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# **Submission on the Inquiry into Human Rights Mechanisms and the Asia-Pacific**

**December 2008**



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### **About the Human Rights Law Resource Centre**

The Human Rights Law Resource Centre (**HRLRC**) is an independent community legal centre that is a joint initiative of the Public Interest Law Clearing House (Vic) Inc and the Victorian Council for Civil Liberties Inc.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

The four 'thematic priorities' for the work of the HRLRC are:

- (d) the development, operation and entrenchment of Charters of Rights at a national, state and territory level;
- (e) the treatment and conditions of detained persons, including prisoners, involuntary patients and persons deprived of liberty by operation of counter-terrorism laws and measures;
- (f) the promotion, protection and entrenchment of economic, social and cultural rights, particularly the right to adequate health care; and
- (g) the promotion of equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples.

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## 1. Introduction

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### 1.1 Scope of this Submission

1. On 3 September 2008 the Minister for Foreign Affairs, the Hon Stephen Smith MP, asked the Joint Standing Committee of Foreign Affairs, Defence and Trade (**the Committee**) to inquire into and report on human rights mechanisms in the Asia-Pacific (**Inquiry**).
2. The Committee's Terms of Reference are '[t]o inquire and report on international and regional mechanisms currently in place to prevent and redress human rights violations, with a view to providing options on possible models that may be suitable for the Asia-Pacific region'.
3. This submission is made by the Human Rights Law Resource Centre (**HRLRC**). The submission focuses discussion and provides detailed recommendations in relation to Australia's engagement with Pacific Island countries for reasons that are outlined below. General principles of engagement relevant to both Asia and the Pacific are also articulated. The submission considers existing regional engagement with human rights as well as previous and ongoing attempts to develop regional human rights mechanisms.
4. The HRLRC considers that any plan for the promotion of human rights in the Pacific must be informed by a number of factors beyond those set out in the terms of reference, including:
  - (a) the needs and priorities of government and civil society within Pacific Island countries;
  - (b) relevant political and historical contexts;
  - (c) existing levels of engagement with international human rights mechanisms; and
  - (d) availability of and access to resources.
5. As a specialist human rights law centre, the HRLRC has expertise in the operation of international and regional human rights mechanisms. While this submission draws on that expertise, we emphasise that Australia's unilateral promotion of a utopian model of human rights protection which pays insufficient attention to the factors listed above would not only be unsuccessful; it would potentially alienate key stakeholders and detract from the promotion of human rights in the region.
6. The HRLRC considers that it would be inappropriate for Australia to take a 'top-down' leadership role in the establishment of a regional human rights mechanism in the Pacific. However, Australia should take a constructive and collaborative leadership role in the promotion of human rights in the region in other ways, many of which are outlined in this submission.

7. This submission sets out a framework for regional engagement and dialogue around human rights. Many of the recommendations contained in the submission should be considered starting points and require further investigation and analysis before they can be fully implemented.
8. We note that on 29 June 1998 the Committee presented its report, 'Improving But...: Australia's Regional Dialogue on Human Rights' (**1998 JFADT Report**).<sup>1</sup> The 1998 JFADT Report concludes that there is potential for Australia to have a 'profound impact on the promotion of human rights' in the region.<sup>2</sup> The HRLRC supports this general conclusion and notes that many of the recommendations in that report have not been implemented and a number are repeated with approval in this submission.

## 1.2 Recommendations

***Recommendation 1:***

The Committee should conduct separate analyses and develop distinct approaches to the development and enhancement of human rights mechanisms for Asia and the Pacific.

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<sup>1</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, 'Improving But...: Australia's Regional Dialogue on Human Rights', 29 June 1998 (available at <http://www.aph.gov.au/House/committee/jfadt/dialog/Reportinx.htm> as at 17 November 2008).

<sup>2</sup> Ibid., xiv.

**Recommendation 2:**

Australia must ensure robust engagement with the UN human rights system and commit to the implementation of its own obligations under international human rights law, including by:

- (a) the establishment of a Joint Parliamentary Committee on Human Rights, to monitor and report on the implementation of the Concluding Observations of UN treaty bodies and the Recommendations of the Special Procedures of the UN Human Rights Council;
- (b) establishing effective domestic mechanisms, including judicial mechanisms, to ensure and monitor implementation of and compliance with Views of the Human Rights Committee against Torture on Individual Communications, together with Views of other UN treaty bodies on such communications; and
- (c) developing effective domestic legislative mechanisms (such as a legislative, federal *Charter of Rights*) to ensure comprehensive legal protection of human rights.

**Recommendation 3:**

The Australian Government should conduct a human rights audit of its relationship with both Asia and the Pacific, including in the areas of aid, trade, defence co-operation and business engagement. Australia's human rights obligations should be mainstreamed in each of these areas.

**Recommendation 4:**

The Australian Government should provide technical and financial support to Pacific Island countries for the ratification of international human rights treaties and associated implementation and reporting requirements, including offering capacity-building programs for Governments and local human rights organisations.

**Recommendation 5:**

The Australian Government should provide financial and technical resources to assist in the development of NHRIs. This should be done within the existing structures of the APF.

***Recommendation 6:***

The Australian Government should conduct an audit of NGOs doing human rights work in the Pacific and implement policies that strengthen and support these organisations. This may involve, among other things, building on existing programs such as AusAID's Human Rights Fund and the Human Rights Small Grants Scheme. Government policies aimed at promoting human rights in the region should be developed and implemented in partnership with these organisations.

***Recommendation 7:***

The Australian Government should support human rights education in the region through its aid and capacity building programs, as well as through increased support of the APF and the Australian Human Rights Commission.

***Recommendation 8:***

The Australian Government should not adopt a top-down leadership role in the development of a regional human rights mechanism. However, in recognition of the many benefits that would flow from the development of such a mechanism, the Australian Government should be prepared to provide significant financial and technical assistance to Pacific Island government and non-government organisations that wish to develop and promote a regional mechanism.

## 2. Background and Overarching Considerations

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### 2.1 Distinction between Asia and the Pacific

9. This submission will focus on policies and programs pertaining to the Pacific region, rather than addressing such initiatives in both Asia and the Pacific. The following reasons underpin this approach:
- (a) the Pacific and Asian regions are extremely different socially, economically and politically;
  - (b) the Committee has previously noted research recommending that Asia and the Pacific be distinguished and addressed separately when considering Australia's role in the regional protection of human rights;<sup>3</sup> and
  - (c) Australia maintains different diplomatic relations with the Pacific and Asia regions. For instance, Australia is not part of ASEAN (although we note the Committee's current inquiry into Australia's relationship with ASEAN). In contrast, Australia has taken a leadership role in the state building process of Timor Leste and maintains strong development relationships with other Pacific Island countries.
10. For these reasons, it is our view that different approaches are needed to accommodate the varying levels of engagement and influence in both regions. Accordingly, this submission focuses on the form of engagement Australia may wish to pursue in the Pacific region. Nevertheless, the principles we articulate should be taken into account by the Committee in developing a relationship in either region.
11. This submission uses the term, 'Pacific Island country' or 'Pacific Island countries' in reference to the island countries and territories in that region, namely American Samoa, Cook Islands, the Federated States of Micronesia, Fiji Islands, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Northern Maiana Islands, Palau, Papua, Papua New Guinea, Samoa, Solomon Islands, Timor Leste, Tokela, Tonga, Tuvalu, Vanuatu, Wallis and

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<sup>3</sup> Justice Michael Kirby, AC CMG, 'Human Rights: An Agenda for the Future', *Rethinking Human Rights*, 19 in 1998 JFADT Report, 135.



Futuna.<sup>4</sup> When this submission uses the term 'the Pacific', we are referring to Pacific Island countries in addition to Australia and New Zealand.

12. The HRLRC makes the following recommendations:

**Recommendation 1:**

The Committee should conduct separate analyses and develop distinct approaches to the development and enhancement of human rights mechanisms for Asia and the Pacific.

**2.2 The Case for a Regional Human Rights Dialogue**

13. The Pacific region is one of only two regions in the world which does not have a regional human rights framework.<sup>5</sup> Asia is the other region. While this is not a reason in itself to create a human rights mechanism, it is an indication of the early stage of formal developments in relation to human rights compared with other regions.

14. In considering the role of human rights in the Pacific, P. Imrana Jalal, the Human Rights Advisor to the Pacific Regional Rights Resource Team (**RRRT**),<sup>6</sup> notes that while it is not widely acknowledged or even understood, 'the human rights framework and the international human rights system has already brought considerable benefits to the Pacific Island countries and its citizens.' Jalal argues that Pacific Islanders who understand the implications of not having human rights to protect them 'would be loath to abdicate them, given a choice.' Even those who resist the role of human rights in the Pacific would agree that certain rights already maintain an important place in the Pacific, such as the right to a fair trial. Jalal summarises the gains of the international human rights framework for Pacific Island countries as including:<sup>7</sup>

- (a) providing the moral and legal framework for decolonisation and independence from former Pacific Island countries' colonial powers (a key feature of the *Universal Declaration on Human Rights* and *International Covenant on Civil and Political Rights (ICCPR)*);

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<sup>4</sup> New Zealand Law Commission, *Converging Currents: Custom and Human Rights in the Pacific*, September 2004, 11 (available at: [http://www.lawcom.govt.nz/UploadFiles/Publications/Publication\\_120\\_340\\_SP17.pdf](http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_120_340_SP17.pdf)) (**New Zealand Law Commission Report**), Appendix 2.

<sup>5</sup> Petra Butler, *A Human Rights Charter for the Pacific*, Human Rights Research, 2005 (available at: <http://www.victoria.ac.nz/nzcpl/HRRJ/vol3/Butler.pdf>) (**Butler**), 1.

<sup>6</sup> RRRT is based in Suva, Fiji, and works in eight focus countries in the region - the Cook Islands, Fiji, Kiribati, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. RRRT assists partner organisations, both State and non-State, with capacity building for human rights. See [http://www.rrrt.org/page.asp?active\\_page\\_id=79](http://www.rrrt.org/page.asp?active_page_id=79)

<sup>7</sup> *Ibid.*

- (b) providing a framework for democracy and elections, constitutions and membership in the UN;
- (c) providing a legal framework of good governance for Pacific Island countries;
- (d) enabling the majority of Pacific Island countries to be perceived globally as functioning democracies and generally respecting of human rights;
- (e) enabling and promoting the establishment of an independent judiciary;
- (f) facilitating the allocation of considerable overseas aid where Pacific Island countries are able to demonstrate elected leadership and good governance;
- (g) providing aid and technical support for combating child pornography, discrimination against women and for other infrastructure development needs;
- (h) providing protection against the arbitrary use of power by the state in terms of the rights to free movement, speech, fair trial, freedom from discrimination, free and fair elections and protection against torture; and
- (i) ratification of certain international human rights treaties has driven positive legislative development. For example, in some states ratification of the *Convention on the Rights of the Child* has been the catalyst for legislation against child pornography.

### **2.3 Historical and Political Context**

15. The receptiveness of Pacific governments and civil society to the development of regional human rights initiatives will be influenced by historical and political factors. Importantly, the legacies of colonialism still exist in the Pacific and are likely to affect Australian relationships with Pacific Island countries for some time.<sup>8</sup>
16. Whether it is a justifiable position or not, many developing countries see human rights as a Western construct that threatens the sovereignty of developing or non-Western nations and perpetuates colonial relationships. For example, the former Malaysian Prime Minister Mahathir Mohamad has criticised Western advocacy of human rights, saying:<sup>9</sup>

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<sup>8</sup> Nick Maclellan, 'Australian neo-colonialism in the Pacific: Human Rights Implications', speech at the Castan Centre for Human Rights Conference, 4 December 2003, Melbourne.

<sup>9</sup> Kausikan B 'Asia's Different Standard' (1993) 92 *Foreign Policy* 24. See generally Pritchard S 'Asian Values' and Human Rights' in (1996) *Proceeding of the Fourth Annual Meeting of the Australian New Zealand Society of International Law* 153-177.

individuals in some developed countries consider it their right to tell us how to rule our country ... These people latch on to various causes such as human rights and the environment in order to reimpose colonial rule on us ...

17. While this view is certainly not shared by all stakeholders, it is important to recognise and be sensitive to the potential for Australian involvement in the promotion of human rights in the Pacific to be seen as imperialist. This concern is closely related to the debate around cultural relativism and the universality of human rights, which is discussed in greater detail below.
18. In practice, this barrier to regional human rights engagement can be mitigated by ensuring that developments are collaborative, rather than being imposed in a 'top-down' manner. For example, Governments and civil society within Pacific Island countries must be involved in the development of education and capacity-building programs and have ownership of a regional human rights mechanism if any of these initiatives are to be successful.

#### **2.4 Theoretical Framework**

19. This submission will not address in detail theoretical debates around the human rights framework. However, two issues of particular relevance are flagged and discussed briefly, namely:
  - (a) the perceived conflict between human rights and customary law; and
  - (b) the 'cost' of human rights, particularly in a development context.
20. While recognising the significance and complexity of these issues, we note that the debates around them are often removed from the practical business of promoting and implementing human rights. Theoretical concerns should not be ignored, but nor should they be allowed to obstruct the work of those within the region who are improving the lives of marginalised and disadvantaged people and whose work would be made more effective through enhanced regional dialogue and engagement with human rights.
21. The 1998 JFADT Report noted that there would be 'a greater receptiveness to dialogue on human rights if it were approached more on a level of what is useful to ordinary people in their everyday lives, rather than moving through debate and division at a high level of government'.<sup>10</sup> The HRLRC reiterates and recommends this approach.

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<sup>10</sup> 1998 JFADT Report, above n 1, 130.

**(a) Custom and Human Rights**

22. The universality of human rights is challenged the world over, including in the Pacific.<sup>11</sup> Questions of universality and cultural relativism are complex and will not be explored fully here. However, the HRLRC emphasises that human rights constitute core minimum standards which are capable of being adopted and implemented in such a way so as to ensure respect for local values and cultures.
23. Maintaining local values and custom and implementing universal human rights are two key objectives regularly cited by Pacific leaders.<sup>12</sup> Dialogue around custom and human rights is of particular importance since 'custom law is the most significant existing mechanism for human rights protection and promotion in many small states. In some islands it is the only meaningful mechanism in the reality of day to day life.'<sup>13</sup>
24. Both custom and human rights are embedded in many Pacific constitutions.<sup>14</sup> However, the two aims are perceived by many Pacific countries as being in conflict: human rights are seen as a threat to custom and the Pacific way of life is seen as a threat to individual freedom and justice.<sup>15</sup> At the same time, there are many values which are shared and common to both custom and human rights. For example, the Pacific emphasis on all people having some divine essence and dignity is consistent with the centrality of a person's dignity to human rights law.<sup>16</sup>
25. International human rights instruments also recognise important cultural and group rights including the right to freely participate in the cultural life of the community.<sup>17</sup> Common Article 1(1) of the *ICCPR* and *ICESCR* recognise the right to self-determination and the rights of

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<sup>11</sup> Imrana Jalal, 'Pacific Culture and Human Rights: Why Pacific Island Countries should ratify International Human Rights Treaties', (April 2006) available at <http://www.rrrt.org/assets/Pacific%20Culture%20and%20Human%20Rights.pdf>, 12. For a discussion of human rights and cultural relativism see chapter five in Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals* (OUP 2<sup>nd</sup> ed.) 2000, 323-403.

<sup>12</sup> New Zealand Law Commission Report, above n 4.

<sup>13</sup> Joy Liddicoat, 'Research on human rights mechanisms in small Pacific states: implications for dialogue about regional human rights mechanisms', 39 (1) *Victoria University of Wellington Law Review* (2009) (forthcoming).

<sup>14</sup> New Zealand Law Commission Report, above n 4, 11 and see Appendix 3 for list of domestic human rights protections in Pacific Island countries.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, 75.

<sup>17</sup> Article 27(1) of the UDHR and Article 15(1) of ICESCR.

peoples to determine their political status and freely pursue their economic, social and cultural development.

26. In considering the potential to harmonise the position of custom and human rights, or resolve the perceived conflict, the New Zealand Law Commission concludes in its report, which involved substantial consultation with Pacific Island countries:<sup>18</sup>

We think any conceptual conflict between custom law and human rights is exaggerated. Most prominently, the human rights framework's focus on individual rights is said to conflict with the customary focus on the individual's duties to the group. However, human rights are also concerned with groups. In addition, with every right there is a duty and with every duty a right. Whether more stress is given to one or the other depends on the problem in question.

27. The New Zealand Commission Report contains a detailed and persuasive analysis on the harmonisation of custom and human rights law. So while Pacific culture must be recognised and respected, this should not impede the promotion of human rights in the region. In other words, 'dialogue and research needs to carefully delineate between cultural sensitivity and cultural relativism in the articulation of human rights'.<sup>19</sup> Pritchard and Corpuz-Brock suggest that 'most of the disagreement is over the implementation of human rights, rather than the norms themselves'.<sup>20</sup>

28. These sentiments have been supported by non-government organisations throughout the region. Prior to the 1993 World Conference on Human Rights, representatives of more than 110 human rights and development NGOs from 26 Asia-Pacific countries adopted the Bangkok NGO Declaration on Human Rights, which states:<sup>21</sup>

There is emerging a new understanding of universalism encompassing the richness and wisdom of Asia-Pacific cultures. As human rights are of universal concern and are universal in value, the advocacy of human rights can not be considered to be an encroachment upon national sovereignty. We affirm our commitment to the indivisibility and interdependence of human rights, be they economic, social and cultural, or civil and political rights.

29. It is clear that the promotion of human rights – when pursued in a respectful manner through participation and engagement – can be compatible with respect for cultural diversity.

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<sup>18</sup> *Ibid.*, 77.

<sup>19</sup> Liddicoat, above n 13, 12.

<sup>20</sup> Sarah Pritchard and Jane Corpuz-Brock, 'Asia-Pacific Regional Dialogue on Human Rights: A Submission to the Human Rights Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade', 9 *Australian Journal of Human Rights* (1999).

<sup>21</sup> Regional Meetings: Report by the Secretariat: *Bangkok NGO Declaration on Human Rights*, UN Doc A/CONF 157/PC/83, at 2.

Nevertheless, it will be important to address the perceived conflict between custom and human rights in any attempt to promote human rights in the Pacific.

**(b) The 'cost' of human rights**

30. Another regularly-cited concern about human rights – particularly in relation to economic, social and cultural rights – is that they are expensive to implement. In the context of the Pacific, many are of the belief that the 'cost' of human rights is prohibitive. According to Jalal:

PICs are very wary of any rights with resource implications like economic, social or cultural rights. Most PIC governments regard such rights as being too expensive to implement and are unable to accept that international law allows for the progressive realisation of rights. There is a view that if these rights are ratified, then citizens will be able to immediately enforce rights such as the right to work, education or shelter. PIC governments perceive conventions to be inconsistent with their own development priorities rather than essential to them.

31. While the idea that human rights are expensive to implement is one that has gained traction around the world, it is largely a myth. The ICESCR obliges States parties to commit 'the maximum of available resources' to ensure the 'progressive realisation of rights'.<sup>22</sup> This means that States are not expected to have fully implemented all their obligations under a treaty prior to, or immediately upon ratification. Further, the ICESCR recognises that developing countries face resource constraints, providing at article 2(3) that 'developing countries may determine to what extent they would guarantee economic rights... to non-nationals'.
32. Related to the concern about the financial implications of human rights implementation is the argument that human rights are realised at the cost of economic growth. Again this is a contentious position which will not be fully explored here except to note the substantial evidence that economic growth is not hampered by respect for human rights.<sup>23</sup>
33. In fact, the prevailing view (which is supported by economic research) is that poverty cannot be addressed without considering a wide variety of issues - including rights-related considerations. Economic research demonstrates a strong correlation between effective and equitable social policy and economic development and growth.<sup>24</sup> This is the position that is taken by the Australian Government in its aid programs throughout the region.<sup>25</sup>

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<sup>22</sup> Article 2(1) of ICESCR.

<sup>23</sup> Amartya, S., *Human Rights and Asian Values* (New York: Carnegie Council on Ethics and International Affairs, 1997), p.10.

<sup>24</sup> See, eg, Thandika Mkandawire (ed), *Social Policy in a Development Context* (2004); Nick Pearce and Will Paxton (eds), *Social Justice: Building a Fairer Britain* (2005); Sen, above n 23; *A Comprehensive Development*

## 2.5 Resource Constraints

34. Both Government and non-government organisations within the Pacific are constrained by lack of resources. Many countries in the Pacific have very small populations – e.g. Tokelau (pop 1466); Tuvalu (pop 11 992); Niue (pop 1679) – and will rely on the support of donors to promote human rights objectives in their countries and engage in the international human rights system.
35. If Australia is to commit to the promotion of human rights within the region, the Government must ensure adequate resourcing to allow for Pacific governments and civil society to engage in a regional dialogue on human rights and to participate in the international human rights system. This should include, for instance, funding adequate to ensure that programs and policies are accessible in the language and media appropriate for Pacific people.<sup>26</sup>
36. Human resources are also limited in most Pacific island countries. Joy Liddicoat, Commissioner of the New Zealand Human Rights Commission, has noted that:

In Niue, Tuvalu and Samoa various Ministerial portfolios are frequently multifaceted, placing high demands on ministerial offices. Similar issues arise for administrators and personnel, with a small number of government agencies having broad and often complex responsibilities for both service delivery and policy development. With a small number of personnel and multiple demands, there is limited reserve capacity for new or increasing work demands, which can quickly lead to overextension.

It is therefore important that the Australian Government recognise and, if possible, assist in addressing the limited capacity and competing priorities of Pacific Island Government personnel.

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Framework has been proposed by the World Bank and is available at: <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/STRATEGIES/CDF/0,,pagePK:60447~theSitePK:140576,00.html> accessed at 18 November 2008); see also Daniel B. Bradlow and Claudio Grossman, 'Limited Mandates and Intertwined Problems: A new Challenge for the World Bank and IMF' (1995) 17.3 *Human Rights Quarterly* 411, 412.

<sup>25</sup> AusAID, *Human Rights and Australia's Aid Program*, available at <http://www.ausaid.gov.au/keyaid/humanrights.cfm>

<sup>26</sup> Liddicoat, above n 13.

## 2.6 Need for a Consistent and Principled Approach

### (a) *Domestically*

37. In order for Australia to speak with a legitimate voice in a regional dialogue on human rights, the Australian Government must itself commit to robust engagement with the United Nations human rights system and the effective implementation of its human rights obligations within Australia.
38. Since taking office, the Rudd Government has taken a number of positive steps in this regard, including:
- (a) the ratification of the Convention on the Rights of Persons with Disabilities;
  - (b) taking steps to become a party to the UN Optional Protocols to the Convention on the Elimination of all Forms of Discrimination Against Women, the Convention Against Torture and the Convention on the Rights of Persons with Disabilities; and
  - (c) issuing a standing invitation to the Special Procedures of the UN Human Rights Council to make official visits to Australia.
39. This commitment to full engagement with the UN and international human rights mechanisms should be continued and supplemented by, among other things, the development of mechanisms at a domestic level, such as:
- (a) the establishment of a Joint Parliamentary Committee on Human Rights, to monitor and report on the implementation of the Concluding Observations of UN treaty bodies and the Recommendations of the Special Procedures of the UN Human Rights Council;
  - (b) establishing effective domestic mechanisms, including judicial mechanisms, to ensure and monitor implementation of and compliance with Views of the Human Rights Committee against Torture on Individual Communications, together with Views of other UN treaty bodies on such communications; and
  - (c) developing effective domestic legislative mechanisms (such as a legislative, federal *Charter of Rights*) to ensure comprehensive legal protection of human rights.
40. It is also important that Australia strive to effectively implement its human rights obligations as failure to do so will undermine any efforts to persuade governments in the region to take their



own obligations seriously. Filipo Masaurua of the Pacific Regional Rights Resource Team has written that:<sup>27</sup>

[w]hilst Pacific Island cultures have begun to tentatively embrace human rights, global moves against terrorism (i.e. counter terrorism) mean that those newfound gains will be severely tested. PIC governments are receiving mixed messages from the global community, particularly powerful states that human rights might also be an obstacle to national security.

41. No country has a perfect record on human rights, but those that take their obligations seriously are in a much better position to promote their implementation abroad.

**Recommendation 2:**

Australia must ensure robust engagement with the UN human rights system and commit to the implementation of its own obligations under international human rights law, including by:

- (a) the establishment of a Joint Parliamentary Committee on Human Rights, to monitor and report on the implementation of the Concluding Observations of UN treaty bodies and the Recommendations of the Special Procedures of the UN Human Rights Council;
- (b) establishing effective domestic mechanisms, including judicial mechanisms, to ensure and monitor implementation of and compliance with Views of the Human Rights Committee against Torture on Individual Communications, together with Views of other UN treaty bodies on such communications; and
- (c) developing effective domestic legislative mechanisms (such as a legislative, federal *Charter of Rights*) to ensure comprehensive legal protection of human rights.

**(b) Within the Region**

42. While it may be difficult for Australia to have direct and immediate influence on the adoption and implementation of human rights in the Pacific, the Australian Government is able to control its own actions and ensure that Australia fulfils its obligation under the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* to pursue the regional realisation of human rights through economic and technical assistance.<sup>28</sup> It is therefore

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<sup>27</sup> Filipo Masaurua, 'Human Rights: The Broader Context' speech at the Commonwealth Secretariat and Commonwealth Parliamentary Association's Government and Opposition – Roles, Rights and Responsibilities Workshop (Fiji), 29-31 August 2005.

<sup>28</sup> Article 2(1) ICESCR.

- necessary that Australia adopt a consistent and principled approach to human rights within the region. This approach should be mainstreamed in Australia's foreign, trade and security policies.
43. Pritchard and Corpus-Brock have suggested that '[h]uman rights policy must be pursued on a genuinely non-selective, non-discriminatory basis. While in particular bilateral relationships, differentiated, results-oriented approaches will be most appropriate, human rights should not be downplayed in deference to other objectives.'<sup>29</sup>
44. Human rights should be central to relationships within the region. There are a number of areas in which the Australian Government should recognise and incorporate human rights. The most important of these are development aid, trade and defence co-operation.
45. The Pacific is a recipient of significant aid funds, much of which comes from Australia.<sup>30</sup> In relation to aid, the Australian Government's position is that 'development and human rights are interdependent and mutually reinforcing'.<sup>31</sup> The Government has also set out six principles through which Australia's aid program supports human rights.<sup>32</sup> The role of human rights in Australia's trade and defence co-operation policies is less clearly defined.

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<sup>29</sup> Pritchard and Corpuz-Brock, above n 20.

<sup>30</sup> Over the last 25 years approximately US \$17 billion has been invested in the region: Pollard S. 'Capacity Development: Pacific Choice' speech given at the Pacific Cooperation Foundation Seminar, Wellington, New Zealand. June 2008.

<sup>31</sup> AusAID, *Human Rights and Australia's Aid Program*, available at <http://www.aisaid.gov.au/keyaid/humanrights.cfm>

<sup>32</sup> *Ibid.* These principles are:

- (1) Human rights are a high priority for the Government. Civil and political rights are ranked equally with economic, social and cultural rights;
- (2) The aid program will continue to undertake activities that directly address specific economic, social, cultural, civil and political rights. A particular emphasis will be on the creation of durable institutional capacity to promote and protect human rights;
- (3) The emphasis will be on the practical and attainable. AusAID, as the Government's aid agency, will pursue practical aid activities in support of human rights. These activities complement and build upon high-level dialogue on human rights. Dialogue on human rights and representations about individual human rights cases will normally be carried out through diplomatic channels;
- (4) The aid program will develop activities primarily as a result of consultations and cooperation with partner countries on human rights initiatives. Regional and multilateral activities will also be undertaken;
- (5) Considerable care will continue to be applied to the use of aid sanctions associated with human rights concerns. The Government will consider such sanctions on a case-by-case basis. Aid conditionality based on human rights concerns would only be used in extreme circumstances since it can jeopardise the welfare of the poorest and it may be counterproductive; and

46. The specific requirements in relation to each of these areas are beyond the scope of this submission, but are examined in the 1998 JFADT Report.<sup>33</sup>
47. Australia may also do more to regulate the operation of Australian businesses in the region to ensure that they do not breach human rights. The Report of the UN Special Representative on Business and Human Rights, Professor John Ruggie states that:<sup>34</sup>

there is increasing encouragement at the international level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas.

48. Again, this is an area that needs to be given further and careful consideration and is an appropriate subject for parliamentary review.
49. The HRLRC makes the following recommendations:

***Recommendation 3:***

The Australian Government should conduct a human rights audit of its relationship with the Pacific, including in the areas of aid, trade, defence co-operation and business engagement. Australia's human rights obligations should be mainstreamed in each of these areas.

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(6) AusAID will continue to link closely with other arms of the Australian Government on governance and human rights issues. AusAID will also liaise with NGOs and human rights organisations in Australia.

<sup>33</sup> JFADT Report, above n 1.

<sup>34</sup> Report on the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: a Framework for Business and Human Rights' A/HRC/8/5, 7 April 2008, (available at: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>)

### **3. Australia's Current Approach to the Region**

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#### **3.1 Australia's New Approach to the Pacific**

50. The Australian Government has stated that it has an 'ambition to play a more active and responsible role in our region.'<sup>35</sup> Comprehensive engagement with the Pacific and Asia is one of the three foreign policy pillars that guide Australia's relationship with the international community.
51. The Hon Stephen Smith, Minister for Foreign Affairs, has recently described the Australian Government's approach to the Pacific as one based on 'mutual respect and mutual responsibility'.<sup>36</sup> Consistent with the HRLRC's recommendations concerning the 'tone' of Australia's engagement with the Pacific, the Government has stated that it has made a 'fundamental change in the way we work with and talk with, not at, our neighbors'.<sup>37</sup> Prime Minister Rudd also commended such an approach with his Port Moresby Declaration on Australia's relationship with the Pacific in March, where he spoke of the 'beginning of a new era of co-operation' with Pacific Island countries.<sup>38</sup>
52. Specifically, Australia has committed to assist in 'building regional skills and capabilities, especially through education'.<sup>39</sup> Human rights education, capacity-building and other areas in which the Government should demonstrate its renewed commitment to the Pacific are explored further in sections five and six, below.

#### **3.2 Australia's International Law Obligations to Provide Assistance**

53. The Centre welcomes the Committee's Inquiry and the Government's commitments in the region. The Centre notes that these developments are consistent with Australia's international human rights law obligations.
54. The international human rights system provides a useful framework to guide and direct Australia's relationship to human rights in the region. Article 2(1) of the ICESCR provides that:

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<sup>35</sup> Minister for Foreign Affairs, Stephen Smith, 'Australia's New Approach to the Pacific', speech at the Australian Institute for International Affairs, Melbourne, 7 August 2008.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Australian Government, AusAID, Port Moresby Declaration, available at [http://www.pm.gov.au/media/Release/2008/media\\_release\\_0118.cfm](http://www.pm.gov.au/media/Release/2008/media_release_0118.cfm)

[e]ach State Party to the present Covenant undertakes to take steps, individual and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving the full realisation of the rights...

55. This recognises two separate obligations: first, rights should be progressively realised by states with the maximum resources they have available (discussed above at paragraphs 30 to 33). Second, article 2 makes it 'clear that it is the responsibility of all states, in their capacity as members of the international community, to take concrete, effective, targeted and expeditious steps to assist in realisation of rights of people beyond their borders.'<sup>40</sup> This obligation is also articulated in article 56 of the UN Charter which requires members states to take 'joint and separate action' for the realisation of human rights and fundamental freedoms for all<sup>41</sup> and the *Universal Declaration of Human Rights*.<sup>42</sup>
56. Nowlan and Costello argue:<sup>43</sup>
- there is a clear obligation on the part of all nations... to provide assistance under international human rights law and that many developed countries, including Australia, are failing to properly discharge their obligations.
57. The Centre recognises that this position was articulated in 2005 and in reference to the previous Government. The Committee's Inquiry provides an opportunity for Australia to ensure that it is meeting its obligations under *ICESCR* to provide assistance to the maximum of its available resources to its neighbours to enhance the protection and promotion of human rights in the region. Nowlan and Costello persuasively note that 'the accident of birth that determines where most people live cannot be the final arbitrator of who gets to enjoy the full range of economic, social and cultural rights'.<sup>44</sup>

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<sup>39</sup> Minister Smith, above n 35.

<sup>40</sup> Kirsty Nowlan & Tim Costello, 'When Right Equals Rights: The International Obligation to Provide Assistance to Developing Countries' (2005) 30(4) *Alternative Law Journal* 2.

<sup>41</sup> *Charter of the United Nations*, articles 55 and 56.

<sup>42</sup> See the Preamble to the UDHR and articles 22, 28 and 30, articles 11, 22 and 23 of *ICESCR* (in addition to article 2).

<sup>43</sup> Nowlan and Costello, above n 41, 2.

<sup>44</sup> *Ibid.*

#### 4. Human Rights in Asia and the Pacific

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58. This section considers current developments in both Asia and the Pacific of relevance to the Inquiry. It articulates the establishment processes and assesses the political will behind the development of the following:

- (a) Asia Pacific Forum;
- (b) Pacific Islands Forum and the Pacific Plan;
- (c) LAWASIA draft Charter of Human Rights; and
- (d) ASEAN human rights process.

##### 4.1 Asia Pacific Forum

###### *(a) Establishment*

59. The Asia Pacific Forum (**APF**) was established in Darwin, Australia in 1996 at a workshop attended by the national human rights commissions of Australia, India, Indonesia and New Zealand. The workshop discussed matters of common interest to National Human Rights Institutions (**NHRIs**), including their independence, their functions and powers, their investigation and conciliation processes, community education and media relations. The workshop produced a final statement, the Larrakia Declaration, and agreed to the establishment of the APF.

60. APF member NHRIs have been established in compliance with the minimum standards of the United Nations General Assembly endorsed 'Principles relating to the status of National Institutions' (**the Paris Principles**). The Paris Principles include:

- (a) a clearly defined and broad-based mandate, based on universal human rights standards;
- (b) independence guaranteed by legislation or the constitution;
- (c) autonomy from government;
- (d) pluralism, including membership that broadly reflects the society;
- (e) adequate powers of investigation; and
- (f) sufficient resources.

61. Of relevance to the Committee's Inquiry and the potential for staggered involvement in regional mechanism, the APF provides that members can be full members (full compliance

with Paris Principles), candidate members (likely to fully comply in the near future) or associate members (not complying with principles).

**(b) Asia Pacific Forum Activities**

62. As part of the Larrakia Declaration, APF members agree to respond to requests from governments in the region for assistance in the establishment and development of national institutions. APF members also agreed to provide mutual support, co-operation and joint activity through:
- (a) information exchanges;
  - (b) training and development for NHRI members and staff;
  - (c) development of joint positions on issues of common concern;
  - (d) undertaking joint projects;
  - (e) sharing expertise;
  - (f) periodical regional meetings;
  - (g) specialist regional seminars on common themes and needs; and
  - (h) responding promptly and effectively to requests from other NHRIs to investigate violations of the human rights of their nationals present in a country that has a national institution.
63. Australia's role in supporting the development and functioning of NHRIs should recognise the significant experience and expertise that has already been developed within the APF.

**(c) NHRIs Capacity Building, Education and Training**

64. An important activity of the APF is building the capacity of national human rights institutions. The APF implement programs to:
- (a) assist governments in establishing NHRIs;
  - (b) assist NHRIs in meeting the Paris Principles in order to become an APF member; and
  - (c) assist member NHRIs in improving human rights knowledge and understanding.
65. The APF provides an important educational function to its members. The APF's training programs help build the professional skills and strengthen the capacity of member NHRIs. Training programs are tailored and often run by NHRI staff. This enhances the ownership of

- both NHRIs staff and the relevant Pacific Island country in regards to the content of the relevant human right and how it might be meaningfully protected. The APF also work with member institutions to promote the inclusion of human rights in school curriculum.<sup>45</sup>
66. Education and training programs also extend to governments and civil society groups. The APF monitors and evaluates training, to ensure that it is useful to NHRIs and that the skills that are taught are implemented. The APF have provided training in the following areas:
- (a) Human Rights Defenders – to assist member institutions to understand the role of human rights defenders and the international standards and mechanisms that protect their rights;
  - (b) the International Human Rights system – training on the development of international human rights law, monitoring and the meaning of progressive realisation of rights;
  - (c) investigation techniques to assist APF members develop capacity to investigate complaints of alleged human rights abuses in accordance with international standards and best practice;
  - (d) media and communications;
  - (e) national inquiries – the APF is currently working on providing a step-by-step guide to establishing and conducting national inquiries into human rights issues;
  - (f) prevention of torture – this training was designed to provide members with knowledge, skills and processes to effectively monitor places of detention and investigate allegations of torture; and
  - (g) thematic regional workshops which specialised in human rights issues of shared concern to member institutions.<sup>46</sup>
67. Further, the APF provides advice on the nature and status of human rights institutions, including advice on compliance with the Paris Principles and operational issues such as institutional strengthening, organisational structure, operational procedures and financial resources and the development of 'best practice' models which are consistent with the protection of human rights. The APF has developed draft guidelines on the establishment of

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<sup>45</sup> See Submission 33 *Human Rights and Good Governance Education in the Asia Pacific, Supplementary Questions and Answers*, 5 (available at: <http://www.aph.gov.au/house/committee/jfadt/HRGoodGov/subs/sub33.pdf>, accessed 10 November 2008) to the previous JFADT inquiry: see above n 1.

<sup>46</sup> Asia Pacific Forum Website, 'Training': <http://www.asiapacificforum.net/services/training> (accessed 18 November 2008).



national human rights institutions as a resource to assist governments, civil society and other organisations in the process of establishing a NHRI. One specific project which aims to further the protection of human rights is the Internal Displacement Project which aims to improve the capacity of member NHRIs in promoting and protecting the human rights of internally displaced persons.

#### **4.2 The Pacific Islands Forum and the Pacific Plan**

68. The Pacific Islands Forum<sup>47</sup> was founded in August 1971 and comprises 16 independent and self-governing states in the Pacific. The Forum is the region's foremost political and economic policy organisation. It represents Heads of Government of many independent and self-governing Pacific Island countries. Through the Forum, member states express their joint political views and cooperate in areas of political and economic concern. The Secretariat of the Pacific Community provides technical assistance, professional support and capacity-building assistance in the areas of land, marine and social resources to its member countries and territories. It has 22 Pacific Island members together with Australia, France, New Zealand and the USA.<sup>48</sup>
69. The Pacific Islands Forum is now taking a greater interest in human rights as articulated by the Pacific Islands Forum Pacific Plan. In addition, the Pacific Islands Forum has agreed on nine 'Principles of Good Leadership', which include protection of fundamental human rights and respect for cultural values, customs and traditions.<sup>49</sup>
70. It was agreed that a Pacific Plan be developed to:
- (a) promote economic growth, sustainable development, good governance and security;
  - (b) strengthen regional cooperation and integration in areas where the region could gain the most through sharing resources of governance, alignment of policies and delivery of practical benefits;
  - (c) strengthen support for current programmes, develop new initiatives and advocate for the needs of the Smaller Island States, particularly given their limited capacity and fragile and vulnerable environment, including to climate change;
  - (d) promote and protect cultural identity, regional inclusiveness, sub-regional representation, human rights, gender, youth and civil society;

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<sup>47</sup> Formerly referred to as the 'South Pacific Forum' up to October 2000.

<sup>48</sup> New Zealand Law Commission Report, above n 4, 30.

- (e) reform the Forum and the regional institutional mechanism;
  - (f) clarify Members' own understanding and appreciation of regionalism with a clear perception of the benefits and costs; and
  - (g) build strong partnerships between Member countries, Pacific territories, regional and international organisations and non-state organisations.
71. The Pacific Plan was agreed to by the Pacific Islands Forum in 2004 to give effect to the vision agreed upon in the Auckland Declaration. The vision in the Auckland Declaration states:

Leaders believe the Pacific region can, should and will be a region of peace, harmony, security and economic prosperity, so that all its people can lead free and worthwhile lives. We treasure the diversity of the Pacific and seek a future in which its cultures, traditions and religious beliefs are valued, honoured and developed. **We seek a Pacific region that is 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.** We seek partnerships with our neighbours and beyond to develop our knowledge, to improve our communications and to ensure a sustainable economic existence for all.<sup>50</sup>

The Plan was endorsed by Forum Leaders at their Pacific Islands Forum Meeting in Port Moresby in October 2005. Australia has also indicated its support of the Pacific Plan.<sup>51</sup>

72. The Plan represents a significant recognition of human rights by the region's leaders. The Plan contains a number of positive initiatives relevant to custom and human rights, including judicial training and education, research into harmonising traditional and modern governance values and structures, strengthening traditional courts, establishing a regional ombudsman and other human rights mechanisms, ratification and implementation of international and regional human rights agreements and support for human rights reporting.<sup>52</sup> This provides a clear mandate for a regional human rights mechanism in the Pacific and with the support of Pacific leaders.

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<sup>49</sup> New Zealand Law Commission Report, above n 4, 226.

<sup>50</sup> Pacific Islands Forum Special Leaders Retreat, The Auckland Declaration, 6 April 2004.

<sup>51</sup> Minister Smith, above n 35.

<sup>52</sup> *The Pacific Plan for Strengthening Regional Cooperation and Integration* (2005) 17–18. Also relevant are initiatives in the areas of poverty reduction; improved health and education; improved gender equality; enhanced involvement of youth; protection of cultural values, identities and traditional knowledge; participatory democracy and consultative decision-making; and law enforcement training (including gender issues and human rights).

73. The Plan was launched in 2006 and the Pacific Islands Forum Secretariat describes it as a 'living' document so that it can maintain flexibility and evolve as developments occur.<sup>53</sup> At the end of 2007, the Secretary General of the Pacific Island Forum Secretariat renewed the call for a regional mechanism under the Pacific Plan.<sup>54</sup>

#### **4.3 LAWASIA draft Pacific Charter of Human Rights**

74. The Law Association for Asia and the Pacific (LAWASIA) was formed in 1966 in Canberra with the adoption of a constitution. The main aim of LAWASIA was to 'foster professional and business relations between lawyers, businesses and government representatives in the Asia Pacific region'.<sup>55</sup> In relation to human rights, LAWASIA drafted a Pacific Charter of Human Rights in 1985 at a meeting in Fiji with 63 government and NGO delegates. A draft Pacific Charter of Human Rights was adopted in Apia, Western Samoa in May 1989. The draft is modelled closely on the African (Banjul) Charter on Human and Peoples' Rights and provides for civil and political, economic, social and cultural, as well as peoples rights. It foresees the establishment of a Commission to supervise implementation and hear and determine complaints.<sup>56</sup>
75. The LAWASIA draft Pacific Charter of Human Rights was never finalised and LAWASIA is considering rejuvenating the project. Lack of 'buy-in' at the government level is a potential cause of the LAWASIA Charter's failure to gain momentum and traction.<sup>57</sup> There was a fear that unique national cultural identity would be in danger if a Human Rights Charter came into operation. Pacific communities perceived human rights as a powerful tool for those in control or that human rights would be dictated by political self interest.<sup>58</sup>
76. Petra Butler, an academic at the University of Wellington committed to reviving a Pacific Charter of Human Rights, queries whether this concern will hamper future efforts.<sup>59</sup> Butler

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<sup>53</sup> Pacific Island Forum Secretariat, 'The Pacific Plan For Strengthening Regional Cooperation And Integration' (2006), ([http://www.forumsec.org/UserFiles/File/Pacific\\_Plan\\_Nov\\_2007\\_version.pdf](http://www.forumsec.org/UserFiles/File/Pacific_Plan_Nov_2007_version.pdf) accessed 20 November 2008), 15.

<sup>54</sup> Keynote address by Greg Urwin, Secretary General, Pacific Islands Forum Secretariat, at the inaugural Pacific Network Meeting, Sigatoka, Fiji (12 December 2007).

<sup>55</sup> LAWASIA Webpage Profile (available on <http://lawasia.asn.au/profile-of-lawasia.htm> accessed 20 November 2008).

<sup>56</sup> S Pritchard, *Asia-Pacific and Human Rights: Recent Discussions of Regional Arrangements*, Human Rights Defender, Australian Human Rights Centre [1996] HRD 16

<sup>57</sup> Butler, above n 5, 2.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

states that developments over the past 15 years, such as the development of the Fiji Human Rights Commission and increasing judicial reference to human rights and the peace and reconciliation movement in the Solomon Islands indicates that Pacific governments may now be ready to support a Charter.<sup>60</sup> Further, Pacific Islanders are more aware of human rights due to development and also recent upheavals: the clashes in the Solomon Islands, the democracy debate in Tonga, and the coups in Fiji. Furthermore, the Pacific Islands Forum has adopted a number of measures that promote non-discrimination and participation including the Pacific Plan, discussed above in section 4.2.

#### 4.4 ASEAN Human Rights Mechanism

77. The development on an ASEAN human rights mechanism commenced in 1993 and is ongoing. The ASEAN Charter will enter into force on 15 December 2008. Article 14 of the Charter states:
1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.
  2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.
78. The Working Group for an ASEAN Human Rights Mechanism has submitted to the High Level Task Force its recommendations for the mandate and powers of the ASEAN Human Rights Body. It sets out guiding principles and recommends the establishment of an ASEAN Human Rights Commission.<sup>61</sup>
79. The incremental nature of the progress indicates that in any approach Australia wishes to take, clear and realistic time-lines are critical.
80. JFADT is currently conducting an inquiry into Australia's relationship with ASEAN. Depending on the outcome and Government response to that inquiry, there may be scope for some Australian involvement in the development of the ASEAN human rights mechanism.

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<sup>60</sup> Ibid.

<sup>61</sup> For further information see: M Caballero-Anthony, 'The ASEAN Charter: An opportunity missed or one that cannot be missed?' *Southeast Asian Affairs 2008*, Institute of Southeast Asian Studies, Singapore, 2008 at 72; Working Group For an ASEAN Human rights Mechanism 'Proposed Elements for the Terms of Reference of an ASEAN Human Rights Body' at 2 (available at: <http://aseanhrmech.org/downloads/WGsubmissiontoHLP.pdf>, accessed 18 November 2008).

**4.5 Other developments relating to Human Rights in Asia and the Pacific**

81. Further developments in Asia and Pacific Island countries in regards to the protection of human rights can be summarised as follows:
- (a) the New Zealand Human Rights Commission, Fiji Human Rights Commission and Pacific Islands Forum Secretariat are considering appropriate forms of NHRI for small Pacific states;
  - (b) the Office of the United Nations High Commissioner for Human Rights is promoting the ratification of international human rights instruments by Pacific Island countries;
  - (c) a draft Pacific Charter of Human Rights, prepared under the auspices of the Law Association for Asia and the Pacific (LAWASIA) in the 1980s, is being revised; and
  - (d) a Pacific Judicial Development Program, supported by AusAID and NZAID, is to provide professional development to judicial and court officers, including coverage of custom law and human rights. This follows on from previous judicial training programmes in the region.<sup>62</sup>

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<sup>62</sup> AusAID and NZAID 'Pacific Judicial Development Program: Program Design Document' (20 November 2005).

## 5. Australia's Role

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82. The Centre welcomes the Australian Government's commitment to regional engagement generally and its acknowledgement of the importance of our relationships with our neighbours in the promotion and protection of human rights.
83. The Australian Government's approach, which requires robust and respectful engagement, is endorsed by the HRLRC. This general framework for regional engagement should guide the Government's strategy in relation to the promotion of human rights. Australia can and should contribute to the promotion of human rights in the region in a collaborative fashion by:
- (a) providing technical and financial support for the ratification of international human rights treaties and associated implementation and reporting requirements;
  - (b) assisting in the establishment and operation of national human rights institutions;
  - (c) recognising and supporting local human rights NGOs within the region; and
  - (d) contributing to regional human rights education.
84. As stated in the introduction to this submission, the HRLRC considers that it would be inappropriate for Australia to take a 'top down' leadership role in the establishment of a regional human rights mechanism. Australia should be sensitive to concerns over the dominance, or perceived dominance, of New Zealand and Australia on regional policy issues.<sup>63</sup> The Hon Stephen Smith, Minister for Foreign Affairs, recognised as much in a recent speech where he stated, 'the tone you adopt can matter as much as the substance of your discussion.'<sup>64</sup> The Minister committed Australia to progress through a 'respecting and respectful relationship'.<sup>65</sup>

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<sup>63</sup> S Shameem, 'Fiji Human Rights Head Queries New Zealand and Australia Stance' (2007) *Radio New Zealand International* (available at: [www.rnzi.com/pages/news.php?op=read&id=36965](http://www.rnzi.com/pages/news.php?op=read&id=36965) accessed 26 November 2008).

<sup>64</sup> Minister Smith, above n 35.

<sup>65</sup> *Ibid.*

## 5.1 Engagement with the UN Human Rights System

85. The Pacific region has the lowest ratification rates worldwide of the seven core international human rights treaties.<sup>66</sup> However, all Pacific Island countries have some human rights protected in their constitutions<sup>67</sup> and the Pacific Plan, endorsed by Pacific Island Forum members in 2005, notes the importance of human rights to the plan's third pillar: good governance.<sup>68</sup>

### (a) *Resistance to ratification by Pacific Island countries*

86. There are a number of reasons for the low level of ratification of international human rights instruments by Pacific Island countries and the related low level of human rights understanding and protection in the region. The reasons include that many Pacific Island countries:<sup>69</sup>

- (a) have limited financial and human resources;
- (b) lack the technical capacity and knowledge to fulfill treaty obligations (particularly the reporting requirements) by both governments and citizens. Many Pacific Island country populations are also not legally literate and the relationship between human rights, good governance, democracy and the rule of law is poorly understood;<sup>70</sup>
- (c) focus on immediate (local or regional) priorities (such as sustainable development and fisheries); and
- (d) do not wish to upset internal and powerful stakeholder groups, like the Church and customary chiefs.

## 5.2 Ratification of International Human Rights Instruments

87. The HRLRC considers that Pacific Island countries ratifying the core international human rights treaties would constitute an important step towards improving the experience and protection of human rights in the Pacific. There are a number of benefits to ratification of international human rights instruments, including the provision of a clear and comprehensive

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<sup>66</sup> P Imrana Jalal, 'Pacific Culture and Human Rights: Why Pacific Island Countries should Ratify International Human Rights Treaties' *Pacific Island Rights Resource Team*, April 2006 (available at: <http://www.rrrt.org/assets/Pacific%20Culture%20and%20Human%20Rights.pdf>) (*Jalal*), 4.

<sup>67</sup> *Ibid.*, 14.

<sup>68</sup> *Ibid.*, 5.

<sup>69</sup> *Ibid.*, 6 and 7.

<sup>70</sup> *Ibid.*, 17.

set of standards which can provide for systematic decision-making and protection of human rights as compared with ad hoc protections. The Optional Protocols which are linked to some of the Conventions also provide additional mechanisms under which Governments can be examined and held accountable for individual and systemic human rights violations.

88. More generally, ratification of human rights instruments provides an indication of a government's commitment to protecting human rights. Amnesty International notes, '[r]atification helps to strengthen domestic human rights protection by providing standards and benchmarks for national law and practice'.<sup>71</sup> Accordingly, by working with Pacific Island countries to improve the level of ratification, the broader aims of enhancing the role and place of human rights concepts and obligations in the region can be improved. It is important to note ratification does not provide a 'guarantee that human rights will be protected',<sup>72</sup> however ratification can provide a formal and express statement of the signatory's intentions: it articulates the state's goal of improving the domestic realisation of rights and an acknowledgement of the standards set by the human rights treaty.<sup>73</sup> In this way, ratification can provide a standard against which the state agrees to be assessed and called to account.
89. Non-government organisations play an increasingly important role within the UN human rights system, including through the preparation of NGO (or 'Shadow') Reports to treaty bodies, to promote a constructive and rigorous dialogue between states and independent human rights experts. The purpose of these dialogues is to:
- (a) comprehensively analyse the human rights situation 'on the ground' in the state the subject of the review; and
  - (b) develop recommendations to promote the full and effective realisation of human rights in that state.
90. This process brings to bear the benefits and protections of human rights law on the lives of disadvantaged people through international accountability mechanisms. There is strong evidence that human rights instruments, frameworks and approaches can be effectively used to:
- (a) empower marginalised and disadvantaged individuals, communities and groups;<sup>74</sup>
  - (b) develop more effective, efficient and holistic public and social policy;<sup>75</sup>

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<sup>71</sup> Amnesty International submission to the JSCFADT Regional Human Rights Dialogue Report, above n 1, 97.

<sup>72</sup> 1998 JFADT Report, above n 1, 113.

<sup>73</sup> *Ibid.*, 98.



- (c) provide more flexible, responsive, individualised and 'consumer friendly' public and social services;<sup>76</sup>
  - (d) challenge 'poor treatment' and thereby 'improve the quality of life' of marginalised and disadvantaged individuals and groups; and<sup>77</sup>
  - (e) develop more effective social inclusion and poverty reduction strategies.<sup>78</sup>
91. There is also strong evidence that the community and legal sectors, particularly community legal organisations, can play a critical role in realising the potential of human rights and using human rights to improve disadvantaged lives. According to the UN High Commissioner for Human Rights, human rights advocacy services are among the 'most important tools' to prevent or seek redress for rights violations. It is particularly important that human rights advocacy services be available to marginalised and disadvantaged individuals and groups, many of whom are vulnerable to human rights violations and who are significantly reliant on the community sector for assistance.<sup>79</sup>
92. In addition to undertaking human rights advocacy, community sector engagement with human rights frameworks and bodies can play a vital role in matters such as: standard setting; promoting adoption and ratification of international instruments; monitoring human rights implementation; ensuring scrutiny of human rights reporting obligations; disseminating comments and recommendations; following up on implementation; and educating the broader community about human rights.
93. In a recent RRRT Publication, Jalal stated that:<sup>80</sup>
- The international human rights treaty system offers substantial benefits to the Pacific region. Ratification provides added value by providing a legal regime of accountability and enforceability for regional development plans, filling the lacunae in them. It also enables the realisation of human rights through monitoring of compliance with the treaties, thereby

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<sup>74</sup> See, eg, British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007).

<sup>75</sup> See, eg, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006).

<sup>76</sup> See, eg, Ministry of Justice (UK), *Human Rights Insights Report* (2008); Audit Commission (UK), *Human Rights Act: Improving Public Services* (2003).

<sup>77</sup> See, eg, British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007).

<sup>78</sup> See, eg, Office of the United Nations High Commissioner for Human Rights, *Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002).

<sup>79</sup> *Ibid.*

<sup>80</sup> Jalal, *Pacific Culture and Human Rights*, above n 66, 4.

encouraging adherence to the rule of law. Ratification improves the public standing of PICs and their governments and encourages a fairer and equitable system of aid, technical support and global justice. It also involves participation of civil society and citizens in the development process and thereby acts as a catalyst for the reduction of poverty.

94. In light of the important role for international human rights treaties in the protection and promotion of human rights, the HRLRC makes the following recommendation:

**Recommendation 4:**

The Australian Government should provide technical and financial support for the ratification of international human rights treaties and associated implementation and reporting requirements, including offering capacity building programs for Governments and local human rights organisations.

### 5.3 National Human Rights Institutions

95. Building the capacity of NHRIs in Pacific Island countries is key to the enhanced place and effectiveness of human rights in the region. The UN Commissioner for Human Rights has emphasised the particular importance of NHRIs:

National human rights institutions are by their very nature well placed to transform the rhetoric of international instruments into practical reality at the local level. Because they are national they are able to accommodate the challenges posed by local conditions and cultures, respecting ethnic, cultural, religious and linguistic diversities in implementing internationally agreed human rights principles.<sup>81</sup>

96. Currently, Fiji is the only Pacific Island country with a NHRI. Consequently, the structures and mechanisms for promoting and protecting human rights are limited.<sup>82</sup> There is a role for Australia in providing financial and technical resources to assist in the development of NHRIs. This should be done within, and building upon, the existing structures of the APF.
97. We note, however, that it may not be appropriate for each Pacific Island country to have its own NHRI. Some Pacific Island countries do not have populations large enough to support or justify independent, country-specific NHRIs.<sup>83</sup> The Australian Government should be sensitive to context and capacity when developing its policy on NHRIs in the Pacific.

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<sup>81</sup> UN High Commissioner for Human Rights, Mrs Mary Robinson, Opening Address to Sixth Workshop on Regional Human Rights Arrangements in the Asian and Pacific Region, 28 February 1998, 6.

<sup>82</sup> Masaurua, above n.27.

<sup>83</sup> P Imrana Jalal, 'Why Do We Need a Pacific Human Rights Commission?' , 39 (1) *Victoria University of Wellington Law Review* (2009) (forthcoming).

**Recommendation 5:**

Australia should provide financial and technical resources to assist in the development of NHRIs. This should be done within the existing structures of the APF.

**5.4 Recognising and Supporting Local Human Rights NGOs**

98. Australia's engagement with the region should recognise that there are many skilled and dedicated people doing human rights work in the Pacific.<sup>84</sup> It is vital that these people and groups are supported and engaged in an open dialogue. This approach is consistent with the Australian Government's claim that it 'helps promote and protect human rights through supporting grassroots activities for indigenous human rights groups...'.<sup>85</sup>
99. NGOs are in a position to witness and advocate for victims of abuses and are also best placed to discern where changes need to be made. If adequately resourced, NGOs can also provide training, convene fora and organise other activities designed to promote a continuing dialogue and developments around human rights.
100. However, many PIC NGOs have a limited capacity to perform these functions because many Pacific Island countries lack a proper legal framework that protects and enables the development of NGOs.<sup>86</sup>
101. Currently, the Australian Government supports NGOs in the Pacific through programs such as the Human Rights Fund (which focuses on human rights programs and institutions and often complements other larger and broader interventions implemented through the bilateral, regional and NGO programs) and the Human Rights Small Grants Scheme (which 'provides small grants to in-country organisations (primarily non-government) for activities aimed at promoting and protecting human rights in a direct and tangible way').<sup>87</sup>
102. The HRLRC supports these important initiative and recommends that the Australian Government should also, where possible, support the development of a legal framework that supports and protects the work of human rights NGOs as a function of democracy.<sup>88</sup>

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<sup>84</sup> Amongst these are RRRT, Pacific Islands Association of Non-Government Organisations and several issue-specific organisations working in areas such as women's rights, people living with HIV/AIDS and children's rights.

<sup>85</sup> AusAID, *Human Rights and Australia's Aid Program*, above n 25.

<sup>86</sup> Jalal, above n 83, 20.

<sup>87</sup> Ibid.

<sup>88</sup> Masaurua, above n 27.

**Recommendation 6:**

The Australian Government should conduct an audit of NGOs doing human rights work in the Pacific and implement policies that strengthen and support these organisations. This may involve, among other things, building on existing programs such as AusAID's Human Rights Fund and the Human Rights Small Grants Scheme. Government policies aimed at promoting human rights in the region should be developed and implemented in partnership with these organisations.

**5.5 Human Rights Education**

103. The HRLRC refers to the Committee's 2004 Report on *Human Rights and Good Governance Education in the Asia Pacific Region*.<sup>89</sup> In the forward to that Report, the Committee's Chair wrote that:<sup>90</sup>

Australia is in a strong position to make a contribution to the promotion and protection of human rights and the development of good governance in the Asia Pacific region through its efforts in human rights and good governance education.

104. The UN High Commissioner for Human Rights referred to the importance of citizens knowing and being able to exercise and uphold rights:<sup>91</sup>

Human rights education is a vaccine against intolerance, animosity and conflicts between members of different groups in our communities. ... I see human rights education as empowering individuals to stand up for their rights and those of others. I believe in the good sense of our citizens—and that people who are aware of their human rights are less likely to violate the rights of others.

105. It is therefore essential that regional engagement in the promotion of human rights include an element of human rights education which should be 'rooted in the lives of learners, especially those most marginalised and vulnerable'.<sup>92</sup> The HRLRC notes the existing education activities currently being performed by the Asia Pacific Forum (see paragraphs 59 - 67 of this Submission).

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<sup>89</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights and Good Governance in the Asia Pacific Region*, (June 2004) available at <http://www.apf.gov.au/House/committee/jfadt/hrgoodgov/report/fullreport.pdf>

<sup>90</sup> *Ibid*, x.

<sup>91</sup> UN High Commissioner for Human Rights, Mrs Mary Robinson, Opening Address, Sixth Workshop on Regional Human Rights Arrangements in the Asian and Pacific Region, February 1998, pp. 4-5.

<sup>92</sup> Pritchard and Corpus-Brock, above n 20.

106. A strong regional human rights education program is also an essential support for institutional human rights protections. Commissioner Liddicoat made this point:

If a regional human rights mechanism is to be effective, human rights must have meaning and relevance to people of the region. Measures to promote human rights, including human rights education, must continue to be a priority in order to build knowledge and awareness at village and island as well as local, national and political levels. Human rights education should foster a stronger civil society which, together with governments, sees meaning and purpose in regional mechanisms for promotion and protection of human rights.

***Recommendation 7:***

The Australian Government should support human rights education in the region through its aid and capacity building programs, as well as through increased support of the APF and the Australian Human Rights Commission.

## 6. A Regional Human Rights Mechanism

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107. The experience of the European Court of Human Rights and the Inter-American Human Rights System shows that regional mechanisms have the capacity to substantially assist in the protection and promotion of human rights.<sup>93</sup>
108. The 1993 Vienna Declaration and Programme of Action affirmed that:<sup>94</sup>
- regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection.
109. The HRLRC supports the development of a regional mechanism for the following reasons:
- (a) regional arrangements allow for norms, institutions and processes to be designed to fit the distinctive characteristics of the region and can provide specialised resources and promote the development of valuable region-specific expertise;<sup>95</sup>
  - (b) the localised knowledge and legitimacy of such institutions means that regional mechanisms are uniquely placed to identify and respond to human rights abuses;
  - (c) a regional mechanism could support national engagement in the international human rights system by providing resources and know-how that are currently not available to many Pacific Island countries due to financial constraints;
  - (d) if properly funded, a regional human rights mechanism could facilitate human rights education programs which are currently not financially viable; and
  - (e) regional mechanisms provide a forum independent of government in which the implementation of human rights objectives may be pursued in a transparent environment less susceptible to political interference than national human rights bodies.
110. Despite these significant benefits, the HRLRC does not believe that Australia should direct the development of a regional human rights mechanism. The political and social realities of the region necessitate a 'bottom-up' approach to the promotion of human rights. According to Katheryn Hay, of Massey University, New Zealand: '[i]f a mechanism is established without a

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<sup>93</sup> Steiner and Alston, above n 11, Chapter 10.

<sup>94</sup> Available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)

<sup>95</sup> Steiner and Alston, above n 11, Chapter 10.

- mandate from key stakeholders in individual Pacific states, relevant civil organisations and from Pacific citizens then it is unlikely to be successful and may reinforce the view that widespread regional cooperation in the Pacific is unrealistic, unnecessary and unattainable'.<sup>96</sup>
111. Rather than taking a top-down leadership role in the development of a regional mechanism, the Australian Government is better placed to assist by supporting and strengthening NHRIs and human rights education and capacity-building programs and assisting states that wish to engage with the UN human rights system. The HRLRC anticipates that these initiatives could contribute towards an environment where the promotion of a regional mechanism would be more viable. As Commissioner Liddicoat has stated, '[s]trong national machineries will foster stronger regional machineries and vice versa. However, the dialogue experience suggests there may be resistance to regional mechanisms if national mechanisms which are already under-resourced are not also supported'.<sup>97</sup>
112. Recognising that the establishment of a regional human rights mechanism should be a Pacific island-lead initiative, the support of Australia and New Zealand will also be necessary if such a mechanism is to succeed. There is an important role for the Australian Government in supporting organisations and governments within the Pacific that wish to promote the development of a regional mechanism. The Australian Government should ensure that it engages with, assists and provides financial and technical support to such governments and groups.
113. There is evidence of growing support for a regional mechanism. At the 2008 Symposium *Strategies for the Future: Protecting and Promoting Human Rights in the Pacific* held in Apia, Samoa, participants endorsed the establishment of a regional human rights commission.<sup>98</sup> In addition, in December 2007, RRRT and the UNDP-PC organised a consultation for Pacific judges and magistrates. At the consultation, the idea of a regional human rights mechanism for the Pacific was discussed and the judicial officers at the consultation showed considerable interest and support for the concept of a regional human rights commission.<sup>99</sup> It may be that the Pacific is now ready to begin the process to establishing a regional mechanism. If that is the case, then Australia should assist in the realisation of that goal.

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<sup>96</sup> Kathryn Hay, 'A Pacific Human Rights Mechanism: Specific Challenges and Requirements' 39 (1) *Victoria University of Wellington Law Review* (2009) (forthcoming).

<sup>97</sup> Liddicoat, above n 12.

<sup>98</sup> See Asia Pacific Forum, 'Call for Pacific Human Rights Mechanism', available at <http://www.asiapacificforum.net/news/call-for-pacific-human-rights-mechanism.html>

<sup>99</sup> Hay, above n 96.

***Recommendation 8:***

The Australian Government should not adopt a top-down leadership role in the development of a regional human rights mechanism. However, in recognition of the many benefits that would flow from the development of such a mechanism, the Australian Government should be prepared to provide significant financial and technical assistance to Pacific Island government and non-government organisations that wish to develop and promote a regional mechanism.