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**Submission to the Department of Foreign Affairs and Trade on a
Draft Charter of the Commonwealth**

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The Castan Centre for Human Rights Law thanks the Department of Foreign Affairs and Trade for its invitation to comment on the Draft Charter of the Commonwealth adopted at CHOGM in Perth last year. We would like to make some observations on the relevance of the Charter (and of the Commonwealth itself) in the area of human rights.

On the subject of the Commonwealth's human rights work, the Department's website states:

The promotion of human rights and democratic norms is an essential part of the Commonwealth's mandate. The Commonwealth has played a positive role in promoting good governance among member countries, consistent with the principles in the Harare Declaration of 1991. The Secretary-General has deployed his Good Offices for Peace in support of conflict prevention and resolution in countries as diverse as Bangladesh, Lesotho, Sierra Leone, Fiji and Solomon Islands in recent years.¹

The Centre acknowledges this work. The Commonwealth's work in election observation and legal/judicial assistance and capacity-building are also praiseworthy, as is its recent initiative to open a subsidised office in Geneva for small Member Nations to be represented at the international organisations such as the Human Rights Council.

However, the Eminent Persons Group convened by the Commonwealth in 2009 has concerns about the relevance and efficacy of the organisation's human rights advocacy, and we share those concerns.

Secretary-General Karmallesh Sharma, in his Foreword to the Eminent Persons Group's 2011 report, *A Commonwealth of the People: Time for Urgent Reform* (EPG Report), states that the Commonwealth is a modern organisation with a 'pragmatic, flexible approach.' Although such an approach may have its advantages, it sometimes results in undue deference to States – not least on human rights issues.

In recent times, the Commonwealth has been accused of failing to uphold the human rights values for which it stands, and the CHOGM's failure to adopt the EPG's Recommendation of a Commissioner for the Rule of Law, Human Rights and Democracy demonstrates its reluctance to take concrete measures on these core issues. The delayed publication of the EPG Report – in defiance of the EPG's own request – also gives the impression of a lack of transparency. In addition, the following examples point to a lack of effectiveness in the Commonwealth's human rights work.

Recent events in Sri Lanka prompted grave concern around the world yet the Commonwealth welcomed (and even applauded)² the Sri Lankan Government's own report into the conflict, whose content contrasts starkly with an independent report prepared for the United Nations.³

In July the Commonwealth signed a Memorandum of Understanding with the International Criminal Court to support States in implementing international criminal law, yet several Commonwealth Member Nations were part of the African Union summit in Equatorial Guinea in 2011 which resolved not to cooperate with arrest warrants issued by the ICC.

In 2010 the Housing and Land Rights Network reported that 400,000 people were involuntarily relocated in Delhi to make way for the Commonwealth Games. A Monitoring Committee appointed by the Indian High Court and journalists also substantiated widespread claims of exploitation, unsafe work practices and even child labour⁴ associated with the Games preparations. These things may ultimately have been India's responsibility, but they were done in the Commonwealth's name. In his speech in September 2010, Secretary-General Sharma merely brushed over these issues, observing that the 'preparations for the Games have been in the media for the wrong reasons, as we know.' He expressed concern that bad news could 'have an impact...on the brand' but ended by

¹ <<http://dfat.gov.au/intorgs/commonwealth/index.html>>.

² <<http://www.thecommonwealth.org/press/31555/34582/242942/191211slreport.htm>>.

³ <<http://www.un.org/apps/news/story.asp?NewsID=38194>>.

⁴ <<http://edition.cnn.com/2010/WORLD/asiapcf/09/23/commonwealth.games.child.labor>>.

expressing confidence in the Government of India, saying it had 'gripped the challenges.' Far worse, a leaked document obtained by the Guardian newspaper suggested the Secretary-General had told staff it was not his role to speak out about human rights abuses in Member countries, as he had 'no explicitly defined mandate' to do so.⁵

In 2006, the Commonwealth advised Swaziland and Pakistan on how to set up National Human Rights Institutions, but at the 12th Universal Periodic Review Session five years later Swaziland was still being criticised for failing to give its Commission a legal mandate to enable it to do its job properly. Similarly, in Pakistan recently (25 January 2012) the Senate blocked legislation to set up an independent Human Rights Commission in that country because Senators were of the view that the Bill would not make the Commission sufficiently free from political interference, nor would it establish acceptable criteria for the appointment of members.⁶

The Commonwealth has already made several declarations of its values, including the Harare Declaration and associated Millbrook Plan of Action, the Port of Spain Affirmation, the Kampala Declaration, the Nairobi Declaration on IHL, the Latimer House Principles, the Coolum Declaration, the Victoria Falls Declaration, the Lusaka Declaration and the Singapore Declaration of Commonwealth Principles. However, these declarations carry little political weight and do not, of themselves, constitute human rights outcomes.

When these assertions of high principle are not adequately reflected in the outcomes achieved, the power and relevance of the Commonwealth is called into question.

As part of its response to such criticism, the EPG Report recommended the adoption of a Charter of the Commonwealth that would gather in one place the principles stated in the many declarations above and unite Members States. Such a Charter, according to the EPG, is meant to establish a collective purpose and a Commonwealth 'spirit' as the charter of the people.

The draft Charter presented for comment certainly achieves its aim of collecting Commonwealth values and aspirations into a single document, and its content cannot be faulted. However, its status as a non-binding instrument, which the CHOGM 2011 Communiqué and Agreement by Heads of Government document emphasise, means it risks engendering little more respect than the declarations which preceded it. This, combined with the failure to appoint a Commissioner for the Rule of Law, Human Rights and Democracy as per the EPG's Recommendation 2, indicates a lack of willingness to take serious measures to tackle the Commonwealth's shortcomings in relation to human rights protection and promotion.

The Castan Centre notes that consideration of the EPG's Recommendations 2-10 relating to a Commissioner for the Rule of Law, Human Rights and Democracy and to the work of the Commonwealth Ministerial Action Group has been deferred and/or subsumed in the Action Group's own Reform Plan.

Secretary-General Sharma stated in his introduction to the EPG Report that the Commonwealth is 'measured by the success of its delivery to citizens, and the difference it makes to their lives.' If the Commonwealth wishes to avoid further dismal assessments in this regard, it should implement the EPG's Recommendations 2-10 fully and swiftly. It would also be better if the Charter were to be adopted as binding on all Member States, but the Centre understands that this is unlikely since the Heads of Government have already made their decision in this regard.

As the EPG said in October 2010, silence is not an option if the Commonwealth is to rebuild its relevance and credibility, and strong statements and measures on human rights issues need not preclude quiet diplomacy. The Centre urges the Department to push for the immediate adoption of the Charter, as well as the appointment of a Commissioner for the Rule of Law, Human Rights and Democracy who will have the 'explicitly defined mandate' the Secretary-General lacks to take Commonwealth Members to task over abuses of the Charter principles.

⁵ <<http://www.guardian.co.uk/law/2010/oct/08/commonwealth-human-rights-leaked-document>>.

⁶ <<http://www.dawn.com/2012/01/26/senate-blocks-bill-on-rights-commission.html>>.