

Inquiry into Human Rights Mechanisms and the Asia-Pacific Submission by the Australian Human Rights Centre (AHRC)

1. INTRODUCTION

The Australian Human Rights Centre welcomes the opportunity to make a submission to the Joint Standing Committee's Inquiry into Human Rights Mechanisms and the Asia-Pacific. The Centre, which has been in operation for 25 years, is an interdisciplinary research centre in the field of human rights based in the Faculty of Law at the University of New South Wales. This submission draws on research which has been conducted as part of an ARC Linkage project conducted by Professor Andrew Byrnes, Associate Professor Andrea Durbach, and Ms Catherine Renshaw. Brief details of the project and the backgrounds of the authors of the submission appear at the end of this document.

2. OVERVIEW

- 2.1 In this submission we address a number of issues raised by the terms of reference of the Committee's inquiry relating to mechanisms for the protection of human rights in the region. Our submission suggests that efforts toward the creation of regional mechanisms in the Asia Pacific, by the sub-regions of ASEAN and the Pacific Islands, has reflected ambivalence towards the notion of regionalism. In light of this ambivalence, our submission argues that the development of institutions at the national level is critical to the effective protection of human rights, and that supranational mechanisms are likely to play at best a supplementary role in the Asia Pacific region. Accordingly, we argue that supporting the establishment and strengthening of national human rights institutions (such as Human Rights Commissions), as well as encouraging other national institutions such as Ombudsmen or Children's Commissioners or Parliaments to adopt an explicit human rights approach to their work, is potentially an important means of enhancing the enjoyment of human rights in the region.
- 2.2 We also argue that throughout the region it is important for NHRIs to be connected with each other, in order to share their experiences and expertise. The existing networks of NHRIs, in particular the Asia Pacific Forum of National Human Rights Institutions, are an important resource for NHRIs and their work needs continued support.
- 2.3 At the same time, we recognise that the development of regional or sub-regional human rights mechanisms could play an important supplementary role in the protection of human rights in our region, and that there is much to be said for

supporting efforts currently on foot to develop such mechanisms, provided that it is not at the expense of efforts to strengthen national mechanisms.

- 2.4 Finally, we argue that Australian Parliaments can both contribute to, and learn from, the practices of other Parliaments so far as effective Parliamentary procedures for the protection of human rights are concerned. We argue that the Commonwealth Parliament should take a number of steps to make Australia's international obligations and the output of United Nations human rights treaty bodies in relation to Australia, a more explicit component of its scrutiny of the government's human rights performance, and encourage State and Territory Parliaments to do the same. We also urge the Parliament to take an active role in promoting the exchange of information between Parliaments in the region about effective Parliamentary procedures for the protection of human rights and the implementation of international human rights obligations.

3. REGIONAL MECHANISMS: EFFORTS IN THE ASIA-PACIFIC REGION TO DATE

- 3.1 Since 1977, the United Nations General Assembly has called upon States to establish "regional arrangements for the promotion and protection of human rights." In the mid-1980's, the General Assembly began to pass resolutions specifically directed to the Asia Pacific region, calling upon States from this region to "respond to the call for regional arrangements."¹ This call reflected the fact that alone among the world's regions, the Asia Pacific possesses no regional machinery for the protection of rights. Rights protection remains the responsibility of States, sometimes overlaid by the largely unenforceable architecture of United Nations conventions and treaties to which the State has agreed to become a party.
- 3.2 The call to regionalism reflects a view that a group of states which share geography, history, political traditions and culture, are more likely to enjoy a shared understanding of human rights.² A regional convention is an indication that fundamental commonalities bind a group of states. Because of these commonalities, states are prepared to subscribe to a joint articulation of human rights and are prepared to be held accountable by a regional monitoring body for violations of those rights.

¹ Resolution 41/153 (1986) "Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region" called upon States from the region to respond to the call for "regional arrangements". See also: United Nations General Assembly resolution 43/140 (1988), UN Human Rights Commission 1989/50(1989), United Nations General Assembly resolution 45/168 (1990) , UN Human Rights Commission resolution 1990/71 (1990), UN Human Rights Commission resolution 1991/28 (1991), UN Human Rights Commission resolution 1992/40 (1992) UN Human Rights Commission resolution 1993/57 (1993), UN Human Rights Commission resolution 1994/48 (1994), UN Human Rights Commission resolution 1995/48 (1995), UN Human Rights Commission resolution 1997/45 (1997), UN Human Rights Commission resolution 1998/44(1998)

² Rhona K Smith and Christian van den Anker (eds) (2005) *The Essentials of Human Rights* Hodder Arnold, London

- 3.3 Europe, the Americas and Africa have established regional treaties stipulating key norms and setting up machinery or mechanisms which range from regional human rights commissions to regional human rights courts. The common feature of these regimes is that they review the human rights situation in states within the region and apply pressure to achieve accountability. They afford remedies in the absence of national remedies or where the national mechanisms are inadequate or do not provide the necessary redress.
- 3.4 The “Asia Pacific region”, the vast expanse of land and sea that contains a third of the world’s population, does not reflect the commonalities of history, politics and culture that lead to a shared conception of rights and their methods of implementation. There is recognition of this fact within the Asia Pacific. The region has disaggregated into ‘sub-regions,’ that are most commonly referred to as: West Asia (linked to the League of Arab states), South Asia (linked to the South Asian Association for Regional Cooperation, SAARC), Southeast Asia (linked to Association of Southeast Asian Nations, ASEAN) and the Pacific region (linked to the Pacific Islands Forum). East Asia lacks an associated organisation. Of these regional groupings, at present only the Pacific Islands Forum includes Australia as a member.
- 3.5 Two of these sub-regions, ASEAN and the Pacific region, have made efforts towards the establishment of a regional mechanism for the protection of human rights. It is our submission that the ambivalence surrounding these efforts, on the part of political leaders and civil society, supports our argument that the advancement of human rights in the Asia Pacific region is best served by the establishment of *national* institutions supported by a regional network such as the Asia Pacific Forum.

ASEAN Human Rights Body (AHRB)

- 3.6 Debate and discussion about the viability of and necessity for such a mechanism within ASEAN has been described as “a long and winding road,”³ characterised by regional meetings and deliberations over a sustained period of time with little progress in between. However, recent developments suggest that the establishment of a regional human rights body may be imminent. These include:
- (a) *November 2007*: 10 ASEAN nations signed the ASEAN Charter, designed “to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and freedoms.”⁴ Article 14 of the Charter committed members to establishing an ASEAN Human Rights Body (AHRB);
 - (b) *January 2008*: a consultative meeting in Manila of human rights commissioners

³ Vitit Muntabhorn, *A Roadmap for an ASEAN Human Rights Mechanism* at <http://www.fnf.org.ph/liberallibrary/roadmap-for-asean-human-rights.htm>

⁴ “ASEAN Leaders Sign ASEAN Charter”, Media Release, Association of Southeast Asian Nations, 20 November 2007 at <http://www.aseansec.org/21085.htm>

from four ASEAN countries - Indonesia, Malaysia, the Philippines and Thailand – proposed that the ASEAN human rights mechanism should be a commission, with the possibility that it might evolve into a human rights court;

- (c) *June 2008*: A meeting of the Working Group for an ASEAN Human Rights Mechanism (the Working Group)⁵ agreed to convene a High Level Panel to draft the terms of reference for the proposed human rights body for implementation by December 2009;
- (d) *September 2008*: a meeting of the High Level Panel with the Working Group for an ASEAN Human Rights Mechanism, the four ASEAN NHRIs (the ASEAN NHRI Forum), the Solidarity for Southeast Asian Peoples Advocacy and the Women’s Caucus for an ASEAN Human Rights Mechanism⁶ supported the idea that the human rights body take the form of and function as a Commission which would “devise its own mechanisms and institutions for the promotion and protection of human rights”, including “sub-commissions, special rapporteurs and working groups.”⁷ The meeting envisaged that the Commission’s promotional role would include initiating “discussions on the establishment of an ASEAN human rights court.”⁸ The Working Group suggested that the ASEAN commission could emerge from the “coordinating efforts” between human rights commissions established in all ASEAN countries.

3.7 Although these developments point to some constructive progress towards the establishment of an ASEAN human rights body, various factors mitigating against its creation, many raised throughout the 15 years of deliberation about the body, may still have current application.⁹ These factors include:

- (a) a state -centric resistance”¹⁰ to interference in domestic affairs where the

⁵ The ASEAN members with established human rights commissions – Indonesia, Malaysia, the Philippines and Thailand (“the ASEAN Four”) – lead the Working Group and the initiative to establish a regional human rights body. Myanmar, Laos, Cambodia and Vietnam remain unenthusiastic, with Singapore and Brunei adopting a neutral stance. See: <http://www.aseanhrmech.org/aboutus.html>

⁶ Working Group for an ASEAN Human Rights Mechanism, ‘The Working Group Meets the High Level Panel on the ASEAN Human Rights Body’ at <http://www.aseanhrmech.org/news/working-group-meets-high-level-panel.html>>accessed 6 October 2008. See also Submission from the Second Regional Consultation on ASEAN and Human Rights to the High Level Panel on the Establishment of the ASEAN Human Rights Body at http://www.forum-asia.org/news/submission/Submission_to_HLP_on_ASEAN_human_rights_body-2008Aug7-FINAL-FORENDORS_EMENT.pdf

⁷ *ibid*

⁸ Submission from the Second Regional Consultation on ASEAN and Human Rights to the High Level Panel on the Establishment of the ASEAN Human Rights Body at http://www.forum-asia.org/news/submission/Submission_to_HLP_on_ASEAN_human_rights_body-2008Aug7-FINAL-FORENDORS_EMENT.pdf

⁹ See: Andrea Durbach, Catherine Renshaw and Andrew Byrnes *A Tongue But no Teeth? The emergence of a new regional human rights mechanism in the Asia Pacific region* (2008) Paper presented to the Sixteenth Annual Conference of the Australia and New Zealand Society of International Law, paper annexed to this Submission

¹⁰ Maznah Mohamad writes: “The contestation for a human rights regime has always involved nation-states battling against their domestic civil society and an international movement pushing for a normative global

proposed mechanism has the power to investigate and monitor the human rights situation in member countries;

- (b) the absence of a developed regional human rights convention or charter, a standard or set of principles against which the new body will assess and determine compliance;¹¹
- (c) a recognition that the implementation of a regional human rights mechanism will require an accommodation of “the history, the realities and culture of all the 10 ASEAN member states”¹² and their “national and regional particularities, and various cultural, historical, and religious backgrounds”¹³ with a consequent detraction from the universal application of human rights norms and principles;
- (d) allied to concerns about state sovereignty, a preference for a consultative rather than prescriptive model of rights protection with a promotional and monitoring, rather than an investigative, role;
- (e) appointments to the human rights body of independent experts who might be more critical of human rights violations unlike government officials who “may play it safer rather than jeopardise friendly relations”;¹⁴ and
- (f) the central role played by a willing minority of ASEAN member states (Indonesia, Thailand, the Philippines and Malaysia) in progressing the proposal in the absence of full ASEAN support.¹⁵

3.8 How these factors are mediated in the lead-up to the December 2009 date for the implementation of the proposed human rights body will be critical for its ultimate success as an effective mechanism for human rights protection in the region. While further delay in implementation of Article 14 of the ASEAN Charter might undermine the recent momentum around the proposal, the caution by Singapore’s Second Minister for Foreign Affairs Raymond Lim, at the June 2008 meeting of

order”: “Towards a human rights regime in Southeast Asia: charting the course of state commitment”, *Contemporary Southeast Asia*, August 2002, 230 at 231.

¹¹ The Asian Human Rights Commission and other groups initiated a major consultation process in 1994 to form the basis for an Asian Human Rights Charter. Over 100 Asian NGOs were consulted and provided information for use by a drafting committee consisting of six persons. After three further consultations, a first draft was finalised and submitted to Asian human rights NGOs, community organisations, concerned persons and groups. The final document was completed in 1997. The Asian Human Rights People's Charter, *Our Common Humanity*, was launched by NGOs in Kwangju, South Korea on 17 May, 1998. It called for the adoption by governments of a regional convention on human rights. Two further drafts of the Charter were submitted for consultation, the most recent, drafted by the Association of Asian Parliaments for Peace, appears to have been rejected at a meeting of Asia-Pacific NGOs held in Cambodia in 2000. See: (2000) 1 *Asia Pacific Journal on Human Rights and the Law* 126

¹² *Straits Times*, 28 August 2007

¹³ Bangkok Declaration of 8 August 1967, available at <http://www.aseansec.org/1212.htm>

¹⁴ Simon Tay, “Human Rights: ASEAN’s Way Forward”, Singapore Institute of International Affairs, 18 June 2008 at <http://www.siiionline.org/?q=programmes/commentary/human-rights-asean’s-way-forward>

¹⁵ *ibid*

the Working Group, indicate that there may be further delays. In his keynote address to the meeting, he called for an “evolutionary” approach given that rights are “contested concepts” and warned against committing to a “fixed deadline” to allow for more time to focus on creating a “credible and meaningful body.”¹⁶

- 3.9 It is too early to tell the likely impact of any sub-regional mechanism adopted within the framework of the ASEAN Charter, though the mechanism should offer some additional guarantees for the protection of human rights within those countries which accept the mechanism. At the same time it is perhaps likely at best to provide supplementary support for the protection of human rights in individual countries and strong NHRIs in those countries will remain essential.

A Human Rights Mechanism for the Pacific?

- 3.10 Support for the idea of establishing a regional human rights mechanism for the Pacific has waxed and waned since the 1980s. Significant momentum for a Pacific regional initiative surrounded the 1989 *Draft Pacific Charter of Human Rights*,¹⁷ which was modelled on the *African Charter of Human and People’s Rights*. The *Draft Pacific Charter*, put forward under the auspices of the Law Association of Asia and the Pacific (LAWASIA), failed to gain the support of Pacific Island leaders, civil society or the people of the Pacific Islands.

- 3.11 At present, the leaders of the Pacific Islands are again considering the potential merits of a regional human rights mechanism. The Pacific Plan, endorsed by leaders of Pacific Island Nations in 2005, envisions “a region of peace, harmony, security and economic prosperity....respected for the quality of its governance, the sustainable management of its resources, the full observance of democratic values and for its defence and promotion of human rights.”¹⁸ One of the Strategic Objectives set out in the Plan is “the (E)stablishment of a regional ombudsman and human rights mechanisms to support implementation of Forum Principles of Good Leadership and Accountability.”¹⁹

- 3.12 The reasons why the 1989 initiative floundered are instructive;

- (a) The 1989 *Draft Charter* was perceived by Pacific Islanders to be a project conceived of and executed by Australians and New Zealanders, without sufficient support, consultation or involvement from the people of the Pacific Islands. There was no sense of Pacific Island “ownership” of the initiative, no sense that the initiative was needed by the Pacific Islands, and no sense that the initiative would

¹⁶ Nazry Bahrawi, “ASEAN’s human rights divide”, Singapore News, 13 June 2008 at <http://www.todayonline.com/articles/259299.asp>

¹⁷ *Draft Pacific Charter of Human Rights* is attached to this Submission

¹⁸ Pacific Islands Forum Secretariat ‘*The Pacific Plan For Strengthening Regional Cooperation And Integration*’ (2006) <http://www.forumsec.org/pages.cf/documents/pacificplan/final-2005.html> [10 November 2008]

¹⁹ Strategic Objective 12.1 of the *Pacific Plan*, *ibid*

improve living conditions or economic opportunities, which were (and remain) the priority for most Pacific Islanders;²⁰

- (b) The *Draft Charter's* references to “people’s rights” and “collective rights” did not dispel Pacific Island concerns about “human rights” being a western, individualistic concept that had little cultural relevance to Pacific values of family responsibility and sub-national allegiances to clan and village;²¹
- (c) Pacific Island leaders pointed out that many of their Constitutions already contained Bills of Rights that protected most fundamental civil and political rights. Protection at the regional level was seen as superfluous, and somewhat galling when proposed by a nation such as Australia that did not itself possess a Bill of Rights.²²

3.13 There are two key benefits of regional arrangements for the protection of human rights. First, regionalism enhances understanding of rights through a shared interpretation of their meaning, with neighbours who are somewhat homogeneous culturally and politically. Second, regionalism improves access to justice by bringing judicial mechanisms physically closer to the people whose rights they are designed to protect. In the 1980s, the overwhelming attitude of Pacific Islanders was that neither of these benefits would flow from the establishment of a regional human rights mechanism. The Pacific Islanders did not necessarily view themselves as a homogeneous region; the key commonality was that their nations were tiny and were spread out across a vast expanse of the Pacific. For the majority of the people of the Pacific, Geneva was unimaginably far away, but Suva, where a regional commission would most likely have its headquarters, was only marginally closer.

3.14 Current advocates for a Pacific Island Human Rights mechanism argue that the situation in the Pacific has changed. They argue that the Pacific Islands Forum is now a cohesive political grouping that reflects a commitment to Pacific regionalism. They argue that there is greater awareness of human rights in the Pacific and an understanding that Pacific values can be built upon in a regional charter, not destroyed. As evidence of this, they point to the increased level of ratification of human rights conventions and treaties by Pacific Island nations and the increased levels of reporting in relation to these treaties. They also note a willingness on the part of the domestic courts to use human rights standards and greater use of the language of human rights even by politicians and Pacific Island governments.²³

²⁰ Imrana Jalal, *Why Do We Need a Pacific Human Rights Commission?*, Introductory Remarks to the “Strategies for the Future: Protecting Rights in the Pacific” symposium, National University of Samoa, 27-29 April 1998, copy on file with authors

²¹ AH Angelo “Lo Bilong Yumi Yet” (1992) 22 *Victoria University of Wellington Law Review* 33

²² See the discussion re constitutional guarantees in Dejo Olowu *The United Nations Human Rights Treaty System and the Challenges of Commitment and Compliance in the South Pacific* (2006) 7(1) *Melbourne Journal of International Law* 155

²³ Above n 20 at 7

- 3.15 Advocates for a regional mechanism also point to new challenges, such as climate change, and argue that the consequences of climate change will affect the Pacific as a region and that a regional response, and regional voice at the international level, is required in order to address these problems. Advocates argue that civil society is now an active participant in the debate about a regional mechanism and that a regional mechanism has the support of civil society.²⁴
- 3.16 Despite support from some sectors of civil society, there still appears to be little or no consensus on the part of Pacific leaders about any mechanism, structure or regime that should be employed to attain the 'Pacific vision'. It is apparent that the reservations that led to the demise of the 1989 *Draft Charter*, still linger:

A pervading undercurrent of these and subsequent initiatives is the lack of consensus on the conceptual, institutional and geopolitical parameters of any regional system.²⁵

- 3.17 What does appear clear is a determination that any future mechanism will be the work of Pacific Islanders, not the work of Australian and New Zealander 'outsiders'.²⁶ Most current dialogue about a regional mechanism for the Pacific proceeds on the basis that Australia and New Zealand would not be invited to join any Pacific Human Rights Mechanism, at least not at first. It appears that a prospective regional commission or court of the Pacific would be for the people of Micronesia, Melanesia and Polynesia and would be staffed by these people, the "sons and daughters of the region."²⁷ At best, Australia's most effective role could be via the provision of training, expertise and resources necessary for the independent functioning of such a commission or court.

A Role for Australia in Establishing a Regional Convention or Charter?

- 3.19 In terms of geographical proximity, Australia is most closely aligned to the Pacific and to Southeast Asia. But there has been no suggestion of which we are aware, by advocates for mechanisms in either of these regions, that Australia should become a party to any prospective regional charter or convention. Australia is not a member of ASEAN and it could be argued that Australia lacks a "community of interest" or "common affinity" with the ASEAN region, which includes several states that still have the death penalty and the rights violating regimes of Myanmar and Cambodia.
- 3.20 Advocates for a human rights mechanism in the Pacific, perhaps mindful of how former momentum towards a regional mechanism was derailed by perceptions that

²⁴ Above n 20 at 8

²⁵ Dejo Olowu *The United Nations Human Rights Treaty System in the South Pacific* (2006) 8 Melbourne Journal of International Law at 8

²⁶ Above n 20 at 6

²⁷ *Ibid* at 9

it was Australia-dominated, display no desire that Australia should become party to any prospective regional human rights charter for the Pacific.²⁸

3.21 It is open to Australia to initiate a sub-regional mechanism for human rights protection. Acknowledging the heterogeneous nature of the Asia Pacific and the different stages of evolution toward development and human rights protection of members of this region, a possibility may be that Australia draft a Convention for the Protection of Human Rights, which might form the procedural basis for establishing a new regional Commission on Human Rights and/or a Court of Human Rights, with powers similar to their counterparts in the other regions (as exist in Europe, Africa and the Americas). The Commission or Court could establish a benchmark for regional protection of human rights. New Zealand is a possible partner in such an endeavour. This alternative has the following advantages:

- (a) It would allow for progressive adoption by the diverse and dispersed nations of the Asia Pacific region;
- (b) It would not preclude the formation of sub-regional mechanisms for the protection of human rights, but would provide a standard in the region against which other mechanisms must be measured;
- (c) Once a mechanism is established and issuing determinations, a regional human rights jurisprudence will develop, with the possibility of human rights norms being accepted and implemented across the region.

4. NATIONAL HUMAN RIGHTS INSTITUTIONS: KEY MECHANISMS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN THE ASIA-PACIFIC REGION

Building national human rights capacity

4.1 In the absence of a regional human rights body with powers to investigate human rights abuses, staffed by independent experts unconstrained in holding regional governments accountable, our submission, based on research undertaken since 2007, argues that the establishment and strengthening of effective NHRIs in the Asia-Pacific region is a more constructive strategy for the prevention and redress of human rights violations in the region. Our starting-point and key argument is that the promotion and facilitation of independent and properly resourced national human rights commissions (NHRIs), rather than a limited regional human rights mechanism, offer significant and enduring prospects for the prevention and redress of human rights violations in the Asia Pacific region.

²⁸ Kennedy Graham Models of Regional Governance: Is There a Choice for the Pacific? (2008) in *Models of Regional Governance for the Pacific* at 48 argues for an “Oceanic Council”, which excludes Australia, and is responsible for issues of “community interest,” which include a regional human rights charter.

Ensuring effective NHRIs: compliance with the *Paris Principles*

4.2 NHRIs have been seen as important actors in the promotion and protection of human rights because of the particular status they have been accorded under international law – they are State institutions (in some cases constitutional bodies), but they are not creatures of the Executive Government and subject to its will. This is reflected in the governing international standards for NHRIs – the *Paris Principles* - which are used to assess the eligibility of an NHRI to be accepted as one of the international community of NHRIs and which are intended to set out minimum criteria for an independent and effective NHRI. To comply with the *Paris Principles*, an NHRI must demonstrate:

- (a) a clearly defined and broad-based mandate, based on universal human rights standards
- (b) independence guaranteed by legislative or a constitutional mandate
- (c) autonomy from the executive government
- (d) pluralism, including a membership that broadly reflects society
- (e) adequate powers of investigation
- (f) sufficient resources to support its own staffing and infrastructure “in order to be independent of the Government and not be subject to financial control which might affect its independence.”³¹

4.3 The UN General Assembly endorsed the *Paris Principles* on 20 December 1993,³² affirming “that priority should be accorded to the development of appropriate arrangements at the national level to ensure the effective implementation of international human rights standards.”³³

4.4 The International Co-ordinating Committee of National Human Rights Institutions (ICC) and the Asia-Pacific Forum of National Human Rights Organisations (APF) both base their recognition of NHRIs on their compliance with the *Paris Principles*. The ICC represents NHRIs from all regions of the world, and liaises with the UN human rights bodies. It accredits NHRIs by reference to their level of compliance with the *Paris Principles*, assigning each institution to one of three categories following a formal application procedure.³⁶ Accreditation by the ICC has become increasingly important, as the possession of ‘A’ status entitles a NHRI to participate in a number of ways in the proceedings of the UN Human Rights Council.

³¹ Principles relating to the status of national institutions, GA resolution 48/134, Annex (1993)

³² Ibid

³³ Ibid

³⁶ The four categories are:

- A: Compliance with the *Paris Principles*
- B: Observer status – not fully in compliance with the *Paris Principles* or insufficient information provided to make a determination
- C: Non-compliant with the *Paris Principles*

- 4.5 Admission to the APF,³⁷ a membership organization of NHRIs from the region, brings with it access to an active network of collaboration between the members, and the support of a small but effective secretariat. As at December 2007, out of 52 UN member states, the Asia-Pacific region has 12 accredited NHRIs.³⁸ The APF currently has 14 full member NHRIs and 3 associate members (Fiji resigned from the APF in 2007).³⁹

The contribution of NHRIs to the promotion and protection of human rights

- 4.6 Our research suggests that the creation and ongoing capacity-building of NHRIs in the Asia-Pacific region has contributed to:
- (a) an increase in domestic civil society awareness and understanding of human rights via NHRI educational and training initiatives;
 - (b) increased capacity of NHRIs to receive and investigate complaints of and report on human rights abuses which breach national laws, affording them visibility and the potential for regional and/or international condemnation;
 - (c) the development of innovative forms or models of redress appropriate to specific societal or state needs;
 - (d) the implementation of government policies, laws and programs which are consistent with international human rights treaties, standards and principles;

³⁷ Andrew Byrnes, Andrea Durbach and Catherine Renshaw, "Joining the Club: the Asia Pacific Forum of National Human Rights Institutions, the *Paris Principles*, and the advancement of human rights protection in the region" ((2008) 14 (1) *Australian Journal of Human Rights* (forthcoming) (working paper version available at [2008] UNSWLRS 39)

³⁸ As of December 2007. See National Human Rights Institutions Forum at http://www.nhri.net/2007/List_Accredited_NIs_Dec_2007.pdf

³⁹ Similar to the criteria for ICC members, the APF Constitution establishes three membership categories: full members, candidate members and associate members, based on the institution's degree of compliance with the Paris Principles. Full members are national human rights institutions that comply with the Paris Principles. Candidate members do not fully comply with the Paris Principles but might comply within a reasonable period of time. Admission as a candidate member requires the institution to take active steps to meet the Paris Principles, sufficient to become a full member of the APF. As of June 2008 there were no candidate members of APF. Associate members do not comply with the Paris Principles and are unlikely to do so within a reasonable period. Associate member institutions must, however, possess a broad human rights mandate. Currently, the Palestinian Independent Commission for Citizens Rights, the National Human Rights Committee of Qatar and the Human Rights Commission of the Maldives are associate members of APF. Current full members of APF are: Australia (NHRI established 1986, APF founding member), New Zealand (NHRI established 1993, APF founding member). India (NHRI established 1993 (APF founding member), Indonesia (NHRI established 1993, APF founding member), Philippines (NHRI established 1987, APF founding member), Sri Lanka (NHRI established 1997, admitted to APF 1997), Nepal (NHRI established 2000, admitted to APF 2000), Mongolia (NHRI established 2000, admitted to APF 2001), South Korea (NHRI established 2001, admitted to APF 2002), Thailand (NHRI established 2001, admitted to APF 2002), Malaysia (NHRI established 2000, admitted to APF 2002), Jordan (NHRI established 2002, admitted as an Associate member 2004 and a Full member in 2007), Afghanistan (NHRI established in 2002, admitted as an Associate member in 2004 and a Full member in 2005), Timor Leste (NHRI established 2004, admitted as an Associate member in 2005 and a Full member in 2007)

- (e) the development of regional NHRI networks which allow for transnational collaboration on issues of common human rights concern eg trafficking, the right of migrant workers; and
- (f) incremental dissemination of international human rights principles and standards into domestic jurisdictions where governments might have resisted their reception if instigated or coaxed, for example, by a United Nations resolution.

4.7 The establishment of an NHRI and its compliance with the *Paris Principles* does not provide a panacea for the human rights problems that any country faces; nor do all NHRIs, even those formally in compliance, necessarily show the level of independence and vigour that might be desirable. The effectiveness and impact of a NHRI is the result of many factors, including not just the efforts of the NHRI's members and staff, but also of the government's attitude to human rights and the NHRI and the broader political and social context. Furthermore, a NHRI is generally just one of a number of actors which contribute to the observance of human rights in any country –parliaments, courts, ombudsmen and similar offices, the media, and civil society organisations are all necessary components of an effective system for the protection of human rights. However, in our submission NHRIs have a potentially major role to play in countries of the region.

National Human Rights Institutions in the Asia Pacific region

4.8 At present there are fewer than two dozen National Human Rights Commissions in the Asia Pacific region - and there is presently only one among the Pacific Island States (the troubled case of the Fiji Human Rights Commission). However, there has been a resurgence of interest recently in establishing such bodies, with Pakistan, Oman, Iraq, Samoa and other countries announcing their intention to do so, and still other countries actively exploring the option.

5. THE ASIA-PACIFIC FORUM OF NATIONAL HUMAN RIGHTS INSTITUTIONS: PROVIDING SUPPORT FOR REGIONAL NHRIS

5.1 In this section we outline the importance for the effective functioning of individual NHRIs of membership of a network of NHRIs, in particular the Asia Pacific Forum of National Human Rights Institutions.

5.2 In the early 1990s, the “Asia Pacific region” (whose boundaries extend from the Middle East to the Pacific), contained only five nations with national human rights institutions which were *Paris Principles*-compliant. These were Australia, India, Indonesia, New Zealand and the Philippines. In July 1996, four NHRI representatives from these nations⁴⁰ met in Darwin, Australia for the first meeting of the Asia Pacific Forum of National Human Rights Institutions (APF). The meeting, sponsored by the United Nations Office of the High Commissioner for

⁴⁰ Philippines was invited, accepted an invitation to attend but was unable to do so.

Human Rights, was also attended by representatives of eight governments where the establishment of NHRIs was underway (Pakistan, Sri Lanka, Nepal, Mongolia, Thailand, Papua New Guinea, Solomon Islands and Fiji) and representatives of several non-government organizations.⁴¹ The meeting adopted the Larrakia Declaration in which the nascent human rights organisations agreed inter alia, that the attainment of effective and credible NHRIs required that their status and responsibilities be consistent with the *Paris Principles*.⁴²

5.3 The primary roles of the APF are:

- (a) to strengthen the capacity of existing APF member institutions to enable them to perform their national mandates, by providing information about best practice and operational efficiencies and technical expertise to enhance the skills and knowledge of member NHRI staff. The APF has also developed training programs (eg for newly appointed commissioners) and specialist networks across member NHRIs which allow for an exchange of information and expertise on institutional governance as well as on substantive human rights issues of common concern, such as internally displaced persons.
- (b) to assist governments and non-governmental organisations to establish national institutions in compliance with the *Paris Principles*. Once a government has issued a formal request for assistance, APF conducts an extensive “needs assessment mission” to the country seeking to host the institution. In determining the need and scope of assistance required, APF consults with relevant members of government, civil society, United Nations officials and international NGOs.⁴³ It reviews and coordinates available expertise in the region or internationally and plans a programme of assistance, which will include securing funding for specific projects.⁴⁴
- (c) to promote regional cooperation on human rights issues by, for example, hosting an annual meeting of APF members and other national human rights organisations, national governments, donors, non-governmental organizations and UN agencies.

5.4 In 2003 Professor Viti Muntarbhorn, the respected Thai international human rights law expert and key advocate for the establishment of an ASEAN human rights body, observed that the APF is “the closest that the Asia-Pacific region has come to a regional arrangement or machinery for the promotion and protection of human

⁴¹ At the first meeting, representatives of attending NHRIs discussed matters of common interest to national human rights institutions in the region, including their independence, their functions and powers, their investigation and conciliation processes, community education and media relations.

⁴² Larrakia Declaration www.asiapacificforum.net/about/annual-meetings/1st-australia-1996/downloads/larakia

⁴³ For example, in 1998, the Forum Secretariat conducted needs assessment missions to Indonesia, Mongolia and Fiji.

⁴⁴ Training programmes involve representatives from all APF member institutions and are delivered by the APF and its partner organisations. In 2008, training programmes have included: in West Asia – National Human Rights Institutions and Human Rights Defenders, in South-East Asia – National Inquiries, in the Maldives – Media and communications.

rights.”⁴⁵ However, it should be noted that many of the core functions of the APF in supporting the work of NHRIs are not those performed by regional human rights mechanism in other parts of the world. Even if one or more sub-regional mechanisms are established in this region, there are still likely to be NHRIs in countries which are not part of such a mechanism, and for these and other NHRIs there will still be a continuing networking role for a body such as the APF.

- 5.5 While the need for and the potential importance of effective ASEAN and Pacific human rights mechanisms has been recognised, difficulties to date have stalled their establishment and results are yet to be seen. This suggests that the APF, as a network of national human rights mechanisms and regional human rights forum, can play an expanded regional role potentially offering greater prospects for strengthening and broadening a human rights culture in the region.

6 ROLES FOR PARLIAMENTS

- 6.1 Parliaments have an important role to play in ensuring the protection of human rights and fundamental freedoms. The fulfilment of this role can take a number of forms, including:
- (a) enacting legislation which gives effect to human rights guarantees (including international treaty obligations), whether this be in the form of general human rights statutes or statutes establishing national human rights institutions, protections in specific areas (eg privacy or anti-discrimination legislation), or legislation which substantively gives effect to specific rights (eg, legislation relating to health or education);
 - (b) scrutinising bills and delegated legislation to ensure that it is consistent with human rights standards (and indeed conducive to the fulfilment of fundamental rights and obligations); and
 - (c) scrutinising the policies and actions of the Executive (and in some cases non-State actors) for consistency with human rights norms, whether through regular committee hearings or special inquiries into specific practices or incidents, consideration of petitions or public debates.
- 6.2 In this submission we make a number of suggestions as to how the Commonwealth Parliament might improve its own scrutiny of human rights and ensure more effective implementation by Australia of its international human rights obligations. This is important, not only to bring about a better level of human rights protection in this country, but also because it would contribute to the reservoir of good Parliamentary practices that other countries can draw on and it would enhance Australia’s ability to promote more effective Parliamentary protection of human rights throughout the region. That said, we also believe that there are practices that

⁴⁵ See Asia Pacific Forum of National Human Rights Institutions, *Report of Activities to the 62nd Session of the UN Commission of Human Rights* at http://www.nhri.net/pdf/E_CN_4_2006_NI_1%20_S_APF.pdf

have been adopted by Parliaments elsewhere, from the adoption of which Australian Parliaments could benefit.

- 6.3 Parliaments have developed many procedures to ensure that human rights issues are identified and taken into account during the legislative process; equally there are examples of cases in which human rights norms have not been identified, adequately examined, or fully respected.⁷⁸
- 6.4 In our view the existence of a bill of rights, whether constitutional or statutory, has the potential to provide significant additional protection of rights in the Parliamentary process. The bill of rights enacted in the United Kingdom, New Zealand, the Australia Capital Territory and Victoria, which all provide specifically for the consideration of human rights norms at various stages of the Parliamentary process, have brought about an enhanced awareness on the part of policymakers and legislators of relevant human rights issues, and ensured a more thorough airing of those issues than would otherwise have taken place.⁷⁹
- 6.5 Our focus is on procedures for more effectively ensuring the full implementation by Australia of its human rights obligations and ongoing scrutiny of government actions in the light of those standards. This requires measures that will more explicitly and explicitly link Australia's international obligations, its reporting under international treaties, and the decision and reports adopted by international bodies on Australia's human rights performance, to the legislative and scrutiny processes which exist in the Parliament at present. Australia reports regularly under the principal UN human rights treaties (as well as other treaties such as ILO conventions), and is subject to a number of international complaint and inquiry procedures.⁸⁰
- 6.6 Whether or not a statutory bill of rights is adopted in the coming years, we recommend that the Commonwealth Parliament work with State and Territory Parliaments to encourage the sharing of information about best practices and the national adoption of procedures which will enhance the level of existing human rights protection through Parliaments.

⁷⁸ See the discussion in Simon Evans and Carolyn Evans, "Australian Parliaments and the Protection of Human Rights" in *National Parliament, National Symbols: Lectures in the Senate Occasional Lecture Series 2006-2007, Papers on Parliament*, Number 47 (July 2007) 17-40, available at http://www.aph.gov.au/senate/pubs/pops/pop47/australian_parliaments.pdf.

⁷⁹ See generally Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, forthcoming), Chapters 4 and 5 (examining the experience under the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities 2006*)

⁸⁰ These include individual complaints procedures under the First Optional Protocol to the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (inquiry procedure as well as individual complaints). To these is likely to be added shortly acceptance of the individual complaints and inquiry procedures under the Optional Protocols to the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities.

- 6.7 The Commonwealth Parliament should expand its initiatives in the region and work with one or more regional Parliaments to convene a series of seminars exploring techniques for more effective Parliamentary supervision of human rights. To some degree, this already occurs through the Inter-Parliamentary Union, which has held a number of seminars on effective Parliamentary procedures for enhancing the protection of human rights,⁸¹ and developed extensive materials on how Parliaments can do this in particular areas (including the preparation of a number of *Handbooks* on different human rights themes⁸² .

7. RECOMMENDATIONS

- 7.1 Given the steps to develop both a sub-regional human rights mechanism in the ASEAN region and the interest within the Pacific to establish a regional mechanism, the Committee should encourage Australian support for both these initiatives. Support should reflect certain key principles, namely, that the regional mechanism:
- (a) derives its functions from human rights conventions, treaties or standards which combine universal human rights principles with domestic considerations;
 - (b) comprises independent experts rather than government officials;
 - (c) exercises investigatory and monitoring roles with powers to enforce determinations and award redress;
 - (d) be properly resourced to implement its mandate
- 7.2 Australian support should not however be provided in the absence of parallel support for facilitating the establishment and strengthening of NHRIs. Given the clear interest on the part of a number of countries in establishing NHRIs, the Australian government and its agencies should support, directly or through appropriate organisations and networks, the establishment of new NHRIs which comply with the *Paris Principles* and engage in capacity building initiatives of existing NHRIs via the APF.

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⁸¹ See in particular the Seminar for Chairpersons and Members of Parliamentary Human Rights Bodies, Geneva 15-17 March 2004 (<http://www.ipu.org/splz-e/hr04.htm>) and the *Report* of the seminar, available at http://www.ipu.org/pdf/publications/hr04_en.pdf

See also the seminars listed at <http://www.ipu.org/strct-e/splzconf.htm>

⁸² These include *Human Rights: Handbook for Parliamentarians* (2005); *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities* (2007); *Handbook for Parliamentarians "The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol"* (2003); *Handbook for Parliamentarians "Refugee protection: A Guide to International Refugee Law"* (2001); *Handbook for Legislators on HIV/AIDS, Law and Human Rights* (1999); and *Handbook for Parliamentarians: Respect for International Humanitarian Law* (1999), all available at <http://www.ipu.org/english/handbks.htm>

7.3 The Committee should recognise the important role that regional networks play in supporting the work of national human rights institutions and recommend that Australia continue to support in various ways the work of the Asia Pacific Forum and similar networks in other regions. This role may be particularly important if more Pacific Island nations move to establish NHRIs.

7.4 In relation to the role of parliaments we recommend that:

- (a) the terms of reference of the Senate Standing Committee on Scrutiny of Bills⁸⁶ be amended to require that it report to the Senate on whether any provisions of a proposed Bill appear to be in conflict with Australia's human rights treaty obligations (in particular but not confined to the principal UN human rights treaties to which Australia is party), and make corresponding amendments to the terms of reference of the Senate Standing Committee on Regulations and Ordinances; and
- (b) that reports of the Australian government to United Nations treaty bodies and the concluding observations of those committees adopted after their consideration of Australia's reports, as well as decisions of those committees in individual cases brought under complaints procedures, are tabled before an appropriate Committee of the Parliament and are discussed by that Committee, and that the Committee keeps under review the implementation of those treaty body recommendations.



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⁸⁶ The current terms of reference of the Senate Scrutiny of Bills Committee provide that the Committee is to examine bills which come before the Parliament and report to the Senate "whether such bills:

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny."

<http://www.aph.gov.au/Senate/Committee/scrutiny/cominfo.htm>

Annexures

Andrea Durbach, Catherine Renshaw and Andrew Byrnes *A Tongue But no Teeth? The emergence of a new regional human rights mechanism in the Asia Pacific region* (2008)
Paper presented to the Sixteenth Annual Conference of the Australia and New Zealand Society of International Law,

Law Association for Asia and the Pacific *Draft Pacific Charter of Human Rights* (1989)

UNSW Project on National Human Rights Institutions in the Asia Pacific Regions

The project

This submission draws on research carried out as part of a Linkage project funded by the Australian Research Council and the Asia Pacific Forum of National Human Rights Institutions (LP0776639 *Building Human Rights in the Region through Horizontal Transnational Networks: the Role of the Asia Pacific Forum of National Human Rights Institutions*).

The AHRC project, which will run from 2007 until 2010, aims to analyse the work of the Asia Pacific Forum by reference to the "network theory" of global power relations, elaborated in particular by political scientist, Anne-Marie Slaughter. It will explore whether international human rights are more effectively advanced by transnational horizontal networks, such as the APF, than via a top-down or vertical approach that characterizes traditional domestic implementation of universal standards. For further details, see <http://www.ahrcentre.org/content/Activites/Projects & Research.html>.

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