



173-175 Phillip St  
Sydney NSW 2000  
Australia

Telephone: +61 2 9351 0351  
Facsimile: +61 2 9351 0200  
Web: [www.law.usyd.edu.au](http://www.law.usyd.edu.au)

Committee Secretary  
Joint Standing Committee on Foreign Affairs, Defence and Trade  
Department of the House of Representatives  
PO Box 6021  
Parliament House  
CANBERRA ACT 2600  
AUSTRALIA

By email: [jscfadt@aph.gov.au](mailto:jscfadt@aph.gov.au)

**20 November 2008**

Dear Committee Secretary,

**RE: Inquiry into Human Rights Mechanisms and the Asia-Pacific**

As members of the Sydney Centre for International Law, we are grateful for this opportunity to make a submission to the Inquiry into Human Rights Mechanisms in the Asia-Pacific. The Sydney Centre for International Law (the Centre) was established with regional international law as a primary focus and it specialises in the teaching and research of this area.

This submission focuses on the inquiry's second term of reference regarding regional mechanisms. However, it does touch upon the other terms of reference also.

**EXECUTIVE SUMMARY**

There are many advantages to be gained from the establishment of an Asia-Pacific human rights mechanism. However, in the Centre's opinion, given the diversity of the Asia-Pacific region it may be difficult to achieve the necessary consensus, political support and resources for such a mechanism. Although it may be productive to encourage dialogue concerning the drafting of a regional human rights charter, the establishment of a Human Rights Commission or Human Rights Court would be especially difficult to facilitate at this juncture in time. In addition, the binding and adversarial mechanism of a court is not presently appropriate for the region.

In our view, a sub-regional human rights mechanism in the Pacific region may be a more viable option. At the same time, it is imperative to support the development of national human rights institutions and the ratification of international human rights instruments to maximise the effectiveness of regional arrangements.

In exploring these issues, this submission will consider:

- the need to support national human rights institutions in the region;
- advantages of a regional human rights mechanism in the Asia-Pacific region;
- the reasons why, to date, no human rights mechanism has been established in the Asia-Pacific region;
- existing moves towards a regional human rights mechanism and the ways in which these could be used as a starting point for further development;
- international and regional models for such a mechanism;
- desirability of a sub-regional mechanism in the Pacific.

## **1. INTRODUCTION**

The formation of regional human rights mechanisms was encouraged by the United Nations General Assembly in 1997, to further deal with security and human rights issues in a manner more attuned to regional conditions. Preceding this, a number of initiatives exemplified by the establishment of the Asia Pacific Forum in 1996 have underscored the salience of such mechanisms.

Trafficking in women and children, internally displaced persons, torture and extra-judicial executions, environmental degradation and lack of access to health, housing and employment opportunities – these are but a few of the urgent and complex human rights issues facing the Asia-Pacific region. Without a regional human rights mechanism, it is not possible to genuinely safeguard the human rights of the most vulnerable persons and groups in the Asia-Pacific.

The following sections highlight the pertinent arguments in favour of the establishment of a regional human rights mechanism in the Asia-Pacific region and analyse the unique attributes relevant to such an undertaking.

## **2. STRENGTHENING NATIONAL HUMAN RIGHTS INSTITUTIONS**

At the outset, it is important to emphasise that any regional initiatives must be accompanied by the strengthening of national human rights protection as a first priority. This is particularly important given that a regional mechanism is unlikely to function properly nor add value until there is a strong corresponding human rights consciousness within Asia-Pacific nations.

Such an approach would accord with the strategies advocated by one of our regional partners, New Zealand, in the context of human rights protection in the Pacific. A 2004 report of the New Zealand Human Rights Commission emphasises the importance of fostering the incremental growth of national human rights institutions

in Pacific nations, as resources and capacity allow, as a first step.<sup>1</sup> Similarly, the New Zealand Law Reform Commission has highlighted the strategic advantage of focusing on existing strong constitutional protection of human rights at the domestic level. As most Pacific nations already have a Bill of Rights within their constitutions, these may provide a better avenue for building local confidence and capacity to then subsequently engage with international human rights treaties and regional arrangements.<sup>2</sup> In our view, these arguments, while directed to the specific situation of Pacific countries, are equally applicable to countries in the broader Asia-Pacific region.

### **3. ADVANTAGES OF A REGIONAL HUMAN RIGHTS MECHANISM**

But should we go further than simply supporting national human rights initiatives? And if so, is establishing a regional human rights mechanism the appropriate course of action?

One argument, of course, is that national human rights initiatives are already supported at the international level, through the work of the United Nations (UN) Human Rights Council, and associated treaty bodies, such as the UN Human Rights Committee. In very general terms, these bodies can be seen to play two main roles. The first is what might be termed a ‘policy’ or ‘political’ role, by which we mean that these bodies develop awareness of human rights and, through political dialogue and the negotiation of international human rights instruments, enhance the international protection of human rights. The second role played by these institutions, and in particular by the treaty bodies which monitor compliance with particular human rights instruments, is a more ‘judicial’ role, in terms of monitoring and ‘enforcing’ existing human rights standards. In terms of this second role, it should be noted that the ability of the relevant bodies to perform this function in relation to the Asia-Pacific region is limited by the fact that the region has a poor record of commitment to the relevant human rights treaties, with less than a quarter of countries in the region having ratified all major instruments. Thus while the international human rights framework may be a useful complement to national human rights initiatives, there is still room for enhancing the protection and monitoring of human rights at the regional level.

In particular, the establishment of a regional human rights framework, in addition to the extant universal human rights mechanisms, would have the advantages of:

- implementing international human rights standards and enhancing their relevance and legitimacy in the region;
- providing an effective medium through which specific regional issues and concerns could be cooperatively targeted and addressed;
- facilitating the development of complementary human rights norms that are of regional concern and filling the lacunae in the reach and influence of international human rights institutions;

---

<sup>1</sup> See the paper prepared by the New Zealand Human Rights Commission, in conjunction with the Pacific Islands Forum Secretariat, *National Human Rights Institutions: Pathways for Pacific States*, available at: [www.hrc.co.nz/hrc\\_new/hrc/cms/files/documents/09-Jul-2007\\_12-52-44\\_Pacific\\_Paper.pdf](http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/09-Jul-2007_12-52-44_Pacific_Paper.pdf).

<sup>2</sup> New Zealand Law Reform Commission, *Converging Currents – Custom and Human Rights in Pacific*, September 2006, Study Paper 17, Wellington, New Zealand at 68.

- helping to build awareness of, respect for and a continuing dialogue on human rights;
- providing support for regional governments with less established national human rights mechanisms; and
- strengthening the independence and institutional capacity of national human rights institutions.

#### 4. LACK OF ASIA-PACIFIC HUMAN RIGHTS MECHANISM

In order to assess whether it is both desirable and possible to establish a human rights mechanism for the Asia-Pacific region, it is necessary first to consider the reasons why, to date, no such mechanism has been established. This is significant because the Asia-Pacific is the only region in the world without a regional human rights mechanism, raising questions as to whether there are fundamental reasons why such a mechanism is not appropriate or achievable in this region. At the very least, we need to be aware of the reasons why such a regional mechanism has not been established, in order to anticipate the challenges which may be associated with the development of a regional approach to human rights protection.

The reasons for the lack of an Asia-Pacific regional mechanism are multifold. Amongst the most important factors are:

- *Size and cultural diversity within the region:* Given the different levels of cultural and economic development amongst the countries in the region, divergent priorities routinely manifest themselves. Consequently, there is considerable debate regarding the desirability and appropriateness of regional human rights mechanisms, and inherent sub-regional groupings.
- *State sovereignty:* One of the greatest obstacles to the existence of a regional mechanism is the strong desire of countries to assert the primacy of state sovereignty whenever human rights concerns are raised. As such, human rights are straightjacketed as ‘internal affairs’ to be dealt with by national governments, with a desire to avoid international scrutiny.
- *Perceived conflict between human rights and other values:* Many states fear that their individual cultural and political identity would be jeopardised by a human rights mechanism due to a perceived conflict between human rights and regional customs and practices. In particular, many countries in the region do not consider the development of human rights mechanisms as a priority, but rather emphasise their multiple and competing concerns including economic/social development and environmental issues. Such a prevailing attitude underpins the belief that human rights can only be realised after a certain level of economic development has been reached.<sup>3</sup> Complementing this attitude is a sense that there is no need for a regional mechanism in light of the protection already afforded in domestic constitutions.<sup>4</sup>

---

<sup>3</sup> This is essentially the ‘Asian values’ argument, which has been much discussed in the literature, but which has also been criticized: see, for example, Amartya Sen, ‘Human Rights and Asian Values’ in *The New Republic*, July 14-July 21, 1997

<sup>4</sup> See above, n 1, at 19.

## 5. ESTABLISHING A REGIONAL HUMAN RIGHTS MECHANISM

### 5.1 Overview

Before considering models for an Asia-Pacific human rights mechanism, it is important to note that there are existing moves to develop human rights protection in the Asia-Pacific. These could be used as a starting point for further dialogue and development in this area. In particular, we would draw the Committee's attention to the following:

- Article 14 of the ASEAN Charter, which has been ratified by all ASEAN States except Thailand, calls for the creation of an ASEAN human rights body. On 11 September 2008, the non-governmental Working Group for an ASEAN Human Rights Mechanism released its Proposed Elements for the Terms of Reference of an ASEAN Human Rights Body, recommending the establishment of a human rights body, to be called a Commission, to promote and investigate human rights in the region and 'to look into possible violations of human rights by an ASEAN Member State'. It appears from this document that the Working Group does not propose the development of an ASEAN Human Rights Charter, but rather envisages that the Commission will promote and protect the human rights embodied in existing international human rights instruments.
- The Asia Pacific Forum (APF), an association of national human rights institutions in the Asia-Pacific region, was established in 1996. Its member institutions have all been established in accordance with the 1991 UN 'Paris Principles' (Principles Relating to the Status and Functions of National Institutions for the Promotion and Protection of Human Rights).<sup>5</sup> The APF works at a regional level to encourage the establishment and growth of national human rights institutions, and to support countries in their protection of human rights, through the provision of training, networking and resource sharing.
- The Asian Human Rights Commission, a Hong-Kong-based non-governmental organisation (NGO), has drafted an Asian Human Rights Charter. The Charter was the result of a three-year period of discussion, with involvement from thousands of individuals from various Asian countries, and over 200 regional NGOs.
- In 1989, the Law Association of Asia and the Pacific (LAWASIA) prepared a Draft Pacific Charter of Human Rights, largely modeled on the African Charter of Human and Peoples' Rights. It also proposed a Pacific Human Rights Commission, which would implement that Charter and receive complaints about human rights violations.

---

<sup>5</sup> The APF has three categories of membership: full members, candidate members and associate members. Currently there are 14 full members including Australia and New Zealand.

When considering possible models for an Asia-Pacific human rights mechanism, drawing on these developments, it is useful to consider the way in which human rights are protected in other regions and internationally. Regional human rights mechanisms exist in Europe, the American continent, and Africa, and operate in a manner broadly complementary to the universal human rights framework. In very general terms, the existing international and regional human rights mechanisms tend to share a number of structural and functional features. These are:

- a legislative instrument, such as a Charter, defining content and scope of the applicable human rights norms;
- a judicial-type body, such as a Court, with vested monitoring/enforcement jurisdiction to resolve disputes arising from breaches of the applicable regional human rights norms; and
- an intermediate, executive-type body, such as a Commission, with a range of responsibilities for activities to develop and promote human rights in the region. Such a body may also conduct preliminary investigations into human rights violations and offer non-binding recommendations.

This section will address which of these features might be appropriate to adopt in an Asia-Pacific human rights mechanism.

## 5.2 Charter

The first step in establishing a regional human rights mechanism would be to define the content and scope of the rights applicable to the region. All existing regional human rights systems have adopted regional charters or treaties to achieve this.

However, some argue that an attempt to formulate an Asia-Pacific Charter would be counter-productive. The concern here is that, in light of the great cultural, social and economic diversity of states within the Asia-Pacific region, the lack of consensus over applicable human rights standards and the low rates of ratification of international human rights instruments, any regional human rights charter would inevitably provide a lower standard of human rights protection than the international human rights system.

For example, Chris Sidoti, then Australian Human Rights Commissioner, in a submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade's 1998 Report, *Improving But...: Australia's Regional Dialogue on Human Rights*, warned that:

*unless we have strong adherence to the existing universal treaties by states in this region, my fear is that any regional treaty would be a lowest common denominator treaty that would in fact have the effect of undermining international global standards rather than providing a regional means for their implementation.*<sup>6</sup>

In other words, rather than putting effort into creating a regional human rights charter that is inferior to, and would undermine, the international human rights framework,

---

<sup>6</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, Report 86: *Improving But...: Australia's Regional Dialogue on Human Rights* (1998) at 136.

emphasis should rather be placed on encouraging regional states to ratify existing human rights instruments. This concern is also echoed by others. For example, Bill Barker, Director of Human Rights International, stated that, in his view, creating an Asia-Pacific Charter of Human Rights ‘would not be a good idea’:

*The countries of the Asia-Pacific region are slowly expanding their adherence to UN human rights instruments and this process should be left to continue. To try to develop an Asia-Pacific Charter would introduce an extremely controversial element into regional human rights diplomacy... [a]nd it is doubtful that the standard in any Asia-Pacific Charter would equal those of existing international instruments.*<sup>7</sup>

Having canvassed opinions such as these, the Joint Standing Committee, in its 1998 report, ultimately endorsed the view that ‘before consideration is given to the development of a regional charter of human rights, Australia should encourage to the fullest extent possible those countries in the region that have not yet entered into the major UN treaties to ratify those documents’.<sup>8</sup>

However, in our view, once the ratification of international instruments becomes a more widespread reality, a regional charter will actually *strengthen* protection for human rights. This is because a charter that contextualises internationally recognised rights might be seen to have greater legitimacy, and thus greater acceptance by states in the region, than international instruments that are arguably not sufficiently sensitive to regionally-specific needs and realities. At the very least, a charter, which may take the form of a binding instrument or a non-binding declaration, will have the positive effect of encouraging a culture of respect for human rights in the region.

Work on a regional charter could build on some of the initiatives outlined above, in particular the Asian Human Rights Commission’s Asian Human Rights Charter and LAWASIA’s Draft Pacific Charter of Human Rights. Of course, reaching consensus on the content of such a Charter is likely to be a lengthy and difficult process. Issues which may be particularly contentious include the treatment of economic, social and cultural rights; whether to include ‘collective’ rights, such as rights to development or to a clean environment; and whether to refer not only to individuals’ *rights*, but also to their corresponding *duties*. Nonetheless, the widespread participation in, and approval of, the drafting of the Asian Human Rights Charter illustrates that there is emerging support for a regional human rights instrument and that consensus on a regional human rights charter may be possible. Further, the mere process of initiating regional discussions on the drafting of an Asia-Pacific Charter is likely to have a positive impact, in terms of encouraging dialogue on human rights.

### 5.3 Court

It is our opinion that, at present, attempts to establish a regional court of human rights would be unproductive, for several reasons. First, before a regional court with enforcement jurisdiction can be established, it is necessary to articulate precisely *what* rights will be enforced. This could be done either by formulating a regional charter of human rights that is then adopted by a majority of states in the region, or by

---

<sup>7</sup> Ibid at 101.

<sup>8</sup> Ibid at 102.

encouraging the widespread ratification of international instruments by the relevant states in the region. Neither of these have yet occurred in the context of the Asia-Pacific. Second, a regional human rights court is unlikely to receive sufficient support, given the general lack of consensus over the content of human rights and the need for a regional human rights system. Third, given the traditional scepticism of regional states towards the imposition of 'Western' human rights concepts, their hostility towards perceived interference in domestic affairs, and the relative instability of the region, the introduction of an adversarial enforcement mechanism is probably unsuited to the Asia-Pacific context. In our view, a mediatory or conciliatory enforcement mechanism is more suited to the region.

#### **5.4 Commission**

In our opinion, a commission that performs an investigative and conciliatory role, similar to that of the Inter-American and African Commissions, would be more suited to an Asia-Pacific context than a court. This reflects the views of the Working Group for an ASEAN Human Rights Mechanism, and the approach taken in the 1989 Draft Pacific Charter of Human Rights.

The key issue to be considered in this context is the functions which such a commission should perform. These functions could range from facilitating inter-governmental dialogue on human rights and providing support for national human rights initiatives, to preparing reports on the human rights situation in the region or in individual states, to investigating and adjudicating individual complaints of human rights violations by states. In view of the factors, set out in section 4 above, which present challenges for the establishment of an Asia-Pacific human rights mechanism, we would make two recommendations.

The first is that the functions of such a commission should initially be limited to facilitating political dialogue and supporting human rights initiatives and protection in the region. Over time, as the commission develops expertise and, more importantly, gains the confidence of member states, it may then be possible to expand the role of the commission to include reporting, monitoring and ultimately enforcement functions. In this, we endorse the recommendation of the Working Group for an ASEAN Human Rights Mechanism that the functions of any human rights commission be the result of an 'evolutionary process' such that 'the Commission's capacity as an institution' could evolve over time, from general promotion of human rights within the region to the investigation of individual complaints.

Our second recommendation is that it may be easier and more productive to develop human rights mechanisms attached to existing regional bodies, rather than to create a new human rights commission from scratch. In particular, given the valuable work of the Asia Pacific Forum (APF), one possibility would be to expand the functions of, and regional participation in, the APF so that it may become a quasi-human rights commission for the Asia-Pacific region. As the most recent past President of the Human Rights and Equal Opportunity Commission remarked, in the context of discussions concerning the development of a Pacific human rights body:

*Rather than engage the APF [Asia Pacific Forum], aid donors, and the two NHRIs [national human rights institutions] in the region - the New Zealand Human Rights Commission and the Australian Human Rights and Equal*



*Opportunity Commission – in supporting the establishment of another body to carry out the same or very similar functions to APF, would it not be better to put the effort directly into assisting each PIF [Pacific Island Forum] member State to overcome its domestic obstacles that stand in the road of establishing a NHRI?*<sup>9</sup>

## **6. ESTABLISHING A SUB-REGIONAL HUMAN RIGHTS MECHANISM**

While it is our opinion that it would be valuable to commence dialogue within the Asia-Pacific region concerning the drafting of a regional human rights charter and the establishment of a human rights commission, the obstacles in the way of achieving such a regional human rights mechanism, as outlined in section 4 above, are significant. However, the creation of a sub-regional mechanism, where common concerns and values can be leveraged, is likely to be more viable.

There are many options for sub-regional groupings. Perhaps the most promising, and that with most relevance to Australia, is the possibility of a Pacific human rights mechanism.

### **6.1 Towards a Regional Human Rights Mechanism in the Pacific: Overview**

The Pacific region may be a viable sub-region, given that it exhibits significant commonalities of culture, custom and values. According to a report of the New Zealand Law Reform Commission, there are notable similarities across the countries of the region, largely based on shared economic issues, similar democratic systems of government, Christian heritage, a shared history of colonisation and the need to respond to the impacts of globalisation.<sup>10</sup> These similarities provide a firm basis for the development of a regionally appropriate mechanism that is capable of harmonising international human rights norms with regional customs and culture

In fact, the establishment of a Pacific human rights mechanism has been discussed by civil society groups since the 1980s. One of the most notable attempts was the 1989 Draft Pacific Charter on Human Rights, noted above. However, this Charter was never adopted by Pacific nations. While it was innovative, and involved widespread public consultation and experts from various institutions, it appears that the failure of the Charter was largely the result of 'lack of buy-in at a governmental level'.<sup>11</sup>

However, there may now be greater governmental support for such an instrument, as there appears to be growing recognition, on the part of leaders of Pacific nations, that the protection and advancement of human rights is a regional issue. For example, in recent years, the Pacific Islander Forum, a network of 16 independent Pacific states, has expressed a strong commitment to regional cooperation on human rights and good

---

<sup>9</sup> John von Doussa QC, presentation at the Australasian Law Reform Agencies Conference in September 2008, *The Potential Role of National Human Rights Institutes in Pacific*, available at: [www.paclii.org/other/conferences/2008/ALRAC/Papers/Session%207/Session%207%20\(von%20Doussa\).doc](http://www.paclii.org/other/conferences/2008/ALRAC/Papers/Session%207/Session%207%20(von%20Doussa).doc).

<sup>10</sup> See above, n 2, at 237.

<sup>11</sup> Petra Butler, *A Human Rights Charter for the Pacific* (2005), available at: [www.victoria.ac.nz/nzcpl/HRRJ/vol3/Butler.pdf](http://www.victoria.ac.nz/nzcpl/HRRJ/vol3/Butler.pdf).

governance. In the Pacific Plan, developed in October 2005 and updated in October 2007, the leaders agreed to ‘promote and protect cultural identity, regional inclusiveness, sub-regional representation, human rights, gender, youth and civil society.’ Moreover, the Forum leaders have repeatedly affirmed the need to protect human rights, and in the 2004 ‘Auckland Declaration’ articulated a vision for the future of the Pacific region as one where ‘cultures, traditions and religious beliefs [of the Pacific] are valued, honoured and developed’ and the region is respected ‘for its defence and promotion of human rights’.

With this background in mind, the rest of this section considers the appropriateness of a charter, court and commission within the subregional context.

## 6.2 Charter

The establishment of a Pacific Charter that articulates and harmonises human rights with regional values is likely to be valuable in facilitating greater regional adherence to human rights. Further, given the current climate of cooperation there is a greater chance of a charter succeeding than in the past. As Petra Butler, of Victoria University, Wellington, has noted:

*In the last 15 years things have changed in the Pacific region. The establishment of the Fiji Human Rights Commission in 1997, the unrest in the Solomon Islands and the subsequent peace and reconciliation movement, and also the ever-increasing judgments referring to human rights by the courts of the Pacific are only some examples to show that political buy-in for a Pacific Human Rights Charter might be easier to achieve than 15 years ago. Furthermore, a regional human rights instrument can foster cultural identity rather than jeopardise it.’<sup>12</sup>*

This last statement is supported by work of the New Zealand Commission for Human Rights, which has conducted extensive research to dispel the perception that human rights and local custom and identity are incompatible, concluding that ‘while the values underlying human rights may be worded differently than Pacific values, both express similar aspirations.’<sup>13</sup>

## 6.3 Court

While there may be growing recognition of the need for the advancement and protection of human rights at a regional level, it is our opinion that the development of a human rights court with enforcement jurisdiction is unlikely to find support among Pacific leaders at this stage. This prediction is confirmed by past experiences: the Draft Pacific Charter’s proposal for an enforcement mechanism proved to be a substantial barrier to it gaining acceptance. Further, the vision currently articulated in the Pacific Plan and Auckland Declaration is largely one based on facilitating cooperation between states to encourage the development of national human rights machinery within their own countries. There is no conception of a supra-national mechanism that would impose reporting obligations on the state, have investigative powers, or receive complaints about human rights contraventions. Further, concerns to preserve state sovereignty appear to be strong, and dispute resolution based on

---

<sup>12</sup> Ibid.

<sup>13</sup> See above, n 2, at 12

mediation, rather than adjudication, is more in line with Pacific customary approaches to conflict.

#### **6.4 Commission**

In light of the concerns noted in the previous paragraph, we are of the view that a human rights commission, with (initially) limited functions is likely to have a greater chance of success. We repeat, in this context, our recommendations set out in section 5.4 above regarding an ‘evolutionary approach’ to the development of a human rights commission, and the usefulness of developing a commission incrementally, through the enhancement of existing regional human rights bodies.

### **7. CONCLUSION**

In light of the above, we recommend Australia consider:

- taking immediate measures to strengthen and support national human rights institutions within the region;
- commencing regional dialogue with a view to developing a regional human rights charter and human rights commission. Such dialogue should build on previous efforts in this area, and should be focused on an incremental or ‘evolutionary’ approach to the protection of human rights in the region;
- commencing dialogue with Australia’s partners in the Pacific region with a view to developing a sub-regional human rights mechanism in the Pacific.

Finally, we would like to emphasise the manifest transforming potential of an Asia-Pacific regional human rights mechanism in creating and nurturing a more robust culture of compliance with international human rights norms. It should be noted that this process has a significantly higher chance of success if Australia assumes a leadership role to cooperatively promote and assist this invaluable regional initiative.

Yours sincerely,

**Prof David Kinley** Professor of Human Rights, Sydney Centre for International Law

**Dr Ben Saul** Director, Sydney Centre for International Law

**Irene Baghoomians** Associate, Sydney Centre for International Law

**Dr Jacqueline Mowbray** Program Co-Director, Sydney Centre for International Law