



**Australian
Human Rights
Commission**

everyone, everywhere, everyday

Human rights mechanisms and the Asia-Pacific region

.....
Submission to the Human Rights Sub-Committee
of the Joint Standing Committee on Foreign Affairs,
Defence and Trade

3 December 2008

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1 Introduction

1. The Australian Human Rights and Commission (the Commission) makes this submission to the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade in its Inquiry into human rights mechanisms and the Asia-Pacific.

2 Summary

2. National Human Rights Institutions (NHRIs) have a valuable role to play in the promotion and protection of human rights in the Asia-Pacific region. This submission discusses the role and functions of NHRIs and provides information about the Australian Human Rights Commission as one example of an NHRI in the Asia-Pacific region.
3. Improving human rights protection in the Pacific region is a current focus of debate. This submission explores some of the key human rights issues and barriers to human rights protection in the Pacific region, and provides several strategies for improving protection.
4. The development of human rights mechanisms in Asia is further progressed than in the Pacific region. This submission will provide a short discussion of some of the existing mechanisms for human rights protection and the current and future role of Australia's technical cooperation in the region.
5. This submission separately addresses the Pacific and the Asian regions as these regions face quite distinct issues in relation to the protection of human rights. Similarly, each region is internally very diverse. The broad categorisation of each region is used with some caution.

3 Recommendations

6. The Australian Human Rights Commission recommends the following strategies for strengthening human rights protection in the Asia-Pacific.

Recommendation 1: That a 'building blocks' approach to the development of NHRIs in Pacific States be adopted, gradually increasing the role and functions of the NHRI as resources and capacity become available. This approach should include education and awareness-raising programs on the meaning of human rights and their interaction with custom.

Recommendation 2: That the development of a regional human rights mechanism in the Pacific be supported.

Recommendation 3: That ratification of international human rights treaties by Pacific States be promoted in conjunction with education about human rights and processes to build local support for the establishment of NHRIs.

Recommendation 4: That, in the absence of NHRIs in Pacific States, resources and training be provided to civil society organisations to assist them to engage with government and communities in the promotion and protection of human rights.

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Recommendation 5: That the federal government consider expanding its human rights technical assistance programs to countries in the Pacific region to help build capacity of organisations working in the area of human rights.

Recommendation 6: That Australia should continue its engagement on human rights in the Asian region, through bilateral dialogues, technical cooperation programs and other exchanges, and consider expanding its programs into other countries in the region.

4 National Human Rights Institutions

7. In this submission, National Human Rights Institutions (NHRIs) are those national institutions for the protection and promotion of human rights that have received accreditation under the Paris Principles.¹
8. NHRIs are recognised as playing an important role in promoting understanding and implementation of human rights standards at the national level.² Their activities can enhance the effectiveness of both national and international systems for the protection of human rights.

4.1 Key features of a NHRI

9. The key requirements for accreditation of NHRIs under the Paris Principles are:
 - independence guaranteed by the national constitution or by legislation
 - autonomy from the government
 - pluralism, including in its membership
 - a broad mandate based on universal human rights standards
 - adequate powers of investigation, without authorisation from higher authority
 - sufficient resources to maintain an adequate infrastructure and to carry out its mandate
 - members that are appointed by an official act, for a specified period.³
10. Within the scope of these requirements, NHRIs can take many forms and it is well recognised that no single model will fit all country situations. The characteristics of a particular NHRI must reflect the political system and maturity of the State, its domestic legal system and the cultural setting.
11. The accreditation process under the Paris Principles is administered by the International Coordinating Committee for the Promotion and Protection of Human Rights (ICC). Over the last three years the accreditation process has

¹ *Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights* [hereinafter 'the Paris Principles'], 20 December 1993, GA Res 48/134, UN Doc A/RES/48/134.

² L Arbour, United Nations High Commissioner for Human Rights, (Opening statement of the 61st session of the Commission on Human Rights, Geneva, 14 March 2005). Available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/527ED2F6E7DD06ADC1256FC400406C8D?openDocument> (viewed 10 November 2008); see also *Report of the Secretary-General Renewing the United Nations: A Programme for Reform*, UN Doc A/51/950 (1997). Available at: <http://www.un.org/reform/chronology.shtml> (viewed 10 November 2008).

³ The Paris Principles, note 1.

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undergone reform and now rigorously applies a body of principles recorded in the General Comments developed by the ICC Sub-Committee on Accreditation.⁴

12. All accredited NHRIs are presently going through the process of reaccreditation which applies these principles and will in future be required to go through a re-accreditation process every five years.⁵

4.2 Core responsibilities

13. Typically, the core responsibilities of a NHRI will include:
 - the authority to examine and make recommendations on legislative and administrative procedure to ensure compliance with human rights principles
 - to raise community awareness about human rights through media and education programs
 - to encourage the State to ratify and implement international human rights instruments
 - to contribute to State party reports to the UN and its committees, where appropriate expressing independent opinion
 - to report on and make recommendations about human rights violations.⁶
14. Some NHRIs also have a complaints function, which enables them to hear complaints about breaches of human rights. However, this function is optional under the Paris Principles.

4.3 Relationship to government

15. The relationship of NHRIs to national governments is critical to their ability to carry out their role and functions effectively.
16. While NHRIs are created by and answerable to parliament, they are also autonomous and independent of government.
17. Independence from government of NHRIs is established through the fixed tenure of their members, secure funding and the ability to select the human rights situations and topics on which they investigate and report.

⁴ International Coordinating Committee for the Promotion and Protection of Human Rights [hereinafter 'the ICC'], *Report and Recommendations of the Sub-Committee on Accreditation*, Geneva, 21-23 April 2008, Available at: <http://planetecom solutions.com/nhri/Report%20Sub-Committee%20April%202008.pdf> (viewed 10 November 2008).

⁵ The reaccreditation requirement recognises that in the past some NHRIs have not, or are now perceived not to meet the minimum requirements of the Paris Principles. The new status of NHRIs in the UN system has prompted this reform.

⁶ The Paris Principles, note 1.

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18. NHRIs have an independent commitment to international human rights principles. Their output is expected to be published and transparent, thereby exposed to judgement by international human rights mechanisms and civil society.
19. This relationship with government is intended to create a situation where the government respects the views of the NHRI, with a sense of commitment to the advice and reports of an institution which it established.

4.4 The international role of NHRIs

20. The role of NHRIs in the United Nations (UN) human rights system has been expanded progressively over the last few years in recognition of the important role which NHRIs can play in the promotion and development of human rights.
21. At the United Nations Human Rights Council, NHRIs have rights to participate in the work of the Council, including in regular and special sessions of the Council and also in its subsidiary mechanisms, such as the Universal Periodic Review.⁷ These participation rights are superior to those enjoyed by international NGOs.
22. The International Coordinating Committee (ICC) of NHRIs has an interim representative at the Human Rights Council who reports frequently to the ICC Chairperson and to NHRIs on current issues in the Council and can, when requested, make interventions on behalf of accredited NHRIs.
23. The Committee on the Elimination of Discrimination against Women has developed guidelines on the participation of NHRIs in its work and has encouraged close cooperation between the Committee and NHRIs.⁸
24. NHRIs played an important role in the drafting of the *Convention on the Rights of Persons with Disabilities* through their representation at and participation in the Working Group.⁹ This Convention came into force earlier this year and many NHRIs may be given monitoring roles under the Convention.¹⁰
25. The provisions of the *Optional Protocol to the Convention against Torture* relating to a National Preventative Mechanism are likely to result in many NHRIs gaining a prominent role in the implementation of the Convention.¹¹
26. NHRIs currently network both with each other and with the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Geneva on a regular basis through annual meetings in Geneva and regional meetings.

⁷ *Institution-building of the United Nations Human Rights Council*, HRC Res 5/1, UN Doc A/HRC/5/L (2007), Rules of Procedure, Rule 7(b).

⁸ *Statement by the Committee on the Elimination of Discrimination against Women on its relationship with national human rights institutions*, UN Doc E/CN.6/2008/CRP.1 (2008).

⁹ *United Nations Convention on the Rights of Persons with Disabilities*, open for signature 30 March 2007 (entered into force 3 May 2008).

¹⁰ *Convention on the Rights of Persons with Disabilities*, note 9, article 33.

¹¹ *United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment*, open for signature 18 December 2002, 42 ILM 26 (entered into force 22 June 2006).

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27. In the Asia Pacific region, the Asia Pacific Forum of National Human Rights Institutions (APF) is the most advanced and active regional network of NHRIs. Established in 1996, the APF provides capacity building, expertise and training to NHRIs, civil society, and governments in States that are moving towards establishing a NHRI. The Australian Human Rights Commission is a founding member of the APF and is currently Deputy Chair.

5 The Australian Human Rights Commission

28. The Australian Human Rights Commission (the Commission) is Australia's national human rights institution. It is an independent statutory body established under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act).
29. The following sections briefly outline the role and functions of the Commission as an example of a NHRI in the Asia-Pacific region.

5.1 Structure of the Commission

30. The Commission is governed by a President and five Commissioners: the Human Rights Commissioner, the Disability Discrimination Commissioner, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Race Discrimination Commissioner, and the Sex Discrimination Commissioner and Commissioner responsible for Age Discrimination. The five Commissioner positions are currently held by three persons.

5.2 Jurisdiction of the Commission

31. The Commission is responsible for administering the following Acts:
 - *Human Rights and Equal Opportunity Commission Act 1986* (Cth)
 - *Racial Discrimination Act 1975* (Cth)
 - *Sex Discrimination Act 1984* (Cth)
 - *Disability Discrimination Act 1992* (Cth)
 - *Age Discrimination Act 2004* (Cth)
32. Functions performed under these Acts are vested either in the Commission as a collegiate body, in the President or individual members of the Commission, or in the federal Attorney-General.
33. Other legislation administered through the Commission includes:
 - functions under the *Native Title Act 1993* (Cth), performed by the Aboriginal and Torres Strait Islander Social Justice Commissioner
 - functions in relation to federal awards and equal pay under the *Workplace Relations Act 1996* (Cth), performed by the Sex Discrimination Commissioner.
34. Human rights are strictly defined under the HREOC Act and only include international instruments scheduled to, or declared under, the Act. They are the:
 - *International Covenant on Civil and Political Rights*
 - *Convention on the Rights of the Child*

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- *Declaration on the Rights of the Child*
- *Declaration on the Rights of Disabled Persons*
- *Declaration on the Rights of Mentally Retarded Persons*
- *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.*¹²

5.3 Functions of the Commission

35. The Commission has functions under both the HREOC Act and the four Acts which concern unlawful discrimination.

36. The Commission's overall responsibilities fall within five main areas:

- human rights education and promotion
- inquiring into discrimination and human rights complaints
- human rights monitoring, policy development and legislative reform
- *amicus curiae* and interventions
- special functions of the President and Commissioners.

(a) Human rights education and promotion

37. Education and raising public awareness in Australia about human rights are important functions of the Commission in promoting respect for human rights. The Commission fosters public discussion about contemporary human rights issues, develops educational resources for teachers and students, and engages with employers, community groups, the legal profession and other sectors of society to promote human rights and eliminate discrimination.

38. The Commission may also formulate guidelines to assist organisations and individuals to comply with requirements of human rights and anti-discrimination legislation and conventions.

(b) Inquiring into complaints

39. Individuals can lodge complaints with the Commission about unlawful discrimination pursuant to the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth).

40. The complaint is then assessed and may be investigated by the Commission. Where appropriate, the Commission will attempt to resolve complaints through conciliation.

¹² Human Rights and Equal Opportunity Act 1986 (Cth), s 3.

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41. The President may terminate a complaint for reasons including if there is no reasonable prospect of settling the complaint by conciliation or the complaint is lacking in substance.
42. A complainant whose complaint has been terminated may lodge an application to the Federal Court of Australia or the Federal Magistrates Court to have their matter determined by the Court.
43. The Commission can also receive and investigate acts or practices that may be contrary to a human right or that may constitute workplace discrimination under the HREOC Act. If the complaint is unable to be resolved through conciliation and is not discontinued for other reasons, the President may report on the case and make recommendations. The report is tabled in federal Parliament. These complaints do not give rise to any enforceable legal rights.

(c) *Human rights monitoring, policy development and legislative reform*

44. The Commission has a role to review legislation and make recommendations about laws and government policies and programs that involve human rights issues. The Commission also makes submissions to government agencies, parliamentary committees and other inquiry bodies.
45. The Commission may monitor and review existing and proposed legislation for any inconsistency with human rights, or for any discriminatory impact which impairs equality of opportunity or treatment in employment or occupation.
46. The Commission has the power to conduct inquiries into issues of major importance, either on its own initiative, or at the request of the Attorney-General.

(d) *Amicus curiae*

47. Section 46PV of the HREOC Act gives the Commissioners an *amicus curiae* ('friend of the court') function.
48. Under this function, the Commissioners may seek leave of the Federal Court, or Federal Magistrates Court, to assist the court as *amicus curiae* in the hearing of unlawful discrimination applications.
49. The Commission may also intervene in court proceedings involving human rights matters with leave of the Court.

(e) *Special functions of the President and the Commissioners*

(i) President

50. The President is the Chief Executive Officer of the Commission, responsible for its financial and administrative affairs. The President is also responsible for the complaint handling function of the Commission.

(ii) Sex Discrimination Commissioner

51. The *Workplace Relations Act 1996* (Cth) gives the Sex Discrimination Commissioner the power to initiate and refer equal pay cases to the Australian Industrial Relations Commission.

(iii) Aboriginal and Torres Strait Islander Social Justice Commissioner

52. The Aboriginal and Torres Strait Islander Social Justice Commissioner, under the HREOC Act, prepares an annual report on the exercise and enjoyment of human rights of Indigenous people and undertakes social justice education and promotional activities.
53. The Commissioner also performs separate reporting functions under the *Native Title Act 1993* (Cth). This includes preparing an annual report on the operation of the Act and its effect on the exercise and enjoyment of human rights of Indigenous people. The Commissioner also reports, when requested by the Minister, on any other matter relating to the rights of Indigenous people under this Act.

5.4 International activities

54. The Commission undertakes an international education and training role, with a specific focus on the Asia-Pacific region. This work builds the capacity and experience of the Commission in promoting and raising awareness about human rights, which enhances its domestic activities in this area.
55. As the Commission's core budget is devoted to fulfilling its domestic mandate, international technical cooperation work is externally funded.

(a) *Human Rights technical cooperation programs*

56. Human rights technical cooperation programs with other countries are based around sharing knowledge and expertise. They are generally delivered through the framework of the Australian Government's development cooperation program administered by the Australian Agency for International Development (AusAID).

(i) China-Australia Human Rights Technical Cooperation Program

57. The Commission's most substantial international program involvement is with China, and is an integral part of Australia's annual intergovernmental Dialogue on Human Rights with China. The Commission participates in the annual meetings of the dialogue.
58. At the inaugural dialogue session in August 1997, the two countries agreed to undertake a program of technical cooperation to strengthen the administration, promotion and protection of human rights in China.
59. The China-Australia Human Rights Technical Cooperation Program (HRTC) is managed by AusAID and the Australian input is managed by the Australian Human Rights Commission.

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60. The HRTC program encompasses three principal themes: protection of the rights of women and children; protection of ethnic minority rights; and reform of the legal system.
61. The program aims to provide an important information base of human rights principles, ideas and strategies which can be drawn upon in the development of Chinese policies and practices.
62. The program includes activities conducted in both China and Australia. Each activity in the program is designed and implemented through a cooperative venture between the Australian Human Rights Commission and a particular Chinese organisation. All activities implemented under the program aim to foster longer-term contact between Chinese and Australian individuals and organisations.
63. On the Chinese side, cooperative relationships leading to the implementation of particular activities have been formed with a wide variety of Chinese organisations. They include the Ministry of Foreign Affairs (the lead coordinating agency), the Supreme People's Procuratorate, the Supreme People's Court, the National Judges College, the State Ethnic Affairs Commission, the Ministry of Public Security, the Ministry of Justice, the Ministry of Civil Affairs, the All-China Women's Federation, the United Nations Association of China, and the National Population and Family Planning Commission.

(ii) Vietnam-Australia Human Rights Technical Cooperation Program

64. The Commission also participates in the Vietnam-Australia Dialogue on International Organisations and Legal Issues, including human rights.
65. A program of human rights technical cooperation with Vietnam was established as part of the dialogue and commenced in late 2006.
66. The Vietnam-Australia HRTC Program (HRTC) is funded by AusAID and the Australian input managed by the Australian Human Rights Commission.
67. The program involves activities conducted in both Vietnam and Australia.
68. The first phase of the HRTC program was implemented between 2006 and 2008 and focused on four areas: access to justice; dissemination of information about legal rights and obligations; the rights of women; and raising awareness of international human rights treaty obligations. The second phase of the HRTC program commenced recently and is expected to be completed in 2009.
69. The Vietnamese cooperating organisations in the HRTC Program consist of the Ministry of Foreign Affairs (the lead coordinating agency), the Ministry of Justice, the Supreme People's Court, the Vietnam Women's Union, the Supreme People's Procuracy and the Vietnam Lawyers' Association.

(b) *The Asia-Pacific Forum*

70. The Commission is an active participant of the Asia Pacific Forum of National Human Rights Institutions (APF). The Commission is currently the Deputy Chair of the APF and served as the Chair from 2007-2008.

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71. The APF is a regional member-based organisation of accredited national human rights institutions (NHRIs) in the region. It provides practical assistance to strengthen existing NHRIs and support the establishment and accreditation of new NHRIs. The APF also works with governments and civil society groups.

(c) *Participation in the Pacific region on human rights issues*

72. The Commission has participated in ongoing initiatives to enhance human rights mechanisms in the Pacific region, including attendance at the *Strategies for the Future: Protecting Rights in the Pacific Conference* (Samoa, April 2008) and presenting at the Australasian Law Reform Agencies Conference on the *Potential Role of National Human Rights Institutions in the Pacific* (Vanuatu, September 2008).
73. In April 2008, the Commission participated in the Pacific Disability Forum's Council Meeting and National Women with Disabilities Forum in Samoa. On behalf of the APF, the Commission conducted training on the Convention on the Rights of Persons with Disabilities and advocacy to government, and a workshop on the international framework protecting the rights of women with disability.
74. The Commission has participated in regional Pacific networks among Indigenous peoples, such as in preparation for the UN Permanent Forum on Indigenous Issues.

6 Strengthening human rights in the Pacific region

6.1 *The need for stronger human rights mechanisms in the Pacific*

(a) Human rights issues in the Pacific

75. The Pacific region faces significant human rights issues. These include issues pertaining to:
- good governance and participation in decision-making
 - restrictions on freedom of expression and information
 - freedom from discrimination, particularly in relation to women, children, migrant workers, people living with HIV/AIDS, and people with disability
 - access to health care and education
 - environmental degradation and associated concerns such as climate change, land alienation and exploitation, water resources and loss of biodiversity.¹³
76. Indigenous peoples in the Pacific are particularly affected by these human rights issues. The United Nations Permanent Forum on Indigenous Issues has recognised, for example, that the effects of climate change are particularly acute for Indigenous communities and many Indigenous peoples are at risk of becoming environmental refugees. This could result in loss of land and erosion of cultural identity.¹⁴

(b) Existing human rights mechanisms in the Pacific

77. There are currently no accredited NHRIs in the Pacific region.¹⁵
78. The Pacific region has the lowest ratification rate of all world regions for the seven core international human rights treaties.
79. The APF is the only existing regional human rights body which has an Asia-Pacific membership. However, it is important to recognise that the APF is not a formal intergovernmental body like the regional human rights bodies in Europe, the Americas and Africa.

¹³ New Zealand Human rights Commission and Pacific Islands Forum Secretariat, *National Human Rights Institutions: Pathways for Pacific States* (Report of the Pacific Human Rights Consultation in Suva in 2004), 2007, pp.14-15.

¹⁴ United Nations Permanent Forum on Indigenous Issues, Report on the seventh session (21 April-2 May 2008), E/C.19/2008/13, para 49. See also Fiu Mataese Elisara, Executive Director, OLSSI, Samoa, Interventions and Reports to the Permanent Forum on Indigenous Issues, Seventh session (2008).

¹⁵ Australia and New Zealand both have accredited NHRIs. In this submission, for the purposes of discussion of human rights issues in the Pacific region, the 'Pacific region' does not include Australia and New Zealand.

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80. In 2005, the Office of the United Nations High Commissioner for Human Rights (OHCHR) established a regional office in Suva, Fiji, to provide technical assistance, capacity building and training on human rights. The OHCHR has been a sponsor of regional workshops on human rights issues in the Pacific, in conjunction with the Secretariat of the Pacific Islands Forum (PIF) and other human rights organisations working in the Pacific.¹⁶

(c) *Other existing institutional structures in the Pacific*

81. Despite the absence of accredited NHRIs or other dedicated human rights mechanisms in the Pacific region, there are a number of existing mechanisms for the protection and promotion of human rights that exist in the region and in individual States.

(i) The Pacific Islands Forum (PIF)

82. The Pacific Islands Forum (PIF) is the regional economic and political intergovernmental organisation for the Pacific. The PIF provides a focal point for regional cooperation amongst governments.

83. The PIF has repeatedly expressed a strong commitment to achieving regional co-operation on human rights and good governance. At their annual meeting in 2003, the Forum Leaders established an Eminent Persons' Group, tasked with providing a fresh mandate and vision for the PIF. In its report, the Eminent Persons' Group recommended that:

The forum should report the work of members in developing national human rights machinery. As part of this process, those leaders whose governments are not already engaged with the [APF], might consider becoming so. This would draw in practical assistance from the Office of the UN High Commissioner for Human Rights.¹⁷

84. These recommendations were endorsed in April 2004 by the Forum Leaders when they adopted the 'Auckland Declaration'.¹⁸

85. The APF, in conjunction with the PIF Secretariat, is progressing towards establishing the position of a human rights adviser within the PIF structure. According to the APF, this new role will provide the PIF with much-needed human rights capacity and capability which will benefit member States across the Pacific region.

¹⁶ J von Doussa, *The Potential Role of National Human Rights Institutions in the Pacific* (speech to Australasian Law Reform Agencies Conference, Port Vila, Vanuatu, September 2008).

¹⁷ The Eminent Persons' Group (EPG), *Pacific cooperation: Voices of the region: The Eminent Persons' Group review of the Pacific Islands Forum*, New Zealand Ministry of Foreign Affairs & Trade, 2004, recommendation 6.

¹⁸ *The Auckland Declaration* (signed at Special Leaders' Retreat, Pacific Islands Forum, Auckland New Zealand, April 2004). Available at: http://www.forumsec.org.fj/_resources/article/files/Auckland%20Declaration.pdf (viewed 10 November 2008).

(ii) The Pacific Plan

86. The Pacific Plan of Action for Strengthening Regional Cooperation and Integration (Pacific Plan) was endorsed by PIF Leaders in 2005 and was revised by the Leaders in October 2007.¹⁹
87. The Pacific Plan identifies 15 strategic objectives to achieve the goals of economic growth, sustainable development, good governance, and security.
88. Under the Plan, States have taken significant steps in committing themselves to protecting human rights, the rule of law, good governance and sustainable development. For example, leaders agreed to give effect to their Vision to:
- promote economic growth, sustainable development, good governance and security;...
- promote and protect cultural identity, regional inclusiveness, sub-regional representation, human rights, gender, youth and civil society;²⁰
89. In expansion of the aim of promoting good governance, the implementation agenda for 2006-2008 included:
- Where appropriate, ratification and implementation of international and regional human rights conventions, covenants, and agreements and support for reporting and other requirements.²¹
90. Further, the Milestones for the evaluation of this item refer to the establishment of a regional support mechanism to cover the drafting, harmonisation and promotion of awareness of rights-based domestic legislation within the Pacific, encompassing the major international human rights Conventions.²²
91. The OHCHR has emphasised that a human rights framework can directly contribute to achieving the Millennium Development Goals and the objectives of the Pacific Plan. Human rights can help secure development and poverty reduction. It is widely accepted that poverty is a manifestation of powerlessness and exclusion, not just a lack of resources. Thus effective poverty reduction is only possible with measures to empower the poor.²³

¹⁹ Pacific Island Forum Secretariat, *The Pacific Plan for Strengthening Regional Cooperation and Integration* [hereinafter 'the Pacific Plan'], endorsed by Leaders at the Pacific Islands Forum meeting October 2005. Available at: http://www.forumsec.org.fj/UserFiles/File/Pacific_Plan_Nov_2007_version.pdf (viewed 10 November 2008).

²⁰ Pacific Plan, note 19, paras 2(i), (iv).

²¹ Pacific Plan, note 19, p7.

²² Pacific Plan, note 19, Attachment A, p19.

²³ Office of the United Nations High Commissioner for Human Rights (OHCHR), *Ratification of International Human Rights Treaties: Added Value for the Pacific Region*, Discussion Paper, 2006, paras 41-46.

(iii) Biwako Millennium Framework

92. The Biwako Millennium Framework (BMF), adopted by governments in Asia and the Pacific, is a regional policy guideline to achieve an inclusive, barrier-free and rights-based society for people with disabilities, for the period 2003-2012.²⁴
93. The BMF sets out a rights-based approach to achieving seven priority areas for action to progress rights and address the significant poverty faced by people with disability in the Asia-Pacific region.
94. The BMF explicitly incorporates the Millennium Development Goals and targets to ensure that concerns relating to people with disability become an integral part of efforts to achieve the goals.
95. The BMF is supplemented by the Biwako Plus Five, developed in 2007 during a mid-term review of the BMF. The Biwako Plus Five creates additional actions and strategies and also provides further principles for the implementation of actions under the BMF. One such principle is that:

the diversity of persons with disabilities should be respected not only because they are the targets of policies, programmes and projects but also because they are partners in the decision-making process concerning disability as well as implementers and evaluators of projects and policies.²⁵

(iv) National institutional structures

96. There are also a number of institutions and mechanisms at a national level in Pacific countries which can play a role in the protection and promotion of human rights.²⁶ These include:
- National constitutions: Human rights are constitutionally protected in many Pacific States. However, apart from Fiji whose constitution contains a few economic, social and cultural rights, the other constitutions only guarantee civil and political rights. Most of these rights are enforceable against governments and provide the right to seek a remedy for their violation through the courts.²⁷
 - Parliamentary systems: Parliamentary processes form a part of the constitutional system of checks and balances.

²⁴ United Nations Economic and Social Commission for Asia and the Pacific, *Biwako Millennium Framework*, May 2002, <http://www.unescap.org/esid/psis/disability/bmf/bmf.html> (viewed 10 November 2008).

²⁵ United Nations Economic and Social Commission for Asia and the Pacific, *Biwako Plus Five: Further Efforts Towards an Inclusive, Barrier-Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific*, E/ESCAP/AP/APDDP(2)/(2) (2007).

²⁶ *National Human Rights Institutions: Pathways for Pacific States*, note 13, pp11-14.

²⁷ J von Doussa, note 16.

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- Governance structures and systems, including government administration, international and regional co-operation agreements, national laws, government policies, national development plans, specialist offices.²⁸
- Legal systems: National Supreme Courts or High Courts exist alongside lower courts and administrative and other tribunals. Many forms of traditional or customary courts with accompanying traditional legal systems also exist.²⁹
- Civil society: In some Pacific States, civil society groups are working in partnership with government departments to deliver national plans of action or specific services.³⁰ The strength of civil society varies greatly between different Pacific nations.

6.2 Challenges facing human rights mechanisms in the Pacific

97. There are a number of significant challenges facing existing institutional structures in the Pacific for the promotion and protection of human rights. These challenges will also impact on any future development of human rights mechanisms, such as NHRIs and a regional human rights body.
98. These challenges include:
- lack of knowledge and understanding about human rights
 - negative perceptions about human rights
 - inadequate resources and capacity.
- (i) Lack of knowledge and understanding about human rights
99. There is a significant lack of knowledge and understanding about the meaning and relevance of human rights in the Pacific region.
100. Although human rights are constitutionally protected in many Pacific Island States, many people know little about their constitution and international human rights law. Consequently, there is limited 'ownership' of human rights by both governments and communities.³¹
- (ii) Negative perceptions about human rights
101. Particular concern has been expressed about the perceived conflict between customary practices and rights and human rights. These concerns include that

²⁸ *National Human Rights Institutions: Pathways for Pacific States*, note 13, pp11-14.

²⁹ *National Human Rights Institutions: Pathways for Pacific States*, note 13, pp11-14.

³⁰ *National Human Rights Institutions: Pathways for Pacific States*, note 13, pp11-14.

³¹ Pacific Islands Forum Secretariat, *Regional workshop on human rights mechanisms: outcome statement* (Nadi, Fiji, 2005).

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human rights might threaten customary rights and that aspects of custom do not accord with human rights.³²

102. There is a lack of quality information about the benefits of adopting international human rights standards and fears that standards may undermine national sovereignty.³³

(iii) Inadequate resources and capacity

103. Many Pacific governments face multiple competing resource demands. Often, there are small numbers of government agencies that must manage broad and complex responsibilities. This is sometimes exacerbated by frequent changes in government.³⁴
104. Participation in the international human rights treaty system, and the corresponding reporting obligations, is seen as financially burdensome and requiring knowledge and technical capacity which they lack. This is a particular concern for smaller States.³⁵

6.3 Strategies for enhancing human rights protection in the Pacific

105. The following sections discuss several possible strategies for strengthening human rights protection in the Pacific region. These strategies are:
- Establishing NHRIs in the Pacific
 - Establishing a regional human rights mechanism
 - Promoting ratification of human rights treaties
 - Supporting civil society
 - Technical cooperation and capacity-building by Australia.
106. It is important to note that these strategies are not mutually exclusive. For example, establishing national institutions would not preclude the establishment of a regional mechanism. Rather, these institutions and mechanisms are able to work in a complementary manner and enhance their respective efforts to protect human rights.

³² *National Human Rights Institutions: Pathways for Pacific States*, note 13, pp19-24.

³³ Pacific Islands Forum Secretariat, *Regional workshop on human rights mechanisms: outcome statement*, note 36.

³⁴ Pacific Islands Forum Secretariat, *Regional workshop on human rights mechanisms: outcome statement*, note 36.

³⁵ OHCHR, *Ratification of International Human Rights Treaties: Added Value for the Pacific Region*, note 23, p11.

(a) *Establishing NHRIs in the Pacific*

107. The Commission believes that establishing NHRIs in Pacific Island countries is the most effective way of enhancing human rights protection for people living in the Pacific.
108. The views expressed by the Eminent Persons' Groups of the PIF, as endorsed by the member States of the PIF, indicate a basic level of support for developing human rights machinery at the national level.³⁶
109. Certain Pacific countries have begun considering the establishment of a NHRI and have received technical assistance on what this would mean in practice and how it could be achieved.³⁷
110. However, there has also been some opposition to the idea of creating NHRIs in the Pacific, largely due to the perceived costs of establishing and running the institutions.
111. These concerns have led to suggestions that other domestic bodies should undertake the role of promoting and protecting human rights at a national level. One such suggestion is enhancing the role of the office of an ombudsman.
112. However, NHRIs have significant benefits and privileges which other domestic bodies lack. These include:
 - Status within the community: Due to their status within the community, NHRIs have the ability to promote human rights principles through the media, workshops and a variety of other educational programs. The regional network of NHRIs has considerable experience in delivering grass roots education programs appropriate to a wide variety of cultural and social settings.
 - Remedy for complaints: NHRIs can act as an official body to receive and remedy individual complaints of discrimination by businesses and people in areas of commercial and public activity (whereas an ombudsman is likely to be concerned only with poor administration by government agencies).
 - Legal assistance: NHRIs have the ability to provide legal assistance in human rights matters to disadvantaged members of a community (a power and function not possessed by an ombudsman).

³⁶ See above discussion on The Pacific Plan, p18. See also *Pacific Island Human Rights Consultation: Concluding Statement and Recommendations* (Suva, Fiji, 2004). Available at: <http://www.humanrights.org.fj/pdf/ConcludingStatement.pdf> (viewed 10 November 2008), which states that:

'The primary focus for the promotion and protection of human rights is at the national level and therefore it is the primary responsibility of States to ensure that human rights are promoted, protected and fulfilled.'

³⁷ For example, Papua New Guinea and Solomon Islands: *National Human Rights Institutions: Pathways for Pacific States*, note 13, p28.

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- Systemic response to human rights issues: NHRIs have the power to pursue systemic human rights issues, particularly in relation to people with disability, women and children, in all areas of public life.
- Access to technical assistance: NHRIs have access to expert technical assistance from the OHCHR and the regional activities of the members of the APF.
- Participation in the UN Human Rights Council: NHRIs have important rights to participate directly in the Human Rights Council and its subsidiary mechanisms.
- Expertise in international human rights law: Through the APF and networks with other NHRIs, NHRIs have access to a wealth of information and resources on international human rights law. NHRIs are able to make this expertise available to courts, providing valuable assistance to judges to identify and apply relevant human rights principles. This is a valuable tool that courts are otherwise likely to lack. Given the small size of many Pacific nations, such international expert assistance will be critical to establishing and maintaining robust human rights institutions.

(i) Building blocks approach

113. In the report *National Human Rights Institutions: Pathways for Pacific States* (Pathways report), the New Zealand Human Rights Commission recommended a 'building blocks' approach to the development of NHRIs in the Pacific.³⁸
114. This approach acknowledges that inadequate resources and capacity are barriers to creating human rights mechanisms in many Pacific States and recommends that NHRIs be developed over time, with their role and functions incrementally expanded as resources and capacity development progress.
115. The Pathways report notes that the success of this approach would depend on having a clear pathway for development and continued commitment to the process.³⁹
116. Through the APF, support and capacity-building could be provided to States to promote and facilitate the establishment and continued development of NHRIs in the Pacific. Since the signing of the Auckland Declaration, the APF has engaged with several Pacific States to explore the establishment of NHRIs. In this regard, it is interesting to note that in October 2008 the Attorney-General of Samoa wrote to the APF requesting its advice and assistance in relation to the establishment of a NHRI in Samoa.

³⁸ *National Human Rights Institutions: Pathways for Pacific States*, note 13.

³⁹ *National Human Rights Institutions: Pathways for Pacific States*, note 13, p30.

(ii) Human rights awareness

117. Raising awareness and understanding about human rights must be a central part of the process of establishment and gradual development of NHRIs in the Pacific.
118. The process for building NHRIs in a particular country should involve constructive dialogue with all groups in society about what human rights mean and how increased protection of human rights might affect their lives.
119. In particular, awareness-raising must address the important issue of the relationship between human rights and custom. *Converging Currents: Custom and Human Rights in the Pacific*, a paper by the New Zealand Law Commission, provides an extensive analysis of ways to enhance understanding in the Pacific about the interaction of tradition and culture and human rights.⁴⁰

(iii) Process for establishing NHRIs

120. The process by which NHRIs are established in Pacific States can significantly impact on the later effectiveness of these institutions.
121. In order to maximise the effectiveness of NHRIs, it is important that the development process provides adequate time and opportunities for consultation and dialogue with all relevant stakeholders, including diverse social and cultural groups. Consultations should cover a wide range of issues, such as the institution's mandate and powers, how to ensure independence, and the structure and staffing of the institution.⁴¹
122. The relationship between a NHRI and the national government should begin to be developed during the early stages of discussions and agreements about roles and responsibilities in order to ensure that they have an effective working relationship.⁴²
123. Dialogue about forms of NHRIs should take account of and have respect for human rights promotion currently being carried out by women's organisations and other groups and ensure participation of women, young people, disabled people and vulnerable or marginalised groups.⁴³

Recommendation 1

That a 'building blocks' approach to the development of NHRIs in Pacific States be adopted, gradually increasing the role and functions of the NHRI as resources and capacity become available. This approach should include education and awareness-raising programs on the meaning of human rights and their interaction with custom.

⁴⁰ New Zealand Law Commission, *Converging Currents: Custom and Human Rights in the Pacific*, 2006, p12.

⁴¹ *National Human Rights Institutions: Pathways for Pacific States*, note 13, p29.

⁴² *National Human Rights Institutions: Pathways for Pacific States*, note 13, pp27-36.

⁴³ *National Human Rights Institutions: Pathways for Pacific States*, note 13, p25

(b) *Establishing a regional human rights mechanism in the Pacific*

124. Establishing a regional human rights mechanism could potentially strengthen the protection of human rights in the Pacific region. Recent debate about a regional mechanism has focussed on creating a mechanism specific to the Pacific. However, a regional human rights mechanism could also cover the broader Asia-Pacific region.⁴⁴
125. The APF is the only existing regional human rights body which includes an Asia-Pacific membership which is comprised of national institutions. The APF is a cooperative body which focuses on the capacity building of NHRIs and does not have any jurisdiction to receive complaints of alleged breaches of human rights by States.
126. Intergovernmental regional human rights bodies exist in each of the other three geographic regions recognised in the UN system - Africa, the Americas and Europe. In each of these bodies, complaints of human rights contraventions can be made against a State.
127. The existence of regional human rights mechanism could also enhance the strength and capacity of national mechanisms. With adequate resources and time, the ultimate goal would be to have both regional and national institutions working together for the common purpose of strengthening human rights protection in Pacific countries.
128. While Pacific leaders have expressed the view that human rights is primarily a national responsibility, there is some discussion in the Pacific Plan of a 'regional human rights mechanism'.⁴⁵ It is important to note that the concept of regionalism under the Pacific Plan is given a restricted meaning:

The Pacific Plan is based on the concept of regionalism: that is, countries working together for their joint and individual benefit. Regionalism under the Pacific Plan does not imply any limitation on national sovereignty. It is not intended to replace any national programmes, only to support and complement them. A regional approach should be taken only if it adds value to national efforts.⁴⁶

Recommendation 2

That the development of a regional human rights mechanism in the Pacific be supported.

⁴⁴ Whilst the discussion has been in terms of a 'regional' body, it would be more accurate to use the description 'sub-regional body' as the United Nations designates the Asia-Pacific area as one of the four world geographic regions.

⁴⁵ Pacific Plan, note 19, p3.

⁴⁶ Pacific Plan, note 19, p3.

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(c) *Promoting ratification of human rights treaties*

129. The OHCHR has directed particular efforts to encouraging greater participation by Pacific nations in UN human rights mechanisms, in particular encouraging ratification of core human rights conventions.
130. According to the OHCHR, greater ratification of human rights treaties by Pacific States is crucial to achieving the Millennium Development Goals and objectives under the Pacific Plan.⁴⁷ For example, international treaty obligations can provide a legal focus to development that is accountable and enforceable, and encourage meaningful participation of civil society and individuals in the development process.⁴⁸
131. However, at a practical level, the benefit of increased ratification of international conventions is questionable since many Pacific nations already have constitutional protection of many core human rights.⁴⁹
132. The real problem that must be addressed is the lack of understanding about human rights protections, whether under international conventions or national constitutions.
133. Recognising these issues in relation to the rights of Indigenous peoples, the United Nations Permanent Forum on Indigenous Issues has noted that there is an urgent need for technical assistance and development cooperation in the Pacific region to build the capacity of Pacific island nations to implement human rights standards and develop local institutions to promote human rights. The Permanent Forum recommended that this be accompanied by efforts to promote increased ratification of human rights treaties within the region and their domestic implementation.⁵⁰

Recommendation 3

That ratification of international human rights treaties by Pacific States be promoted in conjunction with education about human rights and processes to build local support for the establishment of NHRIs.

(d) *Supporting civil society*

134. The existence and strength of civil society groups is considered to be a key measure of how human rights are promoted and protected.
135. In the absence of NHRIs or other dedicated human rights mechanisms to advocate for human rights, civil society groups can play a key role in advising governments and providing services for the realisation of human rights,

⁴⁷ OHCHR, *Ratification of International Human Rights Treaties: Added Value for the Pacific Region*, note 23, pp18-19.

⁴⁸ OHCHR, *Ratification of International Human Rights Treaties: Added Value for the Pacific Region*, note 23, pp24-26.

⁴⁹ J von Doussa, note 16.

⁵⁰ United Nations Permanent Forum on Indigenous Issues, Report on the seventh session (21 April-2 May 2008), note 14, para 50.

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particularly with respect to marginalised and disadvantaged groups, such as women, Indigenous peoples and people with disability.

136. For example, the Government of Vanuatu recently ratified the Convention on the Rights of Persons with Disabilities and has made progress with regard to the development of disability policies. This has largely been due to the efforts of Vanuatu's Disabled Persons Organisation, the Disability Promotion & Advocacy Association, in establishing an effective relationship with the Government and playing a critical advisory role.
137. Many Disabled Persons Organisations and other NGOs in the Pacific have identified the need for training and assistance to build the capacity of their organisations if they are to be effective in their role in this role.

Recommendation 4

In the absence of NHRIs in Pacific States, resources, training, and capacity building should be provided to civil society organisations to assist them to promote and protect human rights.

(e) Technical cooperation and capacity-building by Australia

138. The small size and geographical spread of Pacific nations, along with limited resources, are major obstacles to developing capacity and expertise in human rights.
139. As discussed below in section 7.2, there is opportunity to expand and extend Australia's technical cooperation programs by extending similar assistance to some Pacific island countries. See section 7.2 for further discussion of technical cooperation programs.

Recommendation 5

That the federal government consider expanding its human rights technical assistance programs to countries in the Pacific region to help build capacity of organisations working in the area of human rights.

7 Strengthening human rights in the Asian region

7.1 Existing human rights mechanisms

140. The development of human rights mechanisms in the Asian region is currently further progressed than in the Pacific region.
141. A number of countries in Asia have accredited NHRIs.⁵¹
142. Recently, there have also been movements towards the development of a regional human rights body based on the Association of Southeast Asian Nations (ASEAN). However, this concept is still at an early stage of development.
143. An ASEAN Charter was signed by all member states at the 13th ASEAN Summit on 20 November 2007. The Charter aims to give the intergovernmental organization a legal personality and to establish more clearly its institutional framework and rules of procedure. The Charter also stipulated the establishment of an ASEAN human rights body (Article 14) in conformity with the purposes and principles of the ASEAN Charter relation to the promotion and protection of human rights and fundamental freedoms. In February 2008, ASEAN Foreign Ministers agreed to establish a High Level Panel to draft Terms of Reference for an ASEAN human rights body.
144. Further, an ASEAN NHRI Forum was formed by the established human rights commissions in the region: Indonesia, Malaysia, the Philippines and Thailand. The Forum's primary goal is to establish an intergovernmental human rights commission for ASEAN.⁵²

7.2 Australia's role in strengthening human rights in the Asia region

145. Australia has the potential to make a strong and positive contribution to the strengthening of human rights in the Asian region.
146. A number of countries in the region face the possibility of civil unrest as a result of governing structures that are relatively unresponsive to people's aspirations. Such instability may impact adversely on Australia's interests, including our economic, strategic and national security interests. Addressing this issue will require commitment by Australia to ongoing engagement on human rights in the region.
147. There are a variety of avenues through which Australia's ongoing engagement may be pursued, including bilateral human rights dialogues, technical cooperation programs and participation in regional fora such as the Asia Pacific Forum of National Human Rights Institutions (APF).

⁵¹ For list of current members NHRIs of the APF, see Asia Pacific Forum, *APF Members*, at: <http://www.asiapacificforum.net/members/apf-member-categories> (viewed 10 November 2008).

⁵² For more information see: Working Group for an ASEAN Human Rights Mechanism, at: <http://www.aseanhrmech.org/index.html> (viewed 10 November 2008).

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148. Technical cooperation programs may contribute to practical reforms in the promotion, protection and administration of human rights, which in turn may contribute to reducing the possibility of civil unrest or violent change. These programs provide support and capacity building for key organisations working in areas relevant to human rights.
149. The Australian Human Rights Commission has engaged with some of the most authoritarian regimes in the region, and in the area of technical cooperation has developed a management style and process that sustains human rights engagement. The engagement with China is the most substantial illustration of this. Australia, through the Australian Human Rights Commission, is the only nation that has been able to sustain a government-to-government program that deals specifically with human rights in China. While other governments have programs with China in broader governance related areas, Australia's is the only bilateral program with an explicit human rights focus. The success and longevity of the program reflects its non-confrontational management style, the emphasis on building of relationships, and the program's alignment with the priorities of the partner government.
150. There is opportunity to expand and extend technical cooperation programs by extending similar assistance to other countries in the region, such as Indonesia, Laos, Cambodia and some Pacific island countries. This expansion may require some subtle changes in development cooperation and foreign policy, to increase the priority given to the human rights of people living in relevant countries. Initially it would mean elevating the importance attached to human rights considerations in bilateral discussions with relevant governments.

Recommendation 6

That Australia should continue its engagement on human rights in the Asian region, through bilateral dialogues, technical cooperation programs and other exchanges, and consider expanding its programs into other countries in the region.