportunity to review the advice and impacted on its course of action. Perhaps if CMAG had an independent source of advice, such as a Commissioner, a different response would

have been forthcoming. At a minimum, it demonstrated that the Secretary-General is not held to account by any government or body, which should worry all Member States. Moreover, this lack of accountability is crippling CMAG's efforts to uphold Commonwealth values. It would be a worrying development if the decision not to disclose these opinions derived from a protectionist position in relation to the Good Offices knowing that the contents would necessitate action by CMAG. Ensuring an appropriate separation of the Commonwealth's powers, through the creation of an independent advisor to CMAG, rather than providing the Secretary-General with complete autonomy, would empower CMAG to carry out its functions effectively.

The Commonwealth's ambivalent response to the Sri Lankan situation gives the impression of reward rather than sanction. It has bestowed on Sri Lanka the honour of hosting its most prestigious summit, following which, according to established practice the Sri Lankan President should be installed as Chairperson in Office for the next two years. These developments, rolling out in the first year of the celebrated new Charter, show that now more than ever the Commonwealth needs an independent human rights commissioner who would help it to guard its values contained in the Charter and fulfil its potential.



Benefits of a Commonwealth Commissioner for Human Rights

In keeping with the post envisaged by the EPG,⁵² a Commonwealth Commissioner would be a full-time independent specialist equipped with suitable infrastructure and a mandate to review State compliance with Commonwealth human rights values. As a separate entity, outside the political currents that buffet CMAG and the Secretary-General's office, the Commissioner would be a source of politically neutral country information to CMAG, allowing for better-informed decision-making.

A Commissioner dedicated to human rights compliance could constantly garner information from within the Commonwealth, monitor developments and prepare annual reports – which over time would create a unifying jurisprudence specific to the Commonwealth. This would counter the present contentions that some Member States impose their own standards on other members. It would also give the Commonwealth cohesion, based on common ideals binding members together beyond their long dubious colonial history.

A full-time Commissioner could red-flag situations for the Secretary-General and CMAG, enabling them to avoid the present criticism that the Commonwealth either does not respond to human rights abuses or responds within an inappropriate time frame. The Commonwealth does not currently have such a mechanism.

A Commonwealth mechanism that could be accessed by, and communicate with, citizens of the Commonwealth – in the form of a human

Benefits of a Commissioner

- A mechanism that would be dedicated to the protection of human rights on a full-time basis.
- A Commissioner would be suitably qualified to provide advice. It is inappropriate that human rights law be viewed as a political issue that can be delegated, as an additional function, to a diplomat without a human rights background.
- A Commissioner would provide politically neutral information by being independent of the political currents of the secretariat.
- A Commissioner would be resourced with an appropriate infrastructure and mandate to effectively monitor and investigate human rights situations.
- A Commissioner would be able to introduce an early warning system for grave human rights violations.
- A Commissioner would be able to provide timely advice that could not easily be ignored.
- The provision of better advice will lead to better informed decision-making.
- A Commissioner would create a unifying jurisprudence of human rights principles, standards and compliance throughout the Commonwealth.
- A Commissioner would thwart the appearance of inaction and indifference that plagues the Commonwealth.
- Protecting the Commonwealth's values ensures that the organisation has a clear purpose.
- By instigating a communication procedure a Commissioner would reduce the isolation of the Commonwealth from its people.

rights commissioner – would also go some way towards addressing the isolation of the official Commonwealth from its people. The Commonwealth needs to get into the habit of transparent procedures by which its commitments to the Charter are evident to the world. This is not presently the case. The Commissioner's periodic observations, response to communications, regular reports and warnings would make the Commonwealth commitment to human rights obvious.

Increasing the relevance of the Commonwealth to the international community is a further achievable benefit. Internationally, in an arena crowded with regional, military, thematic and global alliances, the Commonwealth aspires to a premier place for its association of nations. For this, it must bring something to the table beyond a shared history, governance and legal system. It must demonstrate that it is capable and worthy of contributing positively to the international community in an innovative and value-adding manner. It has occasionally done so in the past through its steadfast support to bring down the apartheid regime in South Africa⁵³ and championing debt reduction in highly indebted countries.⁵⁴ However, in a fast moving world the past has limited recall value.



Opposition to a Commissioner for Human Rights

Despite the necessity of a Commonwealth Commissioner for Human Rights many unmeritorious arguments have blocked its creation and thereby the operationalisation of the Charter. When the EPG recommended the establishment of a Commonwealth Commissioner, a variety of Commonwealth States opposed it fervently.⁵⁵ The ostensible objections were that the Commonwealth should focus on development rather than human rights;⁵⁶ a Commissioner would usurp the roles of the Secretary-General and CMAG⁵⁷ and that a Commissioner would provide an excuse for illegitimate intervention in domestic affairs.⁵⁸ Other likely concerns are that a Commissioner might replicate the work done by other bodies or create financial burdens.

It is now well established that the sovereignty versus outside interference argument has lost its potency when used to shield governments that oppress their people. When States belong to international associations that espouse certain values they open themselves up to being questioned about those values.

The establishment of a Commissioner for Human Rights would not dilute the Commonwealth's focus on development; in fact it would enhance it by applying a rights-based approach to development.⁵⁹ Not only do human development and protection of human rights derive from the same motivating factor – a commitment to promote well-being and dignity – they complement each other: one being the means of achieving the other. Human rights provide clear objectives and targets for development, encourage consultation with communities and ensure that development is more than a commitment, but an obligation. It ensures that the intended beneficiaries receive more than promises; they receive enforceable claims – and if unfulfilled, remedies. In this way, the development discourse progresses by incentivisation through accountability, protecting achievements and social advancement from the threat of roll back and protecting against exacerbated marginalization by ensuring that all have the opportunity to participate in the development process. Hence a Commissioner dedicated to human rights would actually enhance development.

Owing to the numerous human rights bodies that currently exist around the world, there may be a tendency for certain States and analysts to assert that another specific body within the Commonwealth is unnecessary. However, the existing Human Rights Commissions and Commissioners are sorely overburdened. Further, they each have constrained mandates and are unable to devote time to the nuances of the Commonwealth in terms of its values, societies, legal systems and history. They are also unable to assume the role of special adviser to Commonwealth mechanisms, as was demonstrated by the reported actions of the Secretary-General blocking the United Nations High Commissioner for Human Rights from briefing CMAG on her country visit to Sri Lanka.⁶⁰ In this respect, the Commonwealth requires its own expert, aware of Commonwealth nuances and with the sole task of providing independent human rights advice to the Commonwealth. It is time to display the benefits of a member-orientated response to human rights.

Neither is a Commissioner a replication of existing Commonwealth mechanisms; it is a much needed complement that will help the Commonwealth live up to its new Charter. A Commonwealth Commissioner would be a full-time specialist, independent from the Commonwealth Secretariat and equipped with suitable infrastructure and a mandate that would enable a politically neutral review of a Member State's human rights compliance. A Commissioner would also have the expertise and facilities to initiate an early warning system, communication procedure and voice for the Commonwealth when confronted with human rights violations. None of these facilities currently exist within the Commonwealth.

The benefits of a Commissioner, in terms of reputation visibility and effectiveness, would offset any cost implications; as stated by the EPG: "The costs of creating the post of Commissioner are far outweighed by the costs of doing nothing".⁶¹ It may be argued that instead of adopting a new mechanism existing Commonwealth mechanisms should be strengthened. The past two years since the reform process began, however, demonstrate that such an approach is not sufficient. Independence cannot be assured within the current structure without jeopardising existing functions.



Conclusion

CHRI has called for a Commonwealth Commissioner for Human Rights for over two decades and was enthused when the EPG took up the idea, sensing that this would be the proposal to make or break the Commonwealth. Sadly, however, this EPG recommendation was not accepted and without a renewed interest from Commonwealth States, the need for a Commissioner will not be considered at the 2013 CHOGM.

The EPG had recommended the appointment of a Commonwealth Commissioner as a means by which the gap between Commonwealth promises and Commonwealth reality could be bridged.⁶² However, this recommendation was not taken forward and has since proved to be the stalling point for the reform process. Despite various significant amendments to the Commonwealth – the adoption of the Charter, amendments to the mandate of CMAG and changes to the Secretary-General's role – the Commonwealth's relevance, vis-à-vis protecting its values, remains ambivalent.

Widespread human rights abuses continue unchallenged in several Commonwealth countries despite the promotion, protection and realisation of human rights being the Commonwealth's stated *raison d'être*.⁶³ Only recently, President Jammeh withdrew The Gambia from the organisation.⁶⁴ President Jammeh's rule has seen extrajudicial executions, suppression of the media and violent hostility towards homosexuals.⁶⁵ Almost two decades of authoritarian rule by President Jammeh brought discredit to the Commonwealth owing to CMAG's lack of an effective response. It further demonstrated the need for a mechanism to protect the Commonwealth's fundamental values. Despite deployment of his Good Offices, the Secretary-General did not succeed in improving the human rights situation in The Gambia, nor did he succeed in holding the Commonwealth together. Not only could a Commissioner have positively impacted upon the lives of Gambians, but early intervention by such a nuanced mechanism, may have more appropriately dealt with the country situation in a timely manner by providing further guidance and expert opinion to CMAG. The fact that The Gambia was allowed to manoeuvre itself to a point where withdrawal was the only potential response to criticism of State policy shows a failing on the part of the Commonwealth.

The renewed Commonwealth mechanisms, designed to respond to human rights challenges, remain insufficient and under utilised for effectively protecting human rights. CMAG, the "custodian" of all Commonwealth values⁶⁶ continues to narrowly interpret its mandate, with the effect of only allowing challenges to democracy to draw its attention in terms of adding countries to its agenda.⁶⁷ Despite a renewed mandate, CMAG has not put countries on its agenda for credible allegations of gross human rights violations including extrajudicial killings,⁶⁸ torture,⁶⁹ restrictions on freedom of expression,⁷⁰ suppression of political parties,⁷¹ incitement to hatred,⁷² open State policies of discrimination against minorities⁷³ and impunity for human rights abuses.⁷⁴ Furthermore, recent developments have illustrated that CMAG lacks independent advice. Two recent controversies have demonstrated that the Secretary-General is the sole gate-keeper regarding information that CMAG has at its disposal.

Within the space of a few months it has been reported that the Secretary-General withheld relevant legal opinions from CMAG⁷⁵ and actively prevented the United Nations High Commissioner for Human Rights from briefing the group on her visit to Sri Lanka.⁷⁶ Given the sensitive nature of CMAG's role, its actions need to be based on the most reliable and objective evidence of country situations.⁷⁷ Without the support of a trusted and neutral advisory body, such as a Commonwealth Commissioner for Human Rights, this appears impossible.

Moreover, the Secretary-General's utilisation of his opaque Good Offices, at the expense of public engagement, is both questionable in terms of effectiveness and inappropriate in terms of appearance – as the Commonwealth frequently appears paralysed and disengaged when faced with gross violations of human rights. Furthermore, States must seriously reflect on the potential consequences of placing so many expectations and responsibilities on, and so much discretion with, one individual. Finally, the Human Rights Unit is both under resourced and over stretched. It is extremely effective at promoting human rights but lacks the resources and expertise to effectively monitor and investigate human rights situations – the missing link in the Commonwealth's armoury of mechanisms.

Establishing a Commonwealth Commissioner for Human Rights is the only suitable way to respond to the continuing question of the relevance of the Commonwealth. The appointment of an independent, full-time, dedicated and qualified expert, free from the political constraints of the Secretariat, would ensure that CMAG receives the level of briefings, and early warnings, that it requires in order to ensure a good decision-making process and appropriate Commonwealth response to allegations of human rights violations. The Commissioner would also positively impact upon the entire Commonwealth by clearly illustrating the added value that the Commonwealth can lend to international affairs through the protection of principles contained in the Charter. This would be achieved through public statements, creation of a Commonwealth unifying human rights jurisprudence and improved engagement with the citizens of the Commonwealth. All these tangible benefits would work together to ensure that States see that their financial contributions are being used in terms of visible action. One need only consider the comments of Canada regarding review of its USD 20 million annual contribution, in response to what it viewed as political inaction regarding human rights violations,⁷⁸ to see the importance of convincing member states of the value of the organisation.

Strong calls for reform of the Commonwealth generally, as well as sustained appeals for the establishment of an independent human rights body, reveal that the development of a Commonwealth Commissioner for Human Rights is long overdue. All involved with the Commonwealth are urged to seriously consider not only the benefits of establishing a Commissioner but also the cost of not having one. The Commonwealth is at a crossroads; it must decide whether to conclude its efforts at renewal with a bang or allow the organisation to end with a whimper, gradually fading into irrelevance while its people suffer. Now is the time for the Commonwealth to respond to its missing link; now is the time to renew the Commonwealth with a Commissioner for Human Rights.

“ The only way the Commonwealth will thrive is to re-assert the moral authority it once had. This may mean more countries withdrawing, but a smaller, more effective Commonwealth is better than one that stays silent simply to keep the club together.”⁷⁹

Distinctive Attributes of Commonwealth Mechanisms to Respond to Human Rights Abuse

	Secretary-General	CMAG	Human Rights Unit	HYPOTHETICAL Commissioner
Detection	N/A.	N/A.	N/A.	Pan-Commonwealth system to detect, investigate and respond. Early warning system. Citizen communication procedure. Investigate the human rights situation of States seeking membership.
Decision-Making	Good Offices: Decision to offer assistance and what type of assistance to offer. CMAG: Decision to place countries on CMAG's agenda and raising countries to be discussed under "other matters of interest".	Decision to place countries on the agenda and raising countries to be discussed under "other matters of interest". Decision to partially or fully suspend members.	N/A.	N/A.
Advice	Advisor: To CMAG on country situations but possess discretion about when to advise and what sources to reveal. Additionally, the Secretary-General is only compelled to advise CMAG when he personally determines that there has been a breach of Commonwealth values.	Receives advice from the Secretary-General and the HRU. Chair can be approached by the Secretary-General to offer advice on the Good Offices.	Mandated to advise CMAG on the protection of human rights.	Permanent, independent source of expert human rights advice to CMAG. Can advise CMAG on any human rights issue and appropriate responses. On request will provide human rights advice to the Secretariat and Member States.
Quiet Diplomacy	Good Offices.	CMAG meetings.	Support Secretary-General.	N/A.
Public Statements	Rarely issues public statements.	Limited statements on their discussions of agenda items.	N/A.	Yes.
Promotion of Human Rights	N/A.	N/A.	Yes: Educational campaigns, publications, promotion of treaty ratification and support to National Human Rights Institutions.	N/A.

APPENDIX

Recommendations contained in the report “Strengthening the Role of the Commonwealth Ministerial Action Group (CMAG)” and subsequently adopted by the Commonwealth Heads of Government Meeting, 2011

The current procedure for addressing serious or persistent violations of Commonwealth values, other than the unconstitutional overthrow of a democratically-elected government, should be revised as follows:

1. The Secretary-General should, in the first instance, take cognisance of a situation of concern, be it a significant structural deficiency in a democratic institution or a serious or persistent violation of Commonwealth values, and raise it with the Member State in question, affording it an opportunity to respond, and offering his/her Good Offices to redress the situation;
2. The Secretary-General’s Good Offices engagement with the government concerned could include:
 - a. the appointment of an envoy,
 - b. the offer of advice and technical assistance in relevant areas to help redress the issues of concern, and
 - c. consultation with relevant regional leaders, with regional and other international organisations, as well as other relevant Commonwealth bodies;
3. The Secretary-General will consult the Chair of CMAG on relevant country situations, as required, including where his/her Good Offices’ engagements are active. The Secretary-General would, of course, also retain the ability to brief and consult the Commonwealth Chairperson-in-Office on matters under consideration and seek his/her intervention as appropriate;
4. In the spirit of the principles expressed in paragraphs 11 and 16, any Member State may draw to the attention of the Secretary-General a situation of concern in a fellow Member country that is perceived to be a significant violation of Commonwealth fundamental political values, offering supporting evidence;
5. If the Secretary-General recognises that a situation is indeed a matter that may constitute a serious or persistent violation of Commonwealth values, he/she will undertake an assessment of the situation in question, using relevant evidentiary sources, and accordingly bring it to the attention of CMAG, also citing, subject to his/her discretion, the sources of information that have led him/her to conclude that it constitutes a “serious or persistent violation”.

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CHRI'S PREVIOUS REPORTS TO CHOGM

A Partnership for Human Rights: Civil Society and National Human Rights Institutions (2011)

A Partnership for Human Rights focused on the relationship between national human rights institutions (NHRIs) and civil society actors. The report explored successful partnerships in the Commonwealth, where close collaboration had proved to be mutually enhancing and called on the Commonwealth to become a champion of NHRIs and civil society engagement.

Silencing the Defenders: Human Rights Defenders in the Commonwealth (2009)

Silencing the Defenders investigated the risks faced by human rights defenders in the Commonwealth, and explored how different contexts serve to magnify their vulnerability to state-sanctioned oppression. The report advocated for international, regional and national mechanisms to be used to expand and safeguard the space of those using legitimate means to further human rights.

Stamping Out Rights: The Impact of Anti-Terrorism Laws on Policing (2007)

Stamping Out Rights examined the impact of anti-terrorism legislation on civilian policing, specifically focusing on anti-terror laws that relate to police powers. It provided practical suggestions, for how the State, police and communities can work together to improve security for all in the effort to counter terrorism.

Police Accountability: Too Important to Neglect, Too Urgent to Delay (2005)

The police accountability report explored the critical relationship between accountability of the police in the Commonwealth and the protection and promotion of basic rights in communities. The report considered the defining elements of good and bad policing and put forward a road map for police reform based on accountability to the law, accountability to democratic government, and accountability to the community.

Open Sesame: Looking for the Right to Information in the Commonwealth (2003)

Open Sesame demonstrated the value to democracy and development of ensuring that people have a guaranteed right to access information held by governments and other powerful institutions. International standards, practice and lessons expounded in this report offer a practical solution to the all too evident systemic governance problems that beset most Commonwealth countries due to the neglect of this fundamental right.

Human Rights and Poverty Eradication: A Talisman for the Commonwealth (2001)

The Talisman report shows how poverty is an abuse of human rights. It advocates for the adoption of a rights-based approach to eradicating the large-scale poverty that continues to exist in the Commonwealth. The report urges member governments to cooperate to fulfill the many commitments made at successive CHOGMs.

Over a Barrel - Light Weapons and Human Rights in the Commonwealth (1999)

Over a Barrel exposed a tragic contradiction in the modern Commonwealth in that although human rights are recognised as central to the Commonwealth, millions of light weapons flow freely, jeopardising safety, development and democracy. The report outlined urgent recommendations to the Commonwealth to curb the reach of light weapons in Member countries.

The Right to a Culture of Tolerance (1997)

This report focused on two themes: ethnic and religious intolerance as an urgent problem throughout the Commonwealth; and freedom of expression and information as a crucial element of a democracy. The report noted that the norms and political values of the Commonwealth compel the association to act to promote tolerance in Member countries and the report made recommendations for achieving this goal.

Rights Do Matter (1995)

Rights Do Matter explored two themes: freedom of expression and the need for major reform in prisons. The report placed this discussion in the context of the transition from authoritarian to democratic political orders and the economic transition from planned to market economies.

Act Right Now (1993)

Act Right Now was an assessment of the progress of human rights in Commonwealth countries since the Harare Declaration and was made with reference to the United Nations World Conference on Human Rights in Vienna in June 1993. It called for the Commonwealth to play a lead role in supporting the long, complex process of moving towards real democracy in transitional countries.

Put Our World to Rights (1991)

Put Our World to Rights was the first independent overview of the status of human rights in the Commonwealth. It provided practical guidance on how to use the international human rights machinery for redress.

CHRI'S PROGRAMMES

CHRI's work is based on the belief that for human rights, genuine democracy and development to become a reality in people's lives there must be high standards and functional mechanisms for accountability and participation within the Commonwealth and its member countries. CHRI furthers this belief by advocating for the protection of human rights, access to information and access to justice.

STRATEGIC INITIATIVES PROGRAMME

CHRI monitors Member States' compliance with human rights obligations and advocates around human rights exigencies where such obligations are breached. CHRI strategically engages with regional and international bodies including the United Nations, the African Commission for Human and Peoples' Rights and the Commonwealth. Ongoing strategic initiatives include: Advocating for and monitoring the Commonwealth's reform process; Reviewing Commonwealth countries' human rights promises at the United Nations Human Rights Council; engaging with the United Nations Universal Periodic Review process; advocating for the protection of human rights defenders and civil society space; and Monitoring the performance of National Human Rights Institutions in the Commonwealth while advocating for their strengthening. CHRI is also involved in monitoring the work of IBSA - India, Brazil and South Africa Dialogue Forum, through a human rights lens. CHRI promotes civil society engagement with government on foreign policy issues with the aim of democratising this niche policy-making area.

ACCESS TO INFORMATION

CHRI catalyses civil society and governments to take action, acts as a hub of technical expertise in support of strong legislation and assists partners with implementation of good practice in relation to freedom of information. In relation to freedom of information CHRI works collaboratively with local groups and officials, building government and civil society capacity, as well as advocating with policy-makers. CHRI is active in South Asia, most recently advocating for a national law in Maldives and Pakistan; provides legal drafting support and inputs in Africa; and in the Pacific, works with regional and national organisations to encourage interest in access to information legislation.

ACCESS TO JUSTICE

Police Reforms: In too many countries the police are seen as oppressive instruments of State rather than as protectors of citizens' rights, leading to widespread rights violations and denial of justice. CHRI promotes systemic reform so that police act as upholders of the rule of law rather than as instruments of the current regime. In India, CHRI's programme aims at mobilising public support for police reform. In East Africa and Ghana, CHRI is examining police accountability issues and political interference.

Prison Reforms: CHRI's work is focused on increasing transparency of a traditionally closed system and exposing malpractice. A major focus area is highlighting, and intervening in, the failures of the legal system that result in systemic overcrowding, intolerably long pre-trial detention periods and prison overstays. Another area of concentration is reviving failed prison oversight systems. CHRI aims to improve the administration of prisons and is of the view that this will have a positive knock on effect on the administration of justice overall.

The Commonwealth finds itself in a crisis of conscience. It has not been able to hold its Member States to its professed core values because its current mechanisms are inadequate for protecting human rights and it does not use the mechanisms it has to optimum effect.

In 2009, the Eminent Persons Group was created to recommend reforms that would “build a stronger, more resilient and progressive Commonwealth and make it relevant to its times and people in the future”. Several of the Eminent Persons Group’s recommendations are now in place but human rights standards in many Commonwealth countries continue to be a cause for alarm. This is as a result of a break in the reform chain. Amongst its recommendations the Eminent Persons Group recommended the creation of a Commonwealth Commissioner for Democracy, the Rule of Law and Human Rights, but this recommendation was not adopted since no consensus could be reached on it between States.

This report calls for the establishment of a Commonwealth Commissioner for Human Rights – the missing link in the Commonwealth reforms process. Experience shows that in the absence of an independent entity able to keep human rights under review the promise of a renewed organisation will not be fulfilled. Now more than ever before there is value in the appointment of a Commonwealth Commissioner for Human Rights. The Commonwealth today needs an independent Commissioner for Human Rights to rebuild the confidence of its people in the values of the Commonwealth and to fill the gap between promise and practice.



Commonwealth Human Rights Initiative

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