

This model offers the advantage of relating domestic and international policy. In particular, in some countries, it may be one means of ensuring that the limited number of available personnel with expertise in the international law of human rights have some responsibilities for, or influence on, domestic law, policy and administration. That is, it may assist in avoiding the current tendency (which is widespread) for bureaucratic familiarity with international human rights instruments to be confined to Ministries of Foreign Affairs - while major responsibilities relevant to national implementation of human rights rest with domestic departments or agencies.

Disadvantages of such a model may include the imposition of an excessive workload on one institution - compared to its resources.<sup>14</sup> There may also be the possibility of conflict of responsibilities in some cases (depending on the way the institution's charter is framed). To the extent that an institution is responsible not simply for providing advice, but for contributing to the formulation of foreign policy on human rights, it could be placed in the position of defending the nation's record internationally while criticising it at home.

(4) A further model is that typified by the Australian national Commission, the Human Rights and Equal Opportunity Commission. This Commission administers legislation directly based on, and incorporating, United Nations human rights instruments. The functions of the Commission are principally domestic, but it also has a degree of international competence - to the extent that this is ancillary to its domestic functions.

The instruments currently within the jurisdiction of the Australian Commission are:-

- the International Covenant on Civil and Political Rights (ICCPR);
- the Convention on the Elimination of all forms of Racial Discrimination (CERD);
- the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW);
- the Declaration of the Rights of the Child;
- the Declaration on the Rights of Disabled Persons;
- the Declaration on the Rights of Mentally Retarded Persons; and
- the International Labour Organisation's Discrimination (Employment and Occupation) Convention.<sup>15</sup>

This extensive jurisdiction enables the Commission to promote human rights in an integrated way. Federal law also provides for further instruments to be added to the Commission's responsibilities. (The Commission has recommended, for example, that this

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14. This is suggested, for example, by the Second Periodic Report of Zaire to the Human Rights Committee, U.N. Doc. CCPR/C/57/Add.1, which states: "The Department of Citizens' Rights and Civil Freedoms, operating within a rather modest budget, is required to do virtually everything."

15. Within the Commission, the Sex Discrimination Commissioner has particular responsibilities for promotion and implementation of CEDAW. The Race Discrimination Commissioner has similar responsibilities regarding CERD, and the Human Rights Commissioner has primary responsibility for the remaining instruments listed, and any others which may be added to the Commission's jurisdiction. Details of the structure of the Australian Commission are given at Appendix A.

be done in relation to the Convention on the Rights of the Child.)<sup>16</sup>

There are a number of advantages in giving national institutions a charter directly based on international human rights instruments. First, it serves as a convenient point of reference by which the degree of domestic implementation of human rights may be assessed - both internally and externally.

Second, it facilitates the development of experience and jurisprudence in applying international standards which, though framed by reference to national conditions, may be applicable by others.

Third, it is increasingly clear that international machinery for the protection of human rights, both Charter based (such as the Commission on Human Rights and mechanisms created under its mandate), and the treaty based Committees (both in their function of receiving individual complaints and in consideration of reports) are limited in the number of problems, situations and cases which they can handle. This is not to denigrate the importance of these bodies or the need to provide them with adequate resources and pursue means of making their operation more effective.<sup>17</sup> However, with growing international acceptance of these mechanisms, and in particular of the treaty based provisions for individual complaints, there is a need to squarely face the danger of overloading the machinery which should form the peak of the international system for protection and promotion of human rights by placing excessive reliance on it to perform tasks which, in the first instance, should be more appropriately and effectively addressed at the national level.

Fourth, as far as the international system is concerned, national machinery has important preventive functions - either in preventing human rights violations from occurring, or in achieving resolution of cases, and redress for violations of rights, before the international level is reached.

One particular benefit of national institutions having a specific basis in international human rights instruments is that it addresses the problem of cases falling through gaps in domestic legal-categories. It is clear, for example, that common law systems, although containing important human rights elements, by themselves offer very inadequate

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16. The jurisdiction of the National Human Rights Commission of Togo, while emphasising civil and political rights in particular, also clearly extends to human rights more generally: see Initial Report of Togo to the Human Rights Committee, U.N. Doc. CCPR/C/36/Add.5. The New Zealand Human Rights Commission Act, s.6(a), specifies that the functions of the Commission include reporting to the Prime Minister from time to time on "the desirability of legislative, administrative or other action to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights". In Guatemala, the Attorney for Human Rights is appointed by Congress for defence of human rights, both as recognised under the Constitution and in the Universal Declaration of Human Rights and international treaties.

17. Discussed in the important report to the General Assembly by Professor Philip Alston, U.N.Doc A/44/668.

protection of human rights, particularly concerning discrimination<sup>18</sup> and the rights of especially disadvantaged groups (such as the mentally ill)<sup>19</sup>.

Fifth, where an individual complaint is not resolved at the national level and comes before a body such as the Human Rights Committee, the Committee on the Elimination of Racial Discrimination or the Committee Against Torture (where the nation concerned has taken the requisite steps to make those procedures available), prior consideration of the matter based on the same international standards by a national body is likely to be of considerable assistance to the international Committee concerned.

Sixth, with respect to the reporting systems instituted under United Nations instruments, a national institution dealing directly with the human rights instrument in question may be of great assistance both to the monitoring body in gaining accurate and authoritative information, and to the Government concerned in compiling information to fulfil its reporting obligations. Given the proliferation of reporting requirements, the extent of overlap between requirements under different treaties, and the difficulties experienced by many governments in collecting information to fulfil their obligations, the model of an integrated national Commission to deal with all or many of the international human rights instruments to which the nation is party has particular advantages. In some cases, depending on the extent of the national Commission's jurisdiction, the annual report of such a body could effectively serve as the basis for substantial parts of the nation's report under the relevant instruments.

A number of national commissions whose principal functions are domestic also have responsibility for providing advice to government on a range of international actions relating to human rights, particularly in relation to the negotiation and ratification of international instruments. This is the case, for example, in relation to the New Zealand Human Rights Commission. The legislation establishing that Commission<sup>20</sup> expressly gives it the function of reporting on "the desirability of the acceptance by New Zealand of any international instrument on human rights". The more general responsibility of the Australian Commission, to recommend action by Australia in relation to human rights,

18. W. Tarnopolsky, "Race relations commissions in Canada, Australia, New Zealand, the United Kingdom and the United States", (1985) 6 *Human Rights Law Journal* 145, at pp.151-154, gives a concise summary of the narrow coverage and pathetically inadequate remedies provided by the common law in relation to racial discrimination. For example, when, on the basis of racial discrimination, the West Indian international cricketer Leary Constantine and his family were refused admission (in insulting and degrading terms) to a London hotel where they had booked to stay, the common law courts could only award five pounds damages: *Constantine v. Imperial Hotels Ltd.* [1944] 1 K.B. 693. Had the hotel refused him service rather than accommodation, no remedy at all would apparently have been available.

19. With respect to the rights of the mentally ill, the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care [U.N. Doc.E/CN.4/1991/39, Annex 1], which were adopted by the Commission on Human Rights at its 1991 session and will be adopted by the General Assembly later this year, provide some much needed standards for the proper protection of this particularly disadvantaged and stigmatised group of people.

20. New Zealand, Human Rights Commission Act 1977 s.6(b), and see Mr Justice Wallace, "The New Zealand Human Rights Commission" (1989) 58 *Nordic Journal of International Law* 155.

also includes advising the government on negotiation and ratification of international instruments.

### Participation in International Meetings

Clearly, governments have the power to determine both how they wish to be officially represented internationally and what, if any, international functions they confer on national human rights commissions. There are, however, a number of roles which national commissions may usefully play in international meetings, in addition to providing advice or information to their government beforehand:-

(a) In general it is possible for governments to request that members of national commissions serve as expert members of government delegations to United Nations treaty monitoring bodies. Australia has done this, for example, in presenting reports to the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. In each case the Committee expressed appreciation for being able to receive information from people directly responsible for administering legislation implementing the international instrument in question. Where the national Commission is independent from direction by Government<sup>21</sup>, it is of course necessary to ensure that this independence is not compromised when participating in a Government delegation. In our experience this is quite possible if Commissions act as advisers to the delegation, rather than as members of it.

(b) Members of national commissions may, in some cases, also usefully serve on government delegations in negotiation of international instruments. Members of the Australian Commission have recently been included in the Australian delegations involved in drafting the Convention on the Rights of the Child and the Principles on the Protection of the Human Rights of Mentally Ill Persons. They have also participated in working groups of the Commission on Human Rights, in drafting the Declaration on the Rights of Indigenous Peoples, and in negotiating draft Standard Rules for the Equalisation of Opportunities for Disabled Persons (presently before a Working Group of the Social Development Commission). The contribution of national commissions has generally been recognised as valuable in this area. The authority of the substantial body of international instruments already adopted depends, in part, on the efforts which have been made to ensure that these instruments reflect national experience. Participation by members of national commissions is likely to contribute to this purpose.<sup>22</sup>

(c) Several national commissions have also recently made significant contributions to international discussions on human rights matters, as experts in their own right rather than on government delegations. It may soon be appropriate, therefore, for the United Nations

21. As is the case with the Australian Commission.

22. Note the related comments by Justice Rajsoomer Lallah, Member of the Human Rights Committee: "Far too often in the past, the question of human rights at the international level has tended to be dealt with solely by Foreign Ministries, admittedly with the assistance of Home Office legal advisers. It is to be wondered whether that is enough. It is the courts which normally deal with the implementation of human rights or their violations at grassroots level. The time has perhaps come to ensure that the thinking of the judiciary is tapped in a systematic way, and that it should be involved at the international level." "International human rights norms", in *Developing Human Rights Jurisprudence*, Commonwealth Secretariat, p.21.

to acknowledge the role of national commissions in an appropriate form, without trespassing on the right of governments to determine the form of their own representation in international political bodies. (It appears, for example, rather anomalous that provision is made for formal recognition only of non-government organisations, some of whose focus on human rights is considerably less direct than national human rights commissions.)

(5) Some national human rights institutions have their responsibilities defined by reference to purely domestic legislation rather than by reference to international instruments. However, a number of these institutions have expressed recognition of the relevance of international instruments and the importance of international experience. The Canadian Commission, for example, although administering legislation which does not explicitly refer to international instruments, describes its role<sup>23</sup> as "to put institutional flesh on the bare bones of [Canada's] international commitments on human rights". There are numerous similarities between the domestic legislation of many countries on human rights and non-discrimination, and the relevant international instruments - even where such instruments are not referred to in the legislation itself. Where national legislation has particular shortcomings (for example in adequately defining discrimination to be combated) legislation elsewhere may have effectively addressed these.

This highlights the importance of comparing experience. The Annual Reports of a number of national commissions afford valuable material for comparative study,<sup>24</sup> - as do various commercially produced law reports which deal with particular national institutions and legislation.<sup>25</sup> There are also several journals which include materials on national institutions within a more general regional or international focus<sup>26</sup> and the Commonwealth Secretariat's Human Rights Unit makes comparative information available. Further, there are the relatively brief but useful reports on national institutions prepared for the General Assembly<sup>27</sup> and the Commission on Human Rights<sup>28</sup>, shortly to be consolidated in a manual on national institutions by the Centre for Human Rights.<sup>29</sup>

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23. *Canadian Human Rights Commission, Annual Report 1990*, p.11.

24. The Annual Report of the Canadian Commission should be mentioned in this context. It has the advantage, in terms of accessibility, of French and English text in the one volume.

25. The Australian and New Zealand Equal Opportunity Reporter is interesting in this respect, since it is inherently international and comparative, dealing with both the Federal and State (provincial) human rights legislation and institutions of Australia and New Zealand.

26. The Nordic Journal of International Law, for example, has included articles on the Australian and New Zealand national commissions.

27. U.N. Docs. A/36/440; A/38/416.

28. U.N. Docs. E/CN.4/1987/37; E/CN.4/1989/47 and Add.1; E/CN.4/1991/23 and Add.1.

29. There is more that could be, and needs to be, done in making comparative information available in published form: not only by the United Nations - which has recently made national institutions and human rights in general a much higher priority in its public information activity, but by each of our own national institutions. There are, however, limits to the extent to which written reports can reflect the particularities of national

Where they exist, regional arrangements offer valuable opportunities for sharing national experience. However, such arrangements remain absent in the Asian-Pacific region, so that institutions in this region are particularly in need of active strategies to ensure that they benefit from experience elsewhere. In recognition of this, the Australian and New Zealand commissions have a continuing program of staff exchanges. The Australian Commission also has a program of staff exchanges with the Danish Centre of Human Rights and has placed staff with the United Nations Centre for Human Rights.

## PARTICIPATION IN THE DRAFTING OF LEGISLATION

Most national commissions have the power to make recommendations for the introduction of new legislation, or amendment of existing legislation, to protect human rights. In the case of several institutions which include members of the legislature, or appointed by the legislature<sup>30</sup>, this may be one way in which the legislature ensures human rights receive their proper place on the legislative agenda.

Institutions which are distinct from the legislature, either as independent statutory commissions or within an executive department, also have functions relating to the drafting of legislation. There are a number of reasons for conferring these functions on national commissions.

### 1. Review of Human Rights Legislation

National commissions which are responsible for administration of human rights legislation will often be in the best position to identify areas where this legislation requires improvement, either because of technical defects or because experience has indicated human rights problems which existing legislation does not adequately address. National institutions responsible for dealing with complaints in individual cases have concrete knowledge (which the legislature may not have in the same detail) concerning human rights problems in society. Where the national commission has power to conduct wide-ranging national inquiries, and is directed to work with non government organisations, as is the case in Australia, this provides a further basis for legislative recommendations.<sup>31</sup>

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... Continued ...

conditions and the work of national commissions. Direct contacts are therefore particularly useful.

30. For example, the Human Rights Commission of the Congress of the Republic in Guatemala - see U.N. Doc. E/CN.4/1991/23; the National Congress Ad Hoc Commission on Human Rights in Ecuador - see U.N. Doc. CCPR/C/58/Add.9; and the Human Rights Inquiry Commission of Turkey - see U.N. Doc. E/CN.4/1991/23/Add.1.

31. The Australian Commission has recommended new legislation, or improvements to existing human rights legislation, in a range of areas including the rights of people with disabilities, protection against age discrimination and discrimination relating to HIV or AIDS, measures against incitement to racial hatred, various aspects of sex discrimination, and the enforcement of the Commission's determinations.

## 2. Drafting or Review of Other Legislation (existing or proposed)

National commissions on human rights generally have the power to review legislation in any area affecting human rights, rather than being confined to review of, or recommendations concerning, specific human rights legislation. The Australian Commission, for example, has functions of reporting on the consistency with human rights of all existing enactments and proposed enactments<sup>32</sup>, as well as the more specifically expressed functions of reporting on laws that should be made or actions taken in relation to human rights<sup>33</sup>. The New Zealand Commission also has the function of reporting on human rights implications of proposed legislation<sup>34</sup>. Clearly, such a function should supplement, rather than displace, the responsibility of all other agencies of government (particularly ministries of justice) and the legislature itself to ensure all legislation is consistent with human rights.

The Chairperson of the New Zealand Human Rights Commission has noted that this function is the one particularly likely to bring the Commission into conflict with the Government.<sup>35</sup> In 1991 an instance of such conflict occurred in Australia in relation to legislation introduced by the Federal Government to ban all advertising containing "political matter" (political matter being very widely defined, and "advertising" not being defined at all) from radio and television. As Federal Human Rights Commissioner I advised the government that such a ban would (a) be inconsistent with the rights to receive and impart information and ideas recognised in Article 17 of the ICCPR; (b) had the potential to interfere with the political rights recognised in Article 25 of the same Covenant; and (c) would have a discriminatory impact on people with disabilities in respect of each of these rights. This advice was released publicly, (pursuant to a request under Freedom of Information legislation). The Government has now amended the legislation and a Parliamentary Committee is currently considering the matter.

## 3. Recommending Legislative Action

An important factor is whether the national commission can initiate a recommendation for legislative action itself, or only on reference from the Government or Parliament. In some instances government authorities may not be aware of relevant human rights issues. The Canadian Human Rights Commission has noted<sup>36</sup> the danger that once human rights laws are in place, the legislature may neglect the need for continuing improvements to the legislation. In some cases, governments may regard it as politically inconvenient to receive recommendations from human rights commissions. Particularly where the commission is part of the Parliament, legislation or parliamentary procedure may require that matters having human rights implications be referred to the national commission. In other cases, however, there may be no legal compulsion on the Government to refer proposed legislation to the commission. (For example in Australia the Human Rights and Equal Opportunity Commission Act allows the Attorney-General to

32. HREOC Act s.11(1)(e).

33. HREOC Act s. 11(1)(k)

34. New Zealand Human Rights Commission Act s.6(2).

35. See Wallace (above), at p.157.

36. *Annual Report, 1990.*

refer proposed legislation to the Commission, but does not require him to do so.) For these reasons, the power to initiate legislative recommendations is important.

## QUASI-JUDICIAL POWERS

The question of whether national human rights institutions have quasi judicial powers raises a number of important issues:

### 1. Power to Compel Production of Documents and Giving of Evidence: Powers to Prevent Interference with Activities

Offices of Ombudsmen appear to be invariably invested with these powers to assist them in their investigations. Specific human rights commissions clearly also require these powers in order to be effective, particularly in investigating actions of government agencies. In the case of bodies formed within the legislature, these powers are generally inherent in the Parliament itself. In cases where the national commission is a separate body, these powers need to be specifically conferred.<sup>37</sup>

In Canada, powers to enter and search premises, and require production of evidence etc, are vested in investigators and tribunals instituted under the Human Rights Act rather than in the Human Rights Commission itself.<sup>38</sup> In Australia, the national Commission itself has power to require production of documents and to compel the giving of evidence<sup>39</sup>.

At the time of the creation of Australia's national commission, these powers were the object of much misconceived criticism to the effect that the new Commission constituted a "star chamber" which itself would be a threat to human rights. This criticism overlooked a number of provisions which ensure that the Commission operates consistently with human rights. For example, there is specific provision for refusal to give evidence on the grounds of self incrimination.<sup>40</sup> The Commission also has a firm policy that its compulsory powers should only be used where absolutely necessary, in keeping with the emphasis of the legislation on settlement by conciliation.

37. In Togo, the national commission has juridical powers: see U.N. Doc. CCPR/C/36/Add.5. In Guatemala, a similar position applies to the Attorney for Human Rights appointed by the Congress to work in association with the Human Rights Commission of the Congress of the Republic: see U.N. Doc. E/CN.4/1991/23. In Mexico, the National Commission on Human Rights has authority to demand all appropriate information for the purposes of its functions, similarly to an Ombudsman: see U.N. Doc. E/CN.4/1991/23/Add.1.

38. The Canadian Human Rights Act s.50 provides that a tribunal established under the Act "may, in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents or things as the Tribunal deems requisite to the full hearing and consideration of the complaint".

39. HREOC Act ss. 21, 22.

40. HREOC Act s.23(3).

The Australian Attorney-General is able to order that evidence should not be produced if it would prejudice the fair trial or safety of any person or national security.<sup>41</sup> The Commission itself is able to order that evidence given to it should not be published, in order to protect the human rights of any person. The Commission is specifically required to observe the principles of natural justice.<sup>42</sup> It is also subject to administrative appeal machinery and to judicial review. These safeguards are important in ensuring that a national human rights commission operates in accordance with the law.

## 2. Power to Make Determinations

A number of human rights institutions, in particular those directly associated with the legislature, deal with complaints (after preliminary analysis and verification) principally by referring them to other appropriate authorities for investigation or institution of legal proceedings.<sup>43</sup>

It is common for the charters of national human rights commissions to emphasise settlement of complaints by conciliation wherever possible (particularly complaints of discrimination). At the international level, conciliation as an effective means of resolving disputes has been emphasised in the practice of the International Labour Organisation and in a number of instruments adopted by that organisation. At the national level, conciliation has frequently been found highly effective in resolving complaints by a settlement agreed to by the parties, thus avoiding the need for the law to impose a settlement. In Australia, for example, the vast majority of complaints brought to the Commission are either successfully conciliated or withdrawn voluntarily - rather than requiring formal determination.

However, where a solution cannot be agreed by conciliation, the issue arises of what determinative powers are available. Experience in dealing with discrimination cases in Australia has been that where legally enforceable remedies are ultimately available, this contributes to the effectiveness of conciliation. The desire to avoid more formal legal proceedings gives parties an additional incentive to conciliate their dispute if possible.

In a number of countries, the human rights commission itself has no determinative powers, but may refer matters to the courts or to a specialised human rights or equal opportunity tribunal. This is the position, for example, under the New Zealand Human Rights Commission Act, which provides for an Equal Opportunities Tribunal.

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41. HREOC Act s.24.

42. Where the Commission proposes to report that a person has engaged in an act which is inconsistent with human rights or constitutes discrimination, that person must be given the opportunity to make oral or written submissions: HREOC Act s.27.

43. The Attorney for Human Rights in Guatemala is empowered to institute legal proceedings after investigation of a complaint: see U.N. Doc E/CN.4/1991/23. The Human Rights Inquiry Commission in Turkey examines complaints and refers them to relevant authorities: see U.N. Doc. E/CN.4/1991/23/Add.1. In Ecuador the National Congress Ad Hoc Commission on Human Rights has the function of analysis and verification of complaints of human rights violations and the institution of proceedings against officials responsible: see U.N. Doc. CCPR/C/58/Add.9.

In Sweden, if the Equal Opportunities Ombudsman is unable to negotiate a settlement in a case of sex discrimination, the case may be referred to the Labour Court.<sup>44</sup> In cases where the Equal Opportunities Ombudsman has unsuccessfully sought to persuade employers to take positive measures to promote equality, an injunction may be requested from a separate body, the Equal Opportunities Commission.<sup>45</sup>

In the United Kingdom, the Equal Opportunity Commission (which deals with sex discrimination) and the Commission for Racial Equality do not themselves have determinative powers.<sup>46</sup> If a complaint of discrimination cannot be settled by conciliation, it may be referred to a court or, in employment-related cases, to an industrial tribunal.

The various pieces of legislation administered by the Australian national Commission offer a range of models in relation to determinative powers. Under the Sex Discrimination Act and the Racial Discrimination Act, if complaints cannot be settled by conciliation, they may be referred for determination to a tribunal hearing. The tribunal consists of the Human Rights and Equal Opportunity Commission itself, rather than a separate body. However, the interests of natural justice are protected by legislative provisions specifying that the Commissioner responsible for conciliation in a case (for example the Sex Discrimination Commissioner in the case of sex discrimination complaints) is not permitted to sit as part of the tribunal or to take part in any Commission decisions relating to the case.

Because of the strict separation of powers which the courts have held to exist under the Australian federal Constitution, Commission determinations in these cases are not directly legally binding. However, a complainant, or the Commission itself, may take enforcement proceedings in the Federal Court. The Commission has recommended, and the Australian Parliament is presently considering, measures to reduce the need for rehearing in the enforcement proceedings of evidence already presented to the Commission.<sup>47</sup>

Under the Human Rights and Equal Opportunity Commission Act (which deals with employment discrimination, and complaints against Federal government departments and agencies in relation to civil and political rights and the rights of children and people with disabilities) the Commission may make findings, but these are contained in a report which must be tabled in Parliament, rather than in the form of an enforceable or binding determination.

Experience has indicated a number of advantages in having a specialist tribunal with binding or enforceable jurisdiction:-

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44. U.N. Doc. E/CN.4/1991/23 par.31.

45. See Fact Sheet on Sweden: *The Swedish Ombudsmen*, published by the Swedish Institute.

46. On these bodies, see e.g. the 3rd periodic report of the U.K. to the Human Rights Committee, U.N. Doc. CCPR/C/58/Add.6 paras.39-42, 51-53.

47. Under the Privacy Act, the Privacy Commissioner has power in some circumstances to make determinations which are more directly legally binding on Federal government agencies.

(a) Such a tribunal will develop expertise in human rights and discrimination law (which in some cases is less well developed in the general court system). As well as leading to more effective handling of individual cases, this is expertise on which the judiciary and other institutions with relevant responsibilities may draw.

(b) It is possible to design hearings by a human rights tribunal to be less expensive, less formal and more accessible than court proceedings. This is particularly important for human rights and anti-discrimination legislation to be effective in protecting the rights of people who are, in many cases, both economically disadvantaged and also disadvantaged by sophisticated systems of advocacy and pleadings.

(c) In a number of countries, including Australia, it has been found advantageous to provide for more flexible remedies to deal with human rights violations than have traditionally been available through the courts.

(d) In many cases the composition of the judiciary is not highly representative of the social composition of the population, and, in particular, contains few representatives of the classes of people most likely to suffer discrimination. The very fact of discrimination means that women, people with disabilities, indigenous people and others experiencing discrimination on the basis of race, religion or other characteristics may be less likely to rise through professional training and experience to the point where they are considered for judicial appointment, particularly at higher levels, (apart from any more direct discrimination in the process of judicial appointment itself). It is possible to make a specialist tribunal more representative, including by specifying that it should include members with particular responsibilities regarding specified groups.<sup>48</sup> Legislation may also specify that the tribunal should include members drawn directly from particular disadvantaged groups, either on a permanent basis or for particular cases.

It has generally been recognised that where a specialist tribunal is created, its decisions should be reviewable by the judiciary. This role obviously provides an important reason for ensuring that judges are adequately trained in the principles of human rights law.

#### ACTIVITIES FOR PROMOTION AND PROTECTION OF HUMAN RIGHTS

As already noted, both national experience and the terms of international human rights instruments indicate that legislative measures alone are not adequate to guarantee the effective enjoyment of human rights. Other active measures of promotion and protection are also needed. In particular, it is necessary to ensure that effective and accessible remedies are available to translate the theoretical protection of the law into practice, and that human rights and the legislative machinery are made widely known - to victims and potential victims of violations of rights, to government agencies, employers and others exercising significant power in society, and to the community generally. It is also

48. As for example by the inclusion of the Race Discrimination Commissioner and Sex Discrimination Commissioner within Australia's national human rights Commission. Proposals for addition of commissioners with specific responsibilities regarding Aboriginal people and for a Children's Commissioner are presently being considered by the national government. The concept of a Disability Commissioner has also been raised by members of the community in the context of proposed further national legislation on the rights of people with disabilities.

important to promote consideration of human rights on a wider basis than simply that of individual violations and complaints: in legislation, in the administration and interpretation of the law, and in the formation of social policy. National commissions have extremely important functions in each of these respects. The very fact that a body such as a Human Rights Commission exists to promote human rights indicates a recognition that simply passing legislation is not, by itself, sufficient.

#### 1. Effective and Accessible Remedies

Different provisions for receipt of individual complaints are discussed in a later section of this paper. A major reason for vesting this jurisdiction in a national commission (rather than relying on civil, administrative and criminal law remedies through the courts) is to increase the accessibility of remedies to members of disadvantaged groups.

There are a number of examples in national experience of the ineffectiveness of anti-discrimination legislation relying only on remedies through the courts.

Considerable shortcomings of early legislation in this area (particularly that of the United States and Canada) have been pointed out:<sup>49</sup>

- (a) With respect to models relying on penal or criminal law:
- frequently the police and prosecution authorities did not act to enforce these laws;
  - victims of discrimination were frequently reluctant to institute a private prosecution;
  - there were difficulties arising from the rules of evidence, particularly where proof beyond reasonable doubt of discriminatory action and discriminatory purpose was required;
  - the judiciary in some cases were reluctant to convict, regarding anti discrimination law as an interference with traditional notions of freedom of contract;
  - without any agency responsible for public education and promotion of the legislation, most people were unaware of its existence;
  - criminal law penalties for perpetrators of discriminatory actions did not, in themselves, provide the person discriminated against with any effective remedy or compensation.

To this list may be added the fact that not all discrimination results from a conscious and deliberate discriminatory intention so as to be culpable in the usual criminal law sense. Discrimination may be equally damaging when it results, as is frequently the case, from stereotyped attitudes or from failure to be aware of the needs of a particular group.

49. See e.g. Tamopolsky, (above), pp.167-69, who also cites Maslow and Robison, "Civil right legislation and the fight for equality, 1862-1952", (1953) 20 *University of Chicago Law Review* 363. Similar problems were encountered with the first Australian anti-discrimination legislation, the South Australian Prohibition of Discrimination Act 1966.

(b) With respect to laws providing for civil remedies through the courts:

- litigation, and fees for lawyers, are expensive in many countries. Many victims of discrimination cannot afford these costs.
- the compensation received (even if the action is successful) may be less than the legal costs incurred. This is particularly the case where only individual complaints are provided for. A great and damaging social wrong, such as racial discrimination in access to public places, might result in relatively small financial compensation to each individual (so that it might not be financially feasible for any one person to take legal action).
- individual legal actions, even where successfully undertaken, might be insufficient to change widespread discriminatory practices. It might be economical for the discriminator to simply pay damages to those victims sufficiently determined, well informed and well-resourced to sue, rather than change the discriminatory practice.
- civil proceedings, though less restricted in procedure than criminal cases, may nonetheless involve technical problems of proof.
- some discrimination cases, in particular those where indirect or systemic discrimination is sought to be shown by analysis of patterns of disadvantage, require specialised skills which many lawyers and courts may not have.
- particularly in countries where the judicial system is primarily based on adversarial procedures, court proceedings may often result in confrontation rather than negotiation and settlement of disputes. Court proceedings may not, therefore, be the best approach where the critical need is a change in attitudes, or where discrimination or interference with rights was unintentional.

Human rights commissions and similar bodies therefore have an important role in making remedies effective and accessible. Dealing with complaints by conciliation is relatively informal and inexpensive.<sup>50</sup> In many cases it can lead to the parties agreeing on a solution much more suited to the individual circumstances of the case than any remedy which a court could order, including redesigning policies and practices which have a discriminatory effect. The settlement agreed need not be confined in its application to the individual case, whereas for courts in many countries there are difficulties in making an order which applies to persons other than the immediate parties to the action. Conciliated settlements may also have important effects in changing attitudes.

## 2. Involvement in Legal Proceedings

Several human rights institutions which lack determinative powers but which refer complaints to courts or tribunals may appear in the courts and tribunals in support of a

50. The court system, in many countries, is now effectively beyond the reach of those except the well-to-do or those of the poor who can arrange to get legal aid. For example, in Australia an action in the County or District Court now costs at least A\$40,000 on average, and a Supreme Court action at least A\$60,000 on average. The Australian Commission does not, of course, charge complainants but the average cost per complaint is A\$500.

complainant's case. The Canadian Human Rights Commission, for example, has such a function.

The Australian Commission is able to appear in court to support orders for the enforcement of Commission determinations. It also has a more general power to intervene in legal proceedings, not confined to those brought under human rights legislation, in order to bring relevant principles of human rights law to the attention of the court. Exercise of this power is conditional on the leave of the court, and (in a practical sense) on there being a basis in domestic law for the application of international human rights instruments. Where such instruments are effectively incorporated into domestic law, a similar function to this would appear to be of considerable relevance, in its direct effects in individual cases and in educating the judiciary and the legal profession generally.

## 3. Community Education, Awareness of Human Rights and Participation

National commissions are of major importance in promoting awareness of human rights, and generally have public education and information as an important function.<sup>51</sup> Part of this function is directly related to complaint handling.<sup>52</sup>

A number of national institutions also place particular emphasis on human rights training for government officials - including the police and the military. (The Philippines commission, for example, has done important work in this area.) This education seeks to build a culture of human rights wherein human rights violations are less likely to occur.

But there is also in most countries an urgent need to educate the general community concerning human rights. The comment that legal measures alone are insufficient for realisation of human rights applies to all categories of human rights, whether designated as "civil and political", "economic, social and cultural", or according to other classifications. While it is clear from experience that different methods may be needed for the realisation of different rights, it is also clear that simple divisions cannot be drawn along the lines of civil and political rights on the one hand and economic social and cultural rights on the other. The realisation of civil and political rights often requires considerable resource commitments, including assistance to disadvantaged groups to enable them to assert their rights. Conversely, the idea that the realisation of economic social and cultural rights is simply a matter of provision of adequate resources is a caricature of these rights as human rights, as well as being contradicted by experience.

51. This function is expressly provided for in the responsibilities of the Australian national Commission under each of the Acts it administers. Similarly, the New Zealand Human Rights Commission has the function "to promote, by education and publicity, respect for and observance of human rights" listed first among its statutory functions: New Zealand Human Rights Commission Act s.5(1)(a).

52. In Australia, for example, the national commission has conducted a major awareness campaign for young women on the protection provided by the Sex Discrimination Act against sexual harassment, particularly in employment and education. This arose from an analysis of individual complaints which showed that few young women were aware of their rights and how to exercise those rights. As well as indicating how to seek a remedy for discrimination, this campaign had a preventive purpose - to assist young women in preventing this form of discrimination from occurring.

Despite the clear position in international law that the different categories of rights are indivisible<sup>53</sup>, arguments continue to be advanced that one or the other has priority: in simple terms, that civil and political rights are irrelevant until basic economic needs are met; or, conversely, that if certain political rights are respected that satisfaction of economic needs will follow.

Human rights must involve opportunities for people to shape their own lives individually and collectively. A major challenge for national institutions, including specific human rights institutions, is to ensure that rather than being bureaucratically remote, they promote participation and the empowerment of disadvantaged groups in society.<sup>54</sup>

#### 4. Public Inquiry Powers

A problem in giving effect to economic and social rights, in particular (but also in systemic discrimination affecting other rights), is that the issues may often be too wide to be addressed by an individual complaint. One of the most significant and innovative powers given to the Australian Commission is the power to conduct public inquiries. This power enables the commission to investigate and report on human rights problems of a more general nature. Typically, public inquiries by the Commission have involved taking oral evidence in public hearings (and confidentially where necessary), receiving written submissions from interested individuals, NGOs and government agencies, further research and analysis of the evidence in the light of relevant international human rights standards, and publication of a report with findings and recommendations which is presented to Parliament.

Public inquiries on human rights issues have an important educational function in addition to identifying human rights problems or abuses and recommending solutions. This power is particularly effective in dealing with situations which involve people who do not have the financial or social resources to lodge individual complaints.

Major inquiries recently conducted in Australia have included:-

- (i) a national inquiry into homeless children;
- (ii) a localised inquiry concerning lack of services to particular Aboriginal communities;
- (iii) a national inquiry on racist violence;
- (iv) a localised inquiry on health services to an Aboriginal community.

53. Note for example the comment of the Justice Bhagwati:- "...each category of human rights is indispensable for the enjoyment of the other. Hence, it is axiomatic that the promotion, respect for and enjoyment of one category of human rights cannot justify the denial of the other category of human rights": Inaugural Address, in *Developing Human Rights Jurisprudence: the Domestic application of International Human Rights Norms* (Report of the Judicial Colloquium, Bangalore 1988), Commonwealth Secretariat, p.xxii.

54. In Australia this is particularly the case with respect to our indigenous peoples - Aborigines and Torres Strait Islanders. However, it is also an urgent need with respect to the mentally ill and other groups which have long suffered gross discrimination and stigmatisation.

- (v) A national inquiry on the human rights of people with mental illness (which is not yet completed.)  
(Details of these inquiries are provided as Appendix B to this paper.)

#### 5. Relations with Non-government Organisations (NGOs)

Relations with non-government organisations also need to be emphasised. These are of critical importance to the promotion and protection of human rights by any national commission.

A number of national institutions include representatives from community organisations within their membership.<sup>55</sup> Several national commissions have associated with them a formally constituted advisory body including representatives of the community or of community organisations. In Mexico, for example, the National Commission on Human Rights has a Council composed of persons prominent in human rights, which conducts studies and issues recommendations to the Commission.<sup>56</sup> In Australia, the legislation which created the national commission permits establishment of a number of such committees to advise the Commission. Moreover, it specifically requires the establishment by the Government of a Committee to advise on matters of discrimination and equality in employment.<sup>57</sup>

In addition to formal links through advisory bodies, or community representation in the membership of national Commissions, co-operation with community organisations more generally is important. In many countries the number of non-government organisations concerned with issues which include human rights aspects is very large, making it impossible that they all be included directly in advisory bodies or in Commission membership.

55. For example the National Human Rights Commission of Togo set up in 1987 included an elected representative of the Togolese Red Cross, and two lawyers elected by the Bar Association, in addition to elected representatives of women, youth, workers, and the traditional chiefs, together with a number of other members: Initial Report of Togo to the Human Rights Committee, U.N. Doc. CCPR/C/36/Add.5.

56. U.N. Doc. E/CN.4/1991/23/Add.1. In addition, there are bodies which facilitate consultation directly between the community and the government. In Morocco the Human Rights Consultative Council serves as a forum for consultation on human rights between non-governmental organisations and the government: see U.N. Doc. E/CN.4/1991/23.

57. When the Government completes the steps to establish this Committee, it will comprise, in addition to representatives of employer organisations, government and unions, representatives of relevant groups including women, Australia's indigenous people and people with disabilities. This Committee will advise the Commission on policy issues in this area, and is also expected to be of great assistance in community education and promotion of non-discriminatory practices. Its advice will be of particular value in dealing with the practical implementation of non-discrimination in various employment settings. There is also a specific Privacy Advisory Committee comprising representatives of interested organisations to provide advice to the Privacy Commissioner on issues in relation to the protection of the right to privacy.

The Australian national commission's charter specifically mandates us to work with non-government organisations, which we do with a large number, both on long term policy, through regular consultations, and on a day to day basis. Several examples of specific types of co-operation are:-

(1) The Australian Commission conducts a regular formal consultation, generally on an annual basis, to which non-government organisations interested in human rights are invited. More frequent informal consultations are conducted on specific issues. This consultation gives NGOs information which they can use in their various fields of human rights activity, as well as assisting to co-ordinate their efforts. It also assists the Commission to ensure that its work program and methods of work are of continuing relevance to the community.

(2) The Convention on the Rights of the Child provides a recent example of close co-operative work between the Australian Commission and NGOs in relation to an international instrument.

First, in providing advice to the Government on its position in the drafting of the Convention, the Commission took account of views expressed by NGOs in its regular consultations.

Second, the Commission co-ordinated a group of NGOs which, together with the Commission itself, engaged in public education and promotion concerning the Convention: through the national media, through publications, and through community networks. This work was crucial in achieving relatively early ratification of the Convention in view of misunderstandings regarding human rights law and the role of the United Nations which continue to exist in some sections of the community. The third stage is that the Commission, jointly with a major national NGO, is currently conducting a review of Australian law and practice relating to children, based on the Convention, which will result in recommendations to Government on further necessary measures for implementation of the Convention. This review includes a survey both of non-government organisations and of government agencies. The information gathered should be of assistance in ensuring that Australia's first report to the Committee on the Rights of the Child is as comprehensive and accurate as possible.

(3) In the area of the rights of people with physical, intellectual, sensory and psychiatric disabilities, the Australian Commission has worked closely with non-government organisations to promote the translation of international standards into national legislative protection.

The Commission engaged a major NGO representing people with disabilities, in co-operation with other NGOs in the field, to produce a report on areas of need for increased protection. After two years of consultation and research, the Commission put proposals to the national government for legislation against discrimination in this area. The Commission is now participating in a government committee preparing that legislation, and is continuing to consult with NGOs as legislative proposals develop.

(4) NGOs can also play a crucial role in what may be termed the "empowerment" of members of disadvantaged groups to bring their concerns to the attention of national commissions.

A specific example may be found in the conduct of the Australian Commission's public inquiry on the human rights of people affected by mental illness. Because of experience of discrimination and denial of rights, and in some cases more directly because of their medical condition, many people with mental illness are reluctant to approach any

official body directly. Community organisations have played an important role in facilitating evidence by many individuals to this Inquiry - either by serving as an intermediary or by providing them with encouragement to personally make submissions. The advice of such organisations has also been valuable to the Commission in designing its procedures to be as accessible as possible.

## 6. Specific Issues or General Human Rights Jurisdiction

A structural feature which has important implications for the work of national institutions in promoting and protecting human rights is whether there are several institutions with jurisdiction to deal with specific categories of rights and/or discrimination, or only one national commission with more general human rights jurisdiction.

A number of national institutions have jurisdiction defined by reference to any human rights treaties to which the nation is a party.<sup>58</sup> The Australian Commission has jurisdiction only in relation to the international instruments included in its legislation but, as already noted, these cover a very wide range of rights and there is provision for further instruments to be added.<sup>59</sup>

In Canada, the Human Rights Commission has jurisdiction to deal with discrimination on a wide range of grounds, including sex, race, religion, marital or family status, disability or age. The Commission does not have direct jurisdiction regarding civil and political or economic, social and cultural rights per se, but only so far as these are affected by discrimination. However, in democratic and economically developed societies such as Canada or Australia, many violations of civil and political, or economic social and cultural, rights are likely to include an element of discrimination against disadvantaged and relatively politically powerless groups.<sup>60</sup> In practice, therefore, the Canadian Commission may be seen as exercising a fairly broad human rights jurisdiction, despite the fact that the direct enforcement of civil and political rights as such (and of some economic, social and cultural rights, in particular Aboriginal rights and language rights) is allocated separately to the courts under the Canadian Charter of Rights and Freedoms.

58. For example the Turkish Human Rights Inquiry Commission: see U.N. Doc. E/CN.4/1991/23/Add.1; the Philippines Commission on Human Rights and the Guatemala Attorney for Human Rights: see U.N. Doc. E/CN.4/1991/23.

59. The Australian Commission's jurisdiction covers discrimination on grounds of sex or race in a wide range of areas, and on other grounds including religion, national origin or nationality, social origin, political opinion, sexual preference, marital status, criminal or medical record, trade union activity, age, impairment, or disability of any kind in relation to employment; as well as jurisdiction in relation to civil and political rights, the rights of children and the rights of people with disabilities. The Privacy Commissioner is also a member of the Commission and is assisted by Commission staff in his functions.

60. Thus in Australia, although civil and political rights are generally well respected, equality of civil and political rights is not in fact enjoyed by Aboriginal people, by people with disabilities, by many children or in some cases by people of non-English-speaking backgrounds. In most cases, though not always, the human rights of the majority and the politically powerful are likely to be reasonably well protected by the democratic political process.

In New Zealand, the Human Rights Commission has jurisdiction in relation to human rights generally, and specific jurisdiction in relation to discrimination on grounds of sex, marital status and religious or ethical belief. Jurisdiction over racial discrimination is exercised by the Race Relations Conciliator, who is a member of the Human Rights Commission but has separate statutory responsibilities and maintains a distinct staff. There is also a separate Children's Ombudsman in New Zealand and in a number of other jurisdictions.

In the United Kingdom, the Equal Opportunities Commission has jurisdiction in relation to sex discrimination while the Commission for Racial Equality has jurisdiction regarding racial discrimination, but there is no national commission with general human rights jurisdiction.<sup>61</sup>

In Sweden, as noted earlier, there are a number of Ombudsmen. The Ombudsman Against Ethnic Discrimination deals with racial discrimination in the labour market and in other aspects of public life. The Equal Opportunities Ombudsman deals with sex discrimination. The jurisdiction of the Parliamentary Ombudsman is not specifically defined by reference to human rights but includes some human rights issues within the more general jurisdiction to supervise actions of government authorities.<sup>62</sup> In Finland there is also a separate Equality Ombudsman who deals with issues of sex discrimination.<sup>63</sup>

In our experience there are a number of advantages in having an integrated human rights body rather than separate bodies to deal with different grounds of discrimination and other aspects of human rights.<sup>64</sup>

Where the different grounds of discrimination are combined under the jurisdiction of an integrated Commission, connections and similarities between different discrimination issues can be more clearly seen. This has several consequences:-

- (a) It promotes co-operation between members of different disadvantaged groups and gives each an interest in the protection of the others.
- (b) Consequently, the political position of a human rights commission is made more secure. This can be of considerable importance since it is inevitable that from time to time effective advocacy of human rights will involve disagreement with significant political forces in society.
- (c) Expertise and experience in one area of discrimination, both in legal interpretation and in practical measures, will frequently be relevant in other areas.
- (d) An integrated body makes possible more effective use of resources and specialised expertise, including in human rights law.

61. There may be some relationship between this fact and the relatively high number of cases before the European Commission on Human Rights which have concerned the United Kingdom.

62. U.N. Doc. CCPR/C/58/Add.7.

63. See U.N. Doc. E/CN.4/1991/23.

64. A number of these points are noted by Tarnopolsky, (above), at p.169.

Another very important feature of an integrated human rights body is that it helps to counteract the impression that anti-discrimination law unfairly gives special rights to particular groups.<sup>65</sup> A more helpful and less divisive approach is that human rights law exists to ensure the equal right of all persons to enjoyment of human rights, including members of minorities who are in particular need of protection. It also reinforces the fact that equality and non-discrimination are an integral part of human rights in international law rather than being something distinct.<sup>66</sup> This approach is emphasised particularly in those countries (Australia and New Zealand for example) where the same body has responsibility for anti-discrimination law and in relation to civil and political rights more directly.

Particular bodies for particular areas of discrimination and human rights have the advantage of ensuring that the issues within their jurisdiction (for example sex discrimination or the rights of indigenous peoples) receive appropriate priority, and may assist in ensuring that the issues in each area are dealt with by persons of appropriate expertise and sensitivity. These concerns, however, would appear to be equally capable of being addressed by instituting an integrated collegiate body with designated officers having specific responsibilities. Clearly, in an integrated body, it is necessary to ensure that each area receives proper priority and a share of resources relative to the needs which exist. The degree of integration achievable in practice is, of course, dependent to some extent on national conditions, including the views in this respect of the disadvantaged groups principally concerned.

## RELATIONS WITH INDIVIDUALS

### 1. Individual Complaints

Although in some countries the main function of specific human rights institutions is to provide advice to government on issues of policy and legislation, it is generally recognised that an important function of a human rights commission is to accept complaints from individuals.<sup>67</sup> Of course, as noted in the earlier paper, dealing with individual complaints is also a principal function of an Ombudsman.

65. Much ill-informed comment to this effect was made in Australia, for example, in the early period of operation of race and sex discrimination laws.

66. See similarly Wallace, (above), at p.159. This is particularly important to emphasise in common law countries where there has been a tendency to think of human rights only in terms of civil liberties. In the same paper Wallace noted that the New Zealand Commission has advised that its jurisdiction regarding discrimination is too narrow: see p.160.

67. This is the case with independent commissions with specific statutory functions regarding human rights and/or discrimination, such as those of Australia, Canada, New Zealand, the Philippines, Togo, and the United Kingdom; with a number of bodies established within government departments, such as the Mexican National Commission on Human Rights, established within the Department of the Interior; and with a number of bodies associated directly with national Parliaments, such as in Ecuador, Guatemala and Turkey.

## 2. "Class Actions" and Representative Complaints

In several jurisdictions there is provision for an individual affected by discrimination or other human rights violation to complain not only on his or her own behalf but on behalf of others similarly affected.<sup>68</sup> In Australia, the Sex Discrimination Act<sup>69</sup> lists a number of factors which will allow a matter to be considered as a representative complaint: that the complainant is a member of the class affected or likely to be affected; that the complainant has personally been affected by the conduct in question; that the class of persons is so numerous that it is impractical to deal with the matter simply by joining a number of specified individuals to the complaint; that there are questions of law or fact common to the members of the class; that the claims of the complainant are typical of the claims of the class; that multiple complaints would be likely to produce inconsistent results; and that the grounds for the action complained of appear to apply to the whole class, making it appropriate to grant remedies to the class as a whole. The same section also provides, however, that a matter may be dealt with as a representative complaint wherever this is demanded by the justice of the case.

Provision for representative complaints helps to ensure that more general social problems are not treated only on an individual basis in the complaint process. Problems of a purely individual complaint based approach have already been noted. In particular, a successful individual complaint may not always be enough to secure a change in a more widespread discriminatory practice, and the damage to any one person (and therefore the likely amount of compensation) may not be sufficient to make it worthwhile even to take action. A representative complaint may also help to reduce the disparity in resources between individual complainants on one side and a large institution, such as a corporation or government agency, on the other. Representative complaints appear particularly appropriate in cases of indirect discrimination, where an apparently non-discriminatory requirement in fact has a disproportionate and unjustifiable adverse impact on a disadvantaged group.

## 3. Complaints by Third Parties or NGOs

The most vulnerable members of society may not be in a position to lodge a complaint or to authorise others to do so on their behalf, because of the very circumstances which render them vulnerable: for example, persons detained incommunicado, or people with severe physical, intellectual or psychiatric disabilities, or whose legal capacity is limited for other reasons. This last group includes, importantly, children.

This is addressed to some extent by provisions allowing a number of national commissions to receive complaints from third parties or from non government

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68. Examples of such provisions may be found in the Canadian Human Rights Act s.40(4) and the Australian Sex Discrimination Act, ss.50, 70, 71 and 72. The Australian Sex Discrimination Act s.61 also allows the Commission itself to decide that a number of individual complaints should be heard together.

69. Section 70(2).

organisations.<sup>70</sup> More specific provision is made in some cases for complaints by trade unions.<sup>71</sup>

Specific provisions allowing third parties and non-government organisations to bring complaints are desirable, to avoid technical arguments regarding who has "standing" to complain. Where such complaints are possible, it would also appear desirable to specify that the complaint should not proceed if the person on whose behalf the complaint is made does not wish it to proceed.<sup>72</sup>

## 4. Can the Commission Initiate Investigations Itself?

A number of national human rights institutions have jurisdiction to initiate an investigation of possible cases of discrimination or other human rights abuses without needing to receive a formal complaint.<sup>73</sup>

This power is important - given that many sections of society remain at best inadequately aware of their rights and how to exercise them; that vulnerable groups or individuals suffering violations of human rights (for example, prisoners or persons affected by mental illness) do not always have effective representative organisations or advocates to act on their behalf; and that people or groups who are the victims of violations of human rights may be reluctant to approach any official agency with a complaint.

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70. This is the case, for example, with the National Human Rights Commission of Togo: see U.N. Doc. CCPR/C/36/Add.5; and the Canadian Human Rights Commission: Canadian Human Rights Commission Act s.40(1).

71. Such provision is made in Australia under the Sex Discrimination Act s.50, and the Racial Discrimination Act s.22. The Human Rights and Equal Opportunity Commission Act does not specify any restrictions on who may complain and therefore implicitly permits complaints by third parties, NGOs and trade unions.

72. Such provision is made in Canada: Canadian Human Rights Act s.40(1), and in Australia under the Human Rights and Equal Opportunity Commission Act s.20(2).

73. For example, the Philippines Commission on human rights may investigate cases on its own motion: see U.N. Doc. E/CN.4/1991/23. The Canadian Human Rights Commission Act, s.40(3), provides that the Commission may initiate an investigation itself where it has "reasonable grounds" to believe that a person is engaging in a discriminatory practice. The Australian Commission has power to initiate an investigation in any case "where it appears to the Commission to be desirable to do so": Human Rights and Equal Opportunity Commission Act s.20(1); or in the case of race and sex discrimination "where it appears to the Commission that a person has done an act which is unlawful" under the legislation: Racial Discrimination Act s.24, Sex Discrimination Act s.52.

## RELATIONS WITH THE STATE

A variety of institutional types have been noted in this paper:-

- institutions created by decision of the Parliament and including members of the legislature;
- institutions constituted within a government department such as the Ministry of the Interior or the Ministry of Foreign Affairs;
- institutions created by legislation.

The first two of these types may be seen as having some advantage in more direct involvement in the process of legislation and policy making.

However, an important feature of a separate commission set up by statute is its greater independence from government. In Australia for example, although the functions of the national commission include giving advice to government, the Commission is independent by law and is not subject to direction by government in the performance of its functions, including in handling complaints and in initiation of national or local inquiries. This independence has been a crucial part of the effectiveness of the Commission's operations.<sup>74</sup>

### ADVISORY OR BINDING JURISDICTION

The Ombudsman and similar institutions do not generally make binding determinations, but either refer cases to the courts or other bodies with power to take binding decisions, or else make non-binding recommendations addressed to the government agency which is the subject of the complaint or to the legislature.

A number of more specific human rights institutions also appear to have a purely advisory jurisdiction. The principal force of the recommendations of such institutions is the force of public opinion.<sup>75</sup> For such institutions to be effective, therefore, it is important that their reports and recommendations be made public and that this function

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74. The New Zealand Commission regards its own independence as similarly vital: see Wallace, (above), at p.157.

75. This has been noted, for example, by Mexico regarding its National Commission on Human Rights: "The strength of its recommendations is of a moral nature, in accordance with the Commission's credibility in society, and is enhanced by the fact that failure to comply with its recommendations will be commented on in its periodic public reports, which would imply a high political cost for the authority involved": U.N. Doc. E/CN.4/1991/23/Add.1 par.2.

should be independent of government control.<sup>76</sup>

In several instances, national human rights institutions have binding jurisdiction in some areas (or have associated with them specialist tribunals which have binding jurisdiction) but advisory jurisdiction only in other respects. Commonly there is a distinction between certain grounds of discrimination which are declared unlawful, and regarding which binding determinations may be made, and other human rights matters, regarding which advisory jurisdiction only is created. This is the position, for example, in New Zealand. In Australia, determinations under the Sex Discrimination Act, the Racial Discrimination Act and under aspects of the Privacy Act are enforceable.<sup>77</sup> In cases of discrimination on other grounds such as disability, sexual preference and age (these being additional grounds of discrimination declared pursuant to Article 1 of the Discrimination (Employment and Occupation) Convention) and in cases regarding rights under the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child and the U.N. Declarations on the rights of people with disabilities, the Commission has power only to report and make recommendations.<sup>78</sup>

Power to make non-binding recommendations and experience gained in the operation of legislation on this basis may, in some instances, be useful as a transitional measure before the introduction of legislation providing for enforceable remedies. This model allows for a period of community education before legislation is introduced imposing binding obligations, and affords government agencies, employers and other interested parties a period to adjust their practices. It may also be a means of ensuring that problems in the operation of legislation are discovered before enforceable legislation is introduced. In particular, it may be important to give judges some guidance in the interpretation of human rights law in cases where the judiciary is not familiar with interpreting and applying statements of rights to give international law domestic application.

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76. In Australia, the Human Rights and Equal Opportunity Commission reports to the Attorney-General, who is required to lay the reports of the Commission before Parliament: Human Rights and Equal Opportunity Commission Act s.46. In addition, the Commission's functions of promoting public awareness and discussion of human rights permit it to publish papers itself.

77. As noted earlier this requires enforcement action through the courts in the case of sex and race discrimination since Commission determinations are not immediately binding.

78. The Commission has recently recommended legislation to enable binding determinations to be made regarding discrimination on a number of further grounds - including age and disability. Legislation on disability is currently being prepared by the Federal Government, in consultation with the Commission, as noted earlier in this paper.

## CONFLICTS OF JURISDICTION

### 1. National Commissions and the Courts

As noted earlier, in several countries there is both a national human rights commission or similar body with jurisdiction to receive complaints, and a judicially enforceable Bill of Rights. Where these jurisdictions overlap, complainants may be expected to approach whichever institution appears more likely to give the remedy desired although, as discussed above, problems in effective access to the courts for members of disadvantaged groups (and indeed, in many countries, for all but a minority of the population) mean the national commission may remain the only remedy effectively available.

As administrative bodies, national commissions established under human rights legislation are generally subject to the supervision of the courts, including in their interpretation of this legislation. However, in specific cases where commissions are not directly bound by a court decision they may tend to take a broad approach, based more on the purposes of the legislation - whereas courts (at least in common law countries) may adhere more closely to stricter domestic rules of legal interpretation.

One area where conflicts may arise is in approaches to positive measures designed to promote equality for disadvantaged groups. In some cases courts taking a formalist approach to discrimination law may regard these as constituting "reverse discrimination".<sup>79</sup>

One interesting mechanism for ensuring that measures which are not in fact discriminatory are not struck down by a formalist approach to antidiscrimination law by the courts (without providing for excessively wide legislative exceptions) is the provision in the Australian Sex Discrimination Act for the Human Rights and Equal Opportunity Commission to grant exemptions from provisions of the Act. This power is required to be exercised consistently with the purposes of the legislation and is subject to judicial review, so that it is not used to undermine the protection of the law against discrimination. The power to grant exemptions has also been relevant in avoiding misinterpretations of anti-discrimination law in industrial tribunals. In other jurisdictions, a similar purpose is served by provisions which allow the human rights or anti-discrimination commission to certify that a measure or program for the benefit of a disadvantaged group, or measures conforming to certain guidelines, are permissible.

### 2. Human Rights Commissions, Ombudsmen and Other Agencies

In many cases where a human rights complaint is made against a government agency, it may be possible for the matter to be dealt with either by the human rights commission or by the Ombudsman - where both exist. In such cases it is necessary for one agency to be able to refer complaints to another, and for both agencies to maintain good communications. In Australia, areas where both the human rights commission and the Ombudsman have been involved have not caused conflicts of jurisdiction to any significant extent.

79. For discussion of problems in this area see e.g. W. Sadurski, "Gerhardy v. Brown v. the concept of discrimination" (1985) 11 *Sydney Law Review* 5.

### 3. Federal - State Conflicts

A detailed examination of the operation of human rights institutions in Federal systems is beyond the scope of this paper. It is important, however, that where both Federal and State or provincial human rights mechanisms and legislation exist, these should be effectively co-ordinated - so that individuals are not deprived of a remedy by jurisdictional conflicts and so that more effective or appropriate provisions or procedures in one jurisdiction are not displaced by less suitable measures in the other.

In Australia, Federal legislation displaces any inconsistent State legislation by virtue of the Australian Constitution.<sup>80</sup> Both the Sex Discrimination Act and the Racial Discrimination Act contain provisions indicating to the courts that the Federal legislation does not displace any State legislation which is capable of operating together with the Federal legislation and which furthers the objects of the relevant international Convention in each case.<sup>81</sup>

## CONCLUSION AND RECOMMENDATIONS

1. The jurisdiction of a human rights commission should be defined as broadly as possible.
2. This jurisdiction should include monitoring and reporting on the nation's compliance with international instruments on human rights. National commissions should be involved in the preparation and presentation of country reports under human rights treaties.
3. Preferably, the charter of the commission should be established by law or by the Constitution.
4. The independence of the commission should be specified in its charter, including by providing for fixed terms of appointment for its members.
5. Where a number of human rights institutions exist in a country, their functioning should be closely co-ordinated.
6. A desirable model incorporates the greatest possible degree of integration of responsibility for different types of human rights and discrimination, together with specific legislative and institutional provisions to protect and promote the rights of particularly disadvantaged or vulnerable groups.
7. A national commission on human rights should be mandated to consult and work with non-government organisations. It is desirable for human rights commissions to be accompanied by formal advisory bodies or other structures to ensure close contact with NGOs.

80. Section 109.

81. The Convention on the Elimination of Discrimination Against Women, and the Convention on the Elimination of Racial Discrimination.

8. National commissions should be authorised to work with and consult international organisations and other national commissions.
9. National commissions should have broadly defined promotional and educational functions in relation to human rights.
10. National commissions should have power to review existing and proposed legislation for consistency with human rights, and recommend legislative and other measures to protect human rights.
11. National commissions have an essential role in providing effective and accessible remedies in cases of discrimination and human rights violations. National commissions should, therefore, be authorised to receive complaints from individuals on their own behalf; from individuals representing themselves and others similarly affected ("class actions"); from third parties; and from NGOs, including trade unions and other representative organisations.
12. National commissions should also be empowered to undertake broader investigations, including by conducting public inquiries involving taking of evidence and making a public report.
13. National commissions should be authorised to initiate investigations on their own initiative.
14. Procedures for making a complaint and for the handling of complaints should be as simple, accessible, and inexpensive as possible. Provision should be made for the commission to attempt to resolve complaints by conciliation. Confidentiality of the conciliation process is an important part of its effectiveness.
15. Provision should be made for referral of complaints by the human rights commission to other agencies including the courts and the Ombudsman (where a separate office of the Ombudsman exists) in appropriate cases.
16. The commission should have power to gather evidence and require production of documents and other evidence for the purposes of its investigations.
17. Where a complaint cannot be resolved by conciliation, provision should be made for a determination to be made. Preferably, such determination should in the first instance be made by the human rights commission or by a specialist human rights tribunal.
18. Effective and accessible means of enforcement of the determinations of the commission or tribunal should be provided.
19. In some cases, depending on national conditions including other institutions which exist, it may be appropriate to give recommendations of the human rights commission advisory rather than binding status.
20. In cases where determinations or recommendations of the human rights commission are advisory rather than binding, these should be made publicly available. Provision should be made, in particular, for the tabling of the reports of national commissions before the legislature.

## APPENDIX A

### STRUCTURE AND FUNCTIONS OF AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

#### Functions of Commission

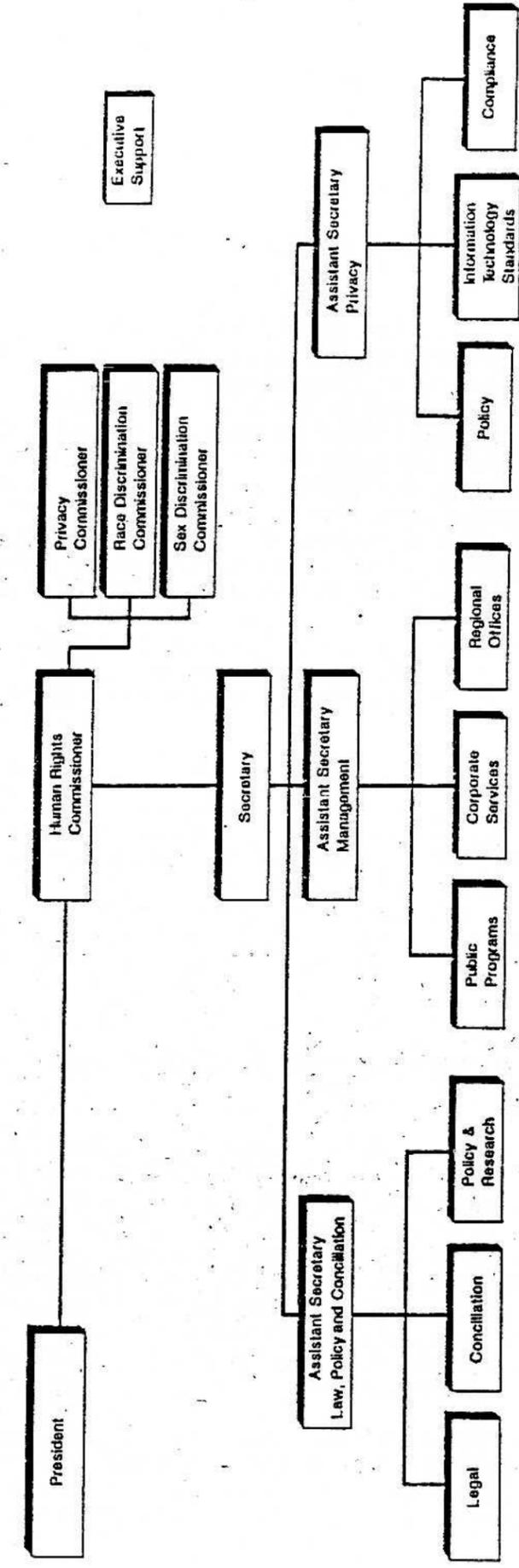
11. (1) The functions of the Commission are -
  - (a) such functions as are conferred on the Commission by the Racial Discrimination Act 1975, the Sex Discrimination Act 1984 or any other enactment;
  - (b) such functions as are to be performed by the Commission pursuant to an arrangement in force under section 16;
  - (c) such functions as are expressed to be conferred on the Commission by any State enactment being functions in relation to which the Minister has made a declaration under section 18;
  - (d) the functions conferred on the Commission by section 31;
  - (e) to examine enactments and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, are, or would be, inconsistent with or contrary to any human right, and to report to the Minister the results of any such examination;
  - (f) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and -
    - (i) where the Commission considers it appropriate to do so - to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
    - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement - to report to the Minister in relation to the inquiry;
  - (g) to promote an understanding and acceptance, and the public discussion, of human rights in Australia.
  - (h) to undertake research and educational programs and other programs, on behalf of the Commonwealth, for the purpose of promoting human rights, and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth;

- (j) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;
  - (k) on its own initiative or when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument;
  - (m) on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Covenant, the Declaration or any other relevant international instrument, and to report to the Minister the results of any such examination;
  - (n) to prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of acts or practices of a kind in respect of which the Commission has a function under paragraph (f);
  - (o) where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court to intervene in proceedings that involve human rights issues; and
  - (p) to do anything incidental or conducive to the performance of any of the preceding functions.
- (2) The Commission shall not -
- (a) regard an enactment or proposed enactment as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (e) by reason of a provision of the enactment or proposed enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons; or
  - (b) regard an act or practice as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (f) where the act or practice is done or engaged in solely for the purpose referred to in paragraph (a) of this sub-section.

*Note: Paragraph 11(b) and (c) refer to functions pursuant to co-operative arrangements with State governments. Section 31 confers on the Commission similar functions regarding discrimination in employment as section 11 confers regarding human rights.*

ORGANISATION CHART

Human Rights and Equal Opportunity Commission



## APPENDIX B

### PUBLIC INQUIRIES ON HUMAN RIGHTS IN AUSTRALIA

#### 1. THE TOOMELAH INQUIRY

The first public inquiry conducted by the Australian Human Rights and Equal Opportunity Commission was a local inquiry into the economic and social rights of the Toomelah Aboriginal community - having regard to the standards laid down in the Convention on the Elimination of All Forms of Racial Discrimination. The inquiry conducted hearings in the area itself (near the N.S.W / Queensland border) and received evidence from individual members of the Aboriginal and non-Aboriginal communities, from local community organisations and leaders and from federal, state and local government authorities. The community had experienced a long history of dislocation, discrimination and inadequate servicing. The standard of housing, health, education, water and other basic services was totally inadequate, (as in many other Aboriginal communities) and well below that enjoyed by neighbouring towns with a white population.

The inquiry identified fundamental problems in co-ordination, allocation and acceptance of responsibilities between different government departments and different levels of government. (These problems have adverse effects on Aboriginal communities in many other parts of Australia.)

The inquiry has resulted in significant improvements in the services provided to the local community involved. The Commission was concerned, however, that similar problems in other communities might not be addressed. We are therefore conducting a follow up project on the adequacy of water supplies to remote Aboriginal communities generally. The Commission is approaching the issue not as an abstract engineering issue but on the basis of consultations with the affected communities. As with the Toomelah inquiry itself, however, the announcement of this project by the Commission has resulted in several positive responses from government even before the Commission has reported its findings.

#### 2. THE HOMELESS CHILDREN INQUIRY

The Homeless Children Inquiry was a national inquiry conducted by the Commission with reference to the principles of the Declaration of the Rights of the Child, (stipulating that children are entitled to special protection, adequate housing and protection against neglect, cruelty and exploitation). The report of this inquiry was presented to the federal government and parliament in February 1989 and then made public. The inquiry did more than just describe the problem, affecting tens of thousands of children. It identified the inadequacies of government responses, and made recommendations to correct them. Some of these recommendations went into some detail on the design of social programs. (This level of involvement with the details of policy was found necessary to give definite content to the economic and social rights involved.)

Giving practical effect to rights with significant public resource implications involves political processes. The level of responses to the homeless children inquiry - in public and political discussion, and in program responses (the federal government has provided \$100 Million over four years) already implemented or proposed has resulted, in

large part, from the human rights basis of the inquiry. That is, to have a situation identified as a major breach of fundamental international standards on human rights is not just a legal point - it is, in itself, a major political argument.

The inquiry heard evidence in every State and Territory from a wide range of people and organisations. That extensive process of consultation assisted in framing a comprehensive set of recommendations on a wide range of issues dealt with by applicable human rights principles.

A government inquiry conducted without reference to human rights principles might look at homelessness purely as a problem in the supply of housing. Human rights instruments dictate a broader approach. First, the right to housing requires that shelter be accessible to young people - not just physically available. It also requires that a range of appropriate accommodation options be available - particularly for those groups who are the subject of particular disadvantage and/or discrimination (such as Aboriginal young people and young people with disabilities).

Other relevant rights - including the right to special protection and, specifically, protection against neglect or abuse - led the inquiry to conclude that accommodation services should be integrated with other support services where these are necessary, (including services to promote family reconciliation wherever possible and appropriate). Increased assistance and support services for families were also emphasised by the inquiry as a means of preventing homelessness, (partly arising from the references in the international human rights instruments to the central role of the family).

Human rights principles also led the inquiry to reject simplistic solutions, like forcing young people to return home if they are mature enough to make their own decision not to, or locking homeless children up in institutions.

The inquiry was also concerned by the vulnerability of homeless young people in their contact with the legal system. It made recommendations for improving the availability, accessibility and quality of advocacy and information services - in dealing with the criminal justice system, child welfare systems and social security and accommodation authorities. These recommendations, although directly related to the needs of homeless children, are also relevant to the protection of the rights of all children and young people - both regarding civil and political rights and economic and social rights.

The commission is continuing to actively monitor government responses to the Inquiry's report, including by reconvening the formal hearings of the Inquiry to receive evidence from governments and community organisations on the implementation of its recommendations. The Federal government and most State governments have implemented a number of major changes to programs in response to the report of this inquiry.

### 3. THE RACIST VIOLENCE INQUIRY

This national inquiry was conducted by reference to the Convention on the Elimination of All Forms of Racial Discrimination. It examined racist violence and intimidation as forms of racial discrimination, and assessed their impact on the equal enjoyment of human rights in the civil, political, economic, social and cultural spheres.

The Report of the Inquiry, released in March 1991, analysed the adequacy of government and community responses, in particular by reference to the right to the equal

protection of the law. It also examined preventive measures. The Inquiry found that racist violence against Aboriginal people was widespread and included officially perpetrated violence. It found that although the number of incidents of racist violence against other groups was relatively low, there was a need for improved measures and procedures.

The Report recommended legislative measures in a number of areas, including that Australia should introduce national legislation against incitement to racial hatred, in order to fulfil its obligations under Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination. The Federal Government is presently considering implementation of this recommendation. The Inquiry also made major recommendations in the areas of community education, and human rights training for public officials including police. The Commission is now working with both State and Federal authorities to put these recommendations into effect.

### 4. THE COOKTOWN INQUIRY

This inquiry concerned the provision of medical and health services to three Aboriginal communities in North Queensland. It was prompted by a number of incidents where it was alleged that racial discrimination had led directly to inadequate medical care for Aboriginal people. Again, the Inquiry took evidence from the local community, from government agencies and community organisations. The Report of the Inquiry was released in August 1991.

The Report does not fix responsibility on individuals for individual acts of racial discrimination. It is concerned, rather, to improve enjoyment of social rights in this area by dealing with inadequacies and inequalities in health care available, and in the need for increased Aboriginal community participation in the planning and operation of health services.

### 5. THE MENTAL ILLNESS INQUIRY

The Commission is presently conducting a national inquiry on the human rights of people affected by mental illness - principally by reference to the International Covenant on Civil and Political Rights, the Declaration on the Rights of Disabled Persons and the Principles for the Protection of Mentally Ill Persons and for the Improvement of Mental Health Care (adopted early this year by the Commission on Human Rights). The inquiry has already received hundreds of written submissions and taken oral evidence from several hundred people affected by mental illness and organisations representing them, families and carers, experts and government authorities.

The major human rights issues concerning mental illness which have received attention as human rights issues in Australia prior to this Inquiry have been civil and political rights issues concerning involuntary treatment and detention, and protection against abuse. Clearly there are serious issues to be considered concerning the legal protection required in this respect.

The international instruments, however, also recognise a much wider range of rights which are extremely important and which the Inquiry will address - including rights to treatment, rehabilitation, education, counselling and other services; the right to economic and social security and a decent living standard; and the right to protection from discrimination, including in employment and in other areas of social life.

## THE UNITED NATIONS AND NATIONAL HUMAN RIGHTS INSTITUTIONS

BRIAN BURDEKIN AND ANNE GALLAGHER<sup>1</sup>

### INTRODUCTION

*"The World Conference on Human Rights reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information and education in human rights . . . The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level."*

Effective implementation of international human rights standards is ultimately a national issue - a reality sometimes lost on those of us working at the international level. International and even regional human rights mechanisms are simply inaccessible to the vast majority of the world's population. Individual rights and freedoms - and those of particularly vulnerable groups or peoples - will primarily be protected or violated because of what exists, or what is lacking, within a given State or society. In other words, the ability of a State to effectively discharge its responsibility to protect and promote human rights will depend predominately on the strength of its domestic institutions. A pluralist and accountable parliament, an executive which is ultimately subject to the authority of elected representatives and an independent,

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<sup>1</sup> Mr Burdekin was Federal Human Rights Commissioner of Australia from 1986-1994 and, since 1995, has served as Special Adviser on National Institutions, Regional Arrangements and Preventive Strategies to the High Commissioner for Human Rights. Ms Gallagher is Human Rights Officer in the Activities and Programmes Branch with special responsibility for National Institutions.

<sup>2</sup> Vienna Declaration and Programme of Action, (adopted by the World Conference on Human Rights, Vienna, 25 June 1993 (A/CONF.157/24 (Part I, paragraph 36)).

impartial judiciary are necessary, but not sufficient institutional prerequisites.

These basic "institutions" must, therefore, be supported by other mechanisms. The development of a culture of human rights at the national level depends on the existence of a vigorous civil society - one which encourages the formation of community groups; which not only tolerates but encourages respect for individual difference and which enjoys a free and responsible press. One particularly useful mechanism for protecting individual liberties and freedoms, located somewhere between the sphere of government and that of civil society, is the "national human rights institution." This term is now commonly used to refer to a body established by government, under the constitution or by legislation, for the specific purpose of promoting and protecting human rights. A variety of different institutional structures fall within this definition - including several types of "ombudsmen" and an increasingly disparate variety of national human rights commissions.

This article is divided into two parts. Part One focuses on the concept of National Institutions; provides an illustrative (rather than definitive) overview of their work<sup>3</sup>; and highlights key criteria for an effective Institution. Part Two briefly surveys recent developments in the area of National Institutions and, in particular, the work of the High Commissioner for Human Rights in promoting the establishment of new institutions and strengthening existing ones. (The Principles Relating to the Status of National Institutions, which were adopted by the United Nations General Assembly in 1993, are reproduced in an annex).

## **PART ONE: THE STRUCTURE AND FUNCTIONING OF NATIONAL HUMAN RIGHTS INSTITUTIONS**

<sup>3</sup>Additional technical information on the structure and functioning of National Human Rights Institutions may be found in the United Nations Publication: *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series No. 4, United Nations, New York and Geneva, 1995. (Copies available from the Office of the High Commissioner for Human Rights).

### **A. Defining a National Human Rights Institution**

National Human Rights Institutions generally enjoy a broad jurisdiction - usually including the protection of civil and political rights and the prevention of discrimination. Some Institutions are also empowered to promote and protect economic, social and cultural rights. Many Institutions have jurisdiction over both public and private entities; others are restricted to acts or practices occurring in the public sector. The precise authority and functions of each particular Institution are defined in the constitutional provisions, legislative acts or decrees by which it is established. Some Institutions are limited to protecting "fundamental rights" as defined in the national constitution. However, an increasing number are empowered to promote and protect human rights prescribed in international human rights treaties and other instruments.

### **B. The Work of National Institutions**

#### **I. Investigating alleged violations of human rights**

One of the most important functions with which a National Institution can be entrusted is the investigation of complaints from individuals or groups alleging violations of human rights. Depending on the Institution's jurisdiction, these rights may be those enshrined in domestic law and/or those set out in international treaties which the State concerned has ratified. Frequently, violations of internationally recognized human rights will be violations of domestic law - but frequently (as with discriminatory practices in many jurisdictions) they will not. The existence of a national mechanism with the power to investigate abuses and provide relief to victims can, of itself, discourage acts or practices inimical to the enjoyment of human rights.

In order to discharge its investigative responsibility effectively, a National Institution may be granted a range of powers enabling it to gather evidence and question witnesses. (Even if used only occasionally, these powers are important in ensuring that the person or body complained against cannot frustrate the investigation by refusing to cooperate). While there are considerable differences in the procedures adopted by various National Institutions in the investigation and resolution of complaints, a growing number rely on conciliation and/or arbitration. National Human Rights Institutions are not usually empowered to impose legally binding decisions on

parties to a complaint. This does not mean, however, that the settlement or remedial steps recommended by the Institution can be ignored. In some countries, a special tribunal has authority to hear and determine issues arising from unresolved cases. In others, the Institution may be able to refer matters to superior courts for a final and legally binding decision or for enforcement of its determination.

## II. Conducting public enquiries

Some National Human Rights Institutions also enjoy a mandate to conduct public enquiries on their own initiative. This is an important power - particularly in effectively addressing systemic violations of the rights of the most vulnerable and disadvantaged groups in society; minorities, the homeless, indigenous peoples, the mentally ill, those with intellectual disabilities and others; - who frequently lack effective advocates and are seldom in a position to lodge individual complaints. (Experience demonstrates that media interest also makes such enquiries an effective vehicle for educating the public generally.)

## III. Providing advice and assistance to governments

Another important function of National Human Rights Institutions is providing assistance and advice to governments. Again, mandates vary widely; some are granted a general authority to bring human rights abuses to the attention of the parliament, the executive and/or the judiciary - to assist these institutions in promoting and protecting human rights. Some are able to submit opinions on proposed or existing legislation directly to parliament; to initiate new legislation; or to intervene in legal proceedings involving questions of human rights (usually with the proviso that leave must be obtained from the court). They may also be entrusted with responsibility for drawing governments' attention to situations of human rights abuse and making specific proposals aimed at preventing such abuse. A number of National Human Rights Institutions play an important role in monitoring the implementation of international human rights standards and assisting governments to fulfil their reporting obligations to various international treaty-bodies.

## IV. Human rights education

Perhaps the most important role of a National Human Rights Institution is to educate individuals that they have rights -- which governments, the private sector and other individuals must respect. There is a growing awareness that preventive strategies must increasingly absorb our attention and resources - and that among the most effective of these are appropriate education and training in human rights. Such strategies can involve a variety of activities, including the collection, production and dissemination of information; the organization of promotional events and the development and implementation of training programmes for a variety of audiences. National Institutions are increasingly focussing their attention on the need to develop practical strategies for effective education - not only in the more formal settings of primary, secondary and tertiary educational facilities, but also in the critical areas of training for police, prison, paramilitary, military and security forces.

## C. Features of an Effective Human Rights Institution

It is the right of each State to choose the framework for a National Institution which best meets its needs. In determining the type of Institution to be established, States must consider a variety of factors including political, cultural and economic realities. Accordingly, it is not possible to prescribe precise standards which will be universally and uniformly applicable.

It is possible, however, drawing on recent experience, to identify "indicators for effectiveness". These criteria, summarized below, have received broad acceptance<sup>4</sup> and are therefore useful tools for evaluating Institutions and encouraging their development.

### I. Independence

A National Human Rights Institution must be independent. While certain restrictions on absolute independence may be necessary, it is essential to ensure these do not impede its ability to discharge its responsibilities effectively. A National Institution should be legally and politically

<sup>4</sup> The majority of the elements listed in this Part are identified in the *Principles Relating to the Status of National Institutions*, endorsed by the Commission on Human Rights in Resolution 1992/54 (1992) and by the General Assembly in Resolution 48/134 (1993).

autonomous - to the extent that no branch of government or any public or private entity can interfere in or obstruct its work. A National Institution must also be able to control its own finances, with external accountability being limited to appropriate audit and evaluation of financial reports and resource utilization. Clearly, any Institution will only be as independent as the individuals of which it is composed. All members, acting individually and collectively, should be capable of generating and sustaining independence of action. The methodology and procedures by which members are appointed and dismissed are obviously critical elements in this context.

## II. An Appropriate, Clearly Defined Mandate

An effective National Institution must enjoy a clearly defined area of jurisdiction. The Institution and the community it serves should be in no doubt as to the functions it is charged to perform. The legal powers conferred on it must be relative to its tasks. It is of no use, for example, granting a National Institution power to investigate complaints without also empowering it to collect evidence and subpoena witnesses. A carefully defined mandate should also serve to avoid possible conflict of jurisdiction with other independent agencies or with the courts.

## III. Pluralistic and Representative Composition

Diversity among those constituting the Institution is particularly important. An effective, credible National Institution will be one which reflects, in composition, the community it is established to serve. A National Institution composed solely of men, for example, or of one particular ethnic or religious group, is unlikely to reflect the diversity of society or inspire confidence in its impartiality.

## IV. Accessibility

A National Human Rights Institution must be readily accessible to its "clients" - those individuals and groups whose rights it has been established to promote and protect. In this respect it is essential to recognize that many of the most important "clients" - those who are most in need of help - will often be difficult to reach through orthodox channels of communication. An

effective Institution will therefore be one which develops proactive strategies for assisting those who are most vulnerable and disadvantaged. Physical accessibility is also important and can be improved through the establishment of related bodies at State and provincial levels. Where decentralization in this context is not a practical option, National Institutions may recruit field officers to serve in different regions. Flexible rules of procedure (e.g.: accepting complaints through the post or over the telephone) will also increase an Institution's accessibility.

## V. Cooperation with non governmental organizations (NGOs)

All effective Human Rights Institutions have established and maintain close relations with non-governmental organizations involved in human rights matters. NGO's frequently have a particular focus, a freedom of movement and a flexibility of action which make them a vital information source for National Institutions. The specialization of many NGO's allows them to make a particularly important contribution in the areas of education and training. The charters of most National Institutions recognize, either explicitly or implicitly, the important role played by NGOs and empower the respective Institutions to work closely with them.

It is important that the synergy of this relationship is appreciated by Governments contemplating the creation of independent National Institutions - and that there is no misapprehension that the establishment of such mechanisms in any way minimizes or derogates from the central role which a vigorous non-government sector has to play in protecting human rights.

## VI. Adequate resources

Sufficient human resources and adequate funding are essential prerequisites for operational efficiency. If at all possible, guarantees on these matters should be included in the Institution's charter. As well as jeopardizing efficiency, inadequate resources can cripple a National Institution. The commitment of any government which establishes a Human Rights Commission and then fails to properly resource it will obviously be called into question.

*"I would like to draw particular attention to the importance of national institutions for the promotion and protection of human rights. Once international standards have been set, once the international mechanisms of protection are functioning, it is the primary responsibility of Governments to ensure human rights. However, Governments can be greatly assisted by national commissions that promote human rights standards and ensure the harmonization of national legislation with international human rights standards. In the past few years, my office has assisted countries in all regions to create or strengthen such national institutions...I intend to make this work one of my highest priorities and use the opportunity of the 50th anniversary ... to pursue further progress in this area"<sup>5</sup>.*

The High Commissioner for Human Rights has been increasingly active in promoting the establishment and strengthening of independent, effective National Human Rights Institutions. The activities of her Office can be broadly divided into two areas. First, provision of practical advice and assistance to those involved in the establishment of new National Institutions or the strengthening of existing ones; second, acting as a facilitator for international and regional meetings of National Institutions.

#### A. Assistance to Governments and to Individual Institutions

Both the General Assembly and the Commission on Human Rights have recently requested the High Commissioner to accord priority to the establishment and strengthening of National Human Rights Institutions. Such assistance is now a major component of the High Commissioner's Technical Cooperation Programme and is generally financed by contributions (often specifically earmarked for National Institutions) to the Voluntary Fund for Technical Cooperation. In the last few years, a large number of countries and Institutions, particularly in Africa, Asia and Eastern Europe, have been the focus of technical cooperation initiatives. The following is an illustrative, rather than an exhaustive list of these activities<sup>6</sup>.

<sup>5</sup> Statement by Mary Robinson, UN High Commissioner for Human Rights to the fifty-second session of the United Nations General Assembly, New York, 14 November, 1997.

<sup>6</sup> Additional information may be found in the report of the Secretary-General to the Commission on Human Rights on the Technical Cooperation Programme (U.N. Doc. E/CN.4/1997/86) and in the report of the High Commissioner for Human Rights to the Commission (U.N. Doc. E/CN.4/1997/98)

Establishing an appropriate constitutional or legislative foundation for any new Institution is of primary importance. It is essential to ensure that the structure and functions of the Institution will enable it to respond adequately to the needs of the community it is being established to serve. In recognition of the importance of the *pre-establishment phase*, the High Commissioner has provided preliminary advice or assistance to a number of countries currently considering or actually establishing a National Human Rights Institution. During the past 12 months, these included, *inter alia*, Armenia, Bangladesh, Cambodia, Fiji, Georgia, Liberia, Malawi, Madagascar, Mauritius, Mongolia, Moldova, Nepal, Papua New Guinea, Rwanda, Sri Lanka and Thailand.

The type of assistance provided varies from country to country and is tailored to specific needs. In Bangladesh, for example, assistance was provided to the Government in the form of high-level consultations concerning the establishment of a National Commission, participation in workshops and facilitating contacts with representatives of National Institutions in other countries. In Mongolia, the High Commissioner has sponsored workshops for parliamentarians on establishing an independent Human Rights Commission and assistance has been provided in drafting the relevant legislation. In Papua New Guinea, a technical cooperation project has been concluded with the Government and work is well advanced on establishing an independent Commission. In Malawi, substantial preparatory work has been done with relevant officials to facilitate the establishment and effective operation of the Human Rights Commission prescribed in the new Constitution. In all cases, consultations conducted have included NGOs.

Assistance is also provided to recently established National Institutions. In South Africa, the Human Rights Commission is a central focus of the High Commissioner's activity. A substantial project of technical assistance to the Latvian Human Rights Office is currently being implemented. In 1997 a needs assessment mission was sent to arrange a comprehensive programme of support for the new Ugandan Human Rights Commission and a technical cooperation project has subsequently been prepared, in close consultation with the Commission. Advice and assistance has also been provided to the new Human Rights Commission in Zambia. Other National Institutions which have worked in cooperation with activities sponsored by the High Commissioner include those in India, Indonesia and the Philippines.

In many of these countries, the High Commissioner is consulting and cooperating with UNDP - in recognition of the close relationship between human rights, good governance and sustainable development. The High Commissioner has also encouraged the formulation of projects conducted in close cooperation with bilateral donors.

#### **B. Assistance to International and Regional Meetings**

In 1991, at a meeting of representatives of National Institutions, held under United Nations auspices in Paris, the "Principles Relating to the Status of National Human Rights Institutions" referred to in the introduction were developed. These Principles, subsequently endorsed by the Commission on Human Rights and the General Assembly of the United Nations, provide important benchmarks for the High Commissioner's work.

The Paris meeting was the first in a series of international meetings of representatives of National Institutions - originally organized by the United Nations in response to resolutions adopted by the Commission on Human Rights. The Second International Meeting was held in Tunis in 1993. (At this Meeting a Coordinating Committee of National Human Rights Institutions was formally convened. The Coordinating Committee, comprising representatives of National Institutions from all regions, meets annually in Geneva during the Commission on Human Rights). The Third International Meeting was held in Manila in 1995 and the Fourth and most recent Meeting took place in Merida, Mexico in November, 1997.

At the Manila meeting in 1995, the organization of regional workshops of National Institutions was formally proposed. The *First Regional Conference of African National Human Rights Institutions* was conducted in Cameroon in February 1996. This was followed by the *First Regional Workshop of Asia-Pacific National Human Rights Institutions*, in Australia, in July 1996 and the *Second Regional Workshop of Asia-Pacific National Human Rights Institutions*, in New Delhi in September, 1997. Similar regional meetings have also been held in Europe. The majority of these initiatives have been organized with the assistance and/or financial support of the High Commissioner.

#### **CONCLUSION**

It is their capacity to contribute substantially to the realization of human rights which makes independent Human Rights Institutions so significant. Democracy alone is no guarantee that the rights of all persons will be protected - as history clearly demonstrates. Nor is the constitutional entrenchment of human rights any guarantee that they will not be frequently and flagrantly violated in practice. But if there is an independent, autonomous, National Commission or similar institution with a mandate and appropriate powers to monitor and protect human rights, the demonstrable deficiencies of governments, constitutional "guarantees" and often inaccessible court systems can be more effectively addressed.

First, National Human Rights Institutions can, by reaching so many, transform the rhetoric of the international instruments into reality for millions of people for whom the term "human rights" has previously had no meaning at all. Second, they can do this in a manner which is consistent with the standards prescribed in the international treaties, while accommodating constitutional peculiarities and the extraordinarily disparate challenges posed by local conditions and cultures - thus respecting ethnic, cultural, religious and linguistic diversity. Third, they can do this in a more informed and sensitive manner than any regional or international body. Fourth, they can do this without compromising a vigorous defence of the rights of minorities by reference to the wishes of the sometimes overwhelming ethnic, linguistic or religious majority. Fifth, they can contribute to and monitor the integrity of government reports to international treaty bodies - better reflecting the reality of human rights. Sixth, they can provide constructive, well-informed criticism from within, which is frequently important in corroborating or balancing criticism from "foreigners" - sometimes dismissed by governments subject to criticism as based on ulterior or illegitimate motives.

For these and other reasons, independent National Institutions can enhance national stability and security - and thereby contribute to national development - at the same time as promoting and protecting human rights.

\* \* \*

**THE  
PROTECTION OF  
HUMAN RIGHTS ACT  
1993**

**(with procedural regulations)**



**National Human Rights Commission  
Sardar Patel Bhawan,  
Parliament street,  
New Delhi-110001.**

# THE PROTECTION OF HUMAN RIGHTS ACT, 1993

No. 10 of 1994

(8th January, 1994)

An Act to provide for the constitution of a National Human Rights Commission, State Human Rights Commissions in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Forty-fourth Year of the Republic of India as follows :-

## CHAPTER I

### PRELIMINARY

#### 1. Short title, extent and commencement

(1) This Act may be called the Protection of Human Rights Act, 1993.

(2) It extends to the whole of India :

Provided that it shall apply to the State of Jammu and Kashmir only in so far as it pertains to the matters relating to any of the entries enumerated in List I or List III in the Seventh Schedule to the Constitution as applicable to that State.

(3) It shall be deemed to have come into force on the 28th day of September, 1993.

#### 2. Definitions

(1) In this Act, unless the context otherwise requires-

(a) "armed forces" means the naval, military and air forces and includes any other armed forces of the Union;

(b) "Chairperson" means the Chairperson of the Commission or of the State Commission, as the case may be;

(c) "Commission" means the National Human Rights Commission constituted under section 3;

1

## CHAPTER II

### THE NATIONAL HUMAN RIGHTS COMMISSION

#### 3. Constitution of a National Human Rights Commission

(1) The Central Government shall constitute a body to be known as the National Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to it, under this Act.

(2) The Commission shall consist of-

(a) a Chairperson who has been a Chief Justice of the Supreme Court;

(b) one Member who is or has been, a Judge of the Supreme Court;

(c) one Member who is, or has been, the Chief Justice of a High Court;

(d) two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.

(3) The Chairpersons of the National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes and the National Commission for Women shall be deemed to be Members of the Commission for the discharge of functions specified in clauses (b) to (j) of section 12.

(4) There shall be a Secretary-General who shall be the Chief Executive Officer of the Commission and shall exercise such powers and discharge such functions of the Commission as it may delegate to him.

(5) The headquarters of the Commission shall be at Delhi and the Commission may, with the previous approval of the Central Government, establish offices at other places in India.

#### 4. Appointment of Chairperson and other Members

(1) The Chairperson and other Members shall be appointed by the President by warrant under his hand and seal.

Provided that every appointment under this sub-section shall be made

(d) "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.

(e) "Human Rights Court" means the Human Rights Court specified under section 30;

(f) "International Covenants" means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966;

(g) "Member" means a Member of the Commission or of the State Commission, as the case may be, and includes the Chairperson;

(h) "National Commission for Minorities" means the National Commission for Minorities constituted under section 3 of the National Commission for Minorities Act, 1992; 19 OF 1992

(i) "National Commission for the Scheduled Castes and Scheduled Tribes" means the National Commission for the Scheduled Castes and Scheduled Tribes referred to in article 338 of the Constitution;

(j) "National Commission for Women" means the National Commission for Women constituted under section 3 of the National Commission for Women Act, 1990; 20 OF 1990

(k) "Notification" means a notification published in the official Gazette;

(l) "Prescribed" means prescribed by rules made under this Act;

(m) "Public servant" shall have the meaning assigned to it in section 21 of the Indian Penal Code; 45 OF 1860

(n) "State Commission" means a State Human Rights Commission constituted under section 21.

(2) Any reference in this Act to a law, which is not in force in the State of Jammu and Kashmir, shall, in relation to that State, be construed as a reference to a corresponding law, if any, in force in that State.

after obtaining the recommendations of a Committee consisting of

- (a) the Prime Minister -- Chairperson;
- (b) Speaker of the House of the People -- member;
- (c) Minister in-charge of the Ministry of Home Affairs in the Government of India -- member;
- (d) Leader of the Opposition in the House of the People -- member;
- (e) Leader of the Opposition in the Council of States -- member;
- (f) Deputy Chairman of the Council of States -- member;

Provided further that no sitting Judge of the Supreme Court or sitting Chief Justice of a High Court shall be appointed except after consultation with the Chief Justice of India.

(2) No appointment of a Chairperson or a Member shall be invalid merely by reason of any vacancy in the Committee.

#### 5. Removal of a Member of the Commission

(1) Subject to the provisions of sub-section (2), the Chairperson or any other Member of the Commission shall only be removed from his office by order of the President on the ground of proved misbehaviour or incapacity after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or such other Member, as the case may be, ought on any such ground to be removed.

(2) Notwithstanding anything in sub-section (1), the President may by order remove from office the Chairperson or any other Member if the Chairperson or such other Member, as the case may be --

- (a) is adjudged an insolvent; or
- (b) engages during his term of office in any paid employment outside the duties of his office; or
- (c) is unfit to continue in office by reason of infirmity of mind or body; or
- (d) is of unsound mind and stands so declared by a competent court; or

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In the constitution of the Commission.

#### 10. Procedure to be regulated by the Commission

(1) The Commission shall meet at such time and place as the Chairperson may think fit.

(2) The Commission shall regulate its own procedure.

(3) All orders and decisions of the Commission shall be authenticated by the Secretary-General or any other officer of the Commission duly authorised by the Chairperson in this behalf.

#### 11. Officers and other staff of the Commission

(1) The Central Government shall make available to the Commission :-

- (a) an officer of the rank of the Secretary to the Government of India who shall be the Secretary-General of the Commission; and
- (b) such police and investigative staff under an officer not below the rank of a Director General of Police and such other officers and staff as may be necessary for the efficient performance of the functions of the Commission.

(2) Subject to such rules as may be made by the Central Government in this behalf, the Commission may appoint such other administrative, technical and scientific staff as it may consider necessary.

(3) The salaries, allowances and conditions of service of the officers and other staff appointed under sub-section (2) shall be such as may be prescribed.

### CHAPTER III

#### FUNCTIONS AND POWERS OF THE COMMISSION

#### 12. Functions of the Commission

The Commission shall perform all or any of the following functions, namely :-

- (a) inquire, *suo motu* or on a petition presented to it by a victim or any person on his behalf, into complaint of-
- (i) violation of human rights or abetment thereof or

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- (e) is convicted and sentenced to imprisonment for an offence which in the opinion of the President involves moral turpitude.

#### 6. Term of office of Members

(1) A person appointed as Chairperson shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier.

(2) A person appointed as a Member shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment for another term of five years.

Provided that no Member shall hold office after he has attained the age of seventy years.

(3) On ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government of India or under the Government of any State.

#### 7. Member to act as Chairperson or to discharge his functions in certain circumstances

(1) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the President may, by notification, authorise one of the Members to act as the Chairperson until the appointment of a new Chairperson to fill such vacancy.

(2) When the Chairperson is unable to discharge his functions owing to absence on leave or otherwise, such one of the Members as the President may, by notification, authorise in this behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

#### 8. Terms and conditions of service of Members

The salaries and allowances payable to, and other terms and conditions of service of, the Members shall be such as may be prescribed.

Provided that neither the salary and allowances nor the other terms and conditions of service of a Member shall be varied to his disadvantage after his appointment.

#### 9. Vacancies, etc., not to invalidate the proceedings of the Commission

No act or proceedings of the Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect

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(ii) negligence in the prevention of such violation, by a public servant;

(b) intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;

(c) visit, under intimation to the State Government, any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection to study the living conditions of the inmates and make recommendations thereon;

(d) review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;

(e) review the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures;

(f) study treaties and other international instruments on human rights and make recommendations for their effective implementation;

(g) undertake and promote research in the field of human rights;

(h) spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;

(i) encourage the efforts of non-governmental organisations and institutions working in the field of human rights;

(j) such other functions as it may consider necessary for the promotion of human rights.

#### 13. Powers relating to Inquiries

(1) The Commission shall, while inquiring into complaints under this Act, have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908, and in particular in respect of the following matters, namely :-

- (a) summoning and enforcing the attendance of witnesses and examining them on oath;
- (b) discovery and production of any document;
- (c) receiving evidence on affidavits;

5 OF 1908

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- (d) requisitioning any public record or copy thereof from any court or office;
- (e) issuing commissions for the examination of witnesses or documents;
- (f) any other matter which may be prescribed.

(2) The Commission shall have power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the Commission, may be useful for, or relevant to, the subject matter of the inquiry and any person so required shall be deemed to be legally bound to furnish such information within the meaning of section 176 and section 177 of the Indian Penal Code. 45 OF 1860

(3) The Commission or any other officer, not below the rank of a Gazetted Officer, specially authorised in this behalf by the Commission may enter any building or place where the Commission has reason to believe that any document relating to the subject matter of the inquiry may be found, and may seize any such document or take extracts or copies therefrom subject to the provisions of section 100 of the Code of Criminal Procedure, 1973, in so far as it may be applicable. 2 OF 1974

(4) The Commission shall be deemed to be a civil court and when any offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code is committed in the view or presence of the Commission, the Commission may, after recording the facts constituting the offence and the statement of the accused as provided for in the Code of Criminal Procedure, 1973, forward the case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case has been forwarded to him under section 346 of the Code of Criminal Procedure, 1973. 45 OF 1860  
2 OF 1974

(5) Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196, of the Indian Penal Code, and the Commission shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973. 45 OF 1860  
2 OF 1974

#### 14. Investigation

(1) The Commission may, for the purpose of conducting any investi-

gation pertaining to the inquiry, utilise the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government, as the case may be.

(2) For the purpose of investigating into any matter pertaining to the inquiry, any officer or agency whose services are utilised under sub-section (1) may, subject to the direction and control of the Commission, --

- (a) summon and enforce the attendance of any person and examine him;
- (b) require the discovery and production of any document; and
- (c) requisition any public record or copy thereof from any office.

(3) The provisions of section 15 shall apply in relation to any statement made by a person before any officer or agency whose services are utilised under sub-section (1) as they apply in relation to any statement made by a person in the course of giving evidence before the Commission.

(4) The officer or agency whose services are utilised under sub-section (1) shall investigate into any matter pertaining to the inquiry and submit a report thereon to the Commission within such period as may be specified by the Commission in this behalf.

(5) The Commission shall satisfy itself about the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it under sub-section (4) and for this purpose the Commission may make such inquiry (including the examination of the person or persons who conducted or assisted in the investigation) as it thinks fit.

#### 15. Statement made by persons to the Commission

No statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement :

Provided that the statement --

- (a) is made in reply to the question which he is required by the Commission to answer; or
- (b) is relevant to the subject matter of the inquiry.

#### 16. Persons likely to be prejudicially affected to be heard

If, at any stage of the inquiry, the Commission--

- (a) considers it necessary to inquire into the conduct of any person; or
- (b) is of the opinion that the reputation of any person is likely to be prejudicially affected by the inquiry;

it shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence :

Provided that nothing in this section shall apply where the credit of a witness is being impeached.

### CHAPTER IV PROCEDURE

#### 17. Inquiry into complaints

The Commission while inquiring into the complaints of violations of human rights may--

(i) call for information or report from the Central Government or any State Government or any other authority or organisation subordinate thereto within such time as may be specified by it;

Provided that--

- (a) if the information or report is not received within the time stipulated by the Commission, it may proceed to inquire into the complaint on its own;
- (b) if, on receipt of information or report, the Commission is satisfied either that no further inquiry is required or that the required action has been initiated or taken by the concerned Government or authority, it may not proceed with the complaint and inform the complainant accordingly;

(ii) without prejudice to anything contained in clause (i), if it considers necessary, having regard to the nature of the complaint, initiate an inquiry.

#### 18. Steps after inquiry

The Commission may take any of the following steps upon the completion of an inquiry held under this Act, namely :-

- (1) where the inquiry discloses, the commission of violation of human rights or negligence in the prevention of violation of human rights by a public servant, it may recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons;
- (2) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;
- (3) recommend to the concerned Government or authority for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary;
- (4) subject to the provisions of clause (5), provide a copy of the inquiry report to the petitioner or his representative;
- (5) the Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission;
- (6) the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission.

#### 19. Procedure with respect to armed forces

(1) Notwithstanding anything contained in this Act, while dealing with complaints of violation of human rights by members of the armed forces, the Commission shall adopt the following procedure, namely :-

- (a) it may, either on its own motion or on receipt of a petition, seek a report from the Central Government;
- (b) after the receipt of the report, it may, either not proceed with the

complaint or, as the case may be, make its recommendations to that Government.

- (2) The Central Government shall inform the Commission of the action taken on the recommendations within three months or such further time as the Commission may allow.
- (3) The Commission shall publish its report together with its recommendations made to the Central Government and the action taken by that Government on such recommendations.
- (4) The Commission shall provide a copy of the report published under sub-section (3) to the petitioner or his representative.

#### 20. Annual and special reports of the commission

(1) The Commission shall submit an annual report to the Central Government and to the State Government concerned and may at any time submit special reports on any matter which, in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report.

(2) The Central Government and the State Government, as the case may be, shall cause the annual and special reports of the Commission to be laid before each House of Parliament or the State Legislature respectively, as the case may be, along with a memorandum of action taken or proposed to be taken on the recommendations of the Commission and the reasons for non-acceptance of the recommendations, if any.

### CHAPTER V

#### STATE HUMAN RIGHTS COMMISSIONS

#### 21. Constitution of State Human Rights Commissions

(1) A State Government may constitute a body to be known as the ..... (name of the State) Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to, a State Commission under this chapter.

(2) The State Commission shall consist of—

- (a) a Chairperson who has been a Chief Justice of a High Court;

- (c) Minister in-charge of the Department of Home in that State -- Member
- (d) Leader of the Opposition in the Legislative Assembly -- Member

Provided further that where there is a Legislative Council in a State, the Chairman of that Council and the Leader of the Opposition in that Council shall also be members of the Committee.

Provided also that no sitting Judge of a High Court or a sitting district judge shall be appointed except after consultation with the Chief Justice of the High Court of the concerned State.

(2) No appointment of a Chairperson or a Member of the State Commission shall be invalid merely by reason of any vacancy in the Committee.

#### 23. Removal of a Member of the State Commission

(1) Subject to the provisions of sub-section (2), the Chairperson or any other member of the State Commission shall only be removed from his office by order of the President on the ground of proved misbehaviour or incapacity after the Supreme Court, on a reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or such other Member, as the case may be, ought on any such ground to be removed.

(2) Notwithstanding anything in sub-section (1), the President may by order remove from office the Chairperson or any other Member if the Chairperson or such other Member, as the case may be,—

- (a) is adjudged an insolvent; or
- (b) engages during his term of office in any paid employment outside the duties of his office; or
- (c) is unfit to continue in office by reason of infirmity of mind or body; or
- (d) is of unsound mind and stands so declared by a competent court; or
- (e) is convicted and sentenced to imprisonment for an offence which in the opinion of the President involves moral turpitude.

- (b) one Member who is, or has been, a Judge of a High Court;
- (c) one Member who is, or has been, a district judge in that State;
- (d) two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.

(3) There shall be a Secretary who shall be the Chief Executive Officer of the State Commission and shall exercise such powers and discharge such functions of the State Commission as it may delegate to him.

(4) The headquarters of the State Commission shall be at such place as the State Government may, by notification, specify.

(5) A State Commission may inquire into violation of human rights only in respect of matters relating to any of the entries enumerated in List II and List III in the Seventh Schedule to the Constitution :

Provided that if any such matter is already being inquired into by the Commission or any other Commission duly constituted under any law for the time being in force, the State Commission shall not inquire into the said matter :

Provided further that in relation to the Jammu and Kashmir Human Rights Commission, this sub-section shall have effect as if for the words and figures "List II and List III in the Seventh Schedule to the Constitution", the words and figures "List III in the Seventh Schedule to the Constitution as applicable to the State of Jammu and Kashmir and in respect of matters in relation to which the Legislature of that State has power to make laws" had been substituted.

#### 22. Appointment of Chairperson and other Members of State Commission

(1) The Chairperson and other Members shall be appointed by the Governor by warrant under his hand and seal :

Provided that every appointment under this sub-section shall be made after obtaining the recommendation of a Committee consisting of—

- (a) the Chief Minister -- Chairperson
- (b) Speaker of the Legislative Assembly -- Member

#### 24. Term of office of Members of the State Commission

(1) A person appointed as Chairperson shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier.

(2) A person appointed as a Member shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment for another term of five years;

Provided that no Member shall hold office after he has attained the age of seventy years.

(3) On ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government of a State or under the Government of India.

#### 25. Member to act as Chairperson or to discharge his functions in certain circumstances

(1) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the Governor may, by notification, authorise one of the Members to act as the Chairperson until the appointment of a new Chairperson to fill such vacancy.

(2) When the Chairperson is unable to discharge his functions owing to absence on leave or otherwise, such one of the Members as the Governor may, by notification, authorise in his behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

#### 26. Terms and conditions of service of Members of the State Commission

The salaries and allowances payable to, and other terms and conditions of service of, the Members shall be such as may be prescribed by the State Government.

Provided that neither the salary and allowances nor the other terms and conditions of service of a Member shall be varied to his disadvantage after his appointment.

#### 27. Officers and other staff of the State Commission

(1) The State Government shall make available to the Commission—

- (a) an officer not below the rank of a Secretary to the State

Government who shall be the Secretary of the State Commission; and

- (b) such police and investigative staff under an officer not below the rank of an Inspector General of Police and such other officers and staff as may be necessary for the efficient performance of the functions of the State Commission.

(2) subject to such rules as may be made by the State Government in this behalf, the State Commission may appoint such other administrative, technical and scientific staff as it may consider necessary.

(3) The salaries, allowances and conditions of service of the officers and other staff appointed under sub-section (2) shall be such as may be prescribed by the State Government.

#### 28. Annual and special reports of State Commission

(1) The State Commission shall submit an annual report to the State Government and may at any time submit special reports on any matter which, in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report.

(2) The State Government shall cause the annual and special reports of the State Commission to be laid before each House of State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House along with a memorandum of action taken or proposed to be taken on the recommendations of the State Commission and the reasons for non-acceptance of the recommendations, if any.

#### 29. Application of certain provisions relating to National Human Rights Commission to State Commissions

The provisions of sections 9, 10, 12, 13, 14, 15, 16, 17 and 18 shall apply to a State Commission and shall have effect, subject to the following modifications, namely :-

- (a) references to "Commission" shall be construed as references to "State Commission";
- (b) in section 10, in sub-section (3), for the word "Secretary-General", the word "Secretary" shall be substituted;
- (c) in section 12, clause (f) shall be omitted;
- (d) in section 17, in clause (i), the words "Central Government or any" shall be omitted;

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#### 34. Accounts and audit

(1) The Commission shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India.

(2) The Accounts of the Commission shall be audited by the Comptroller and Auditor-General at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Commission to the Comptroller and Auditor-General.

(3) The Comptroller and Auditor-General and any person appointed by him in connection with the audit of the accounts of the Commission under this Act shall have the same rights and privileges and the authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Commission.

(4) The accounts of the Commission as certified by the Comptroller and Auditor-General or any other person appointed by him in this behalf, together with the audit report thereon shall be forwarded annually to the Central Government by the Commission and the Central Government shall cause the audit report to be laid, as soon as may be after it is received, before each House of Parliament.

#### 35. Accounts and audit of State Commission

(1) The State Commission shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the State Government in consultation with the Comptroller and Auditor-General of India.

(2) The accounts of the State Commission shall be audited by the Comptroller and Auditor-General at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the State Commission to the Comptroller and Auditor-General.

(3) The Comptroller and Auditor-General and any person appointed by him in connection with the audit of the accounts of the State Commission under this Act shall have the same rights and privileges and the authority in connection with such audit as the Comptroller and Auditor-General gener-

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### CHAPTER VI HUMAN RIGHTS COURTS

30. For the purpose of providing speedy trial of offences arising out of violation of human rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Session to be a Human Rights Court to try the said offences.

Provided that nothing in this section shall apply if -

- (a) a Court of Session is already specified as a special court; or
- (b) a special court is already constituted, for such offences under any other law for the time being in force.

#### 31. Special Public Prosecutor

For every Human Rights Court, the State Government shall, by notification, specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as a Special Public Prosecutor for the purpose of conducting cases in that Court.

### CHAPTER VII FINANCE, ACCOUNTS AND AUDIT

#### 32. Grants by the Central Government

(1) The Central Government shall after due appropriation made by Parliament by law in this behalf, pay to the Commission by way of grants such sums of money as the Central Government may think fit for being utilised for the purposes of this Act.

(2) The Commission may spend such sums as it thinks fit for performing the functions under this Act, and such sums shall be treated as expenditure payable out of the grants referred to in sub-section (1)

#### 33. Grants by the State Government

(1) The State Government shall, after due appropriation made by Legislature by law in this behalf, pay to the State Commission by way of grants such sums of money as the State Government may think fit for being utilised for the purposes of this Act.

(2) The State Commission may spend such sums as it thinks fit for performing the functions under Chapter V, and such sums shall be treated as expenditure payable out of the grants referred to in sub-section (1).

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ally has in connection with the audit of Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the State Commission.

(4) The accounts of the State Commission, as certified by the Comptroller and Auditor-General or any other person appointed by him in this behalf, together with the audit report thereon, shall be forwarded annually to the State Government by the State Commission and the State Government shall cause the audit report to be laid, as soon as may be after it is received, before the State Legislature.

### CHAPTER VIII MISCELLANEOUS

#### 36. Matters not subject to jurisdiction of the Commission

(1) The Commission shall not inquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force.

(2) The Commission or the State Commission shall not inquire into any matter after the expiry of one year from the date on which the act constituting violation of human rights is alleged to have been committed.

#### 37. Constitution of special investigation teams

Notwithstanding anything contained in any other law for the time being in force, where the Government considers it necessary so to do, it may constitute one or more special investigation teams, consisting of such police officers as it thinks necessary for purposes of investigation and prosecution of offences arising out of violations of human rights.

#### 38. Protection of action taken in good faith

No suit or other legal proceeding shall lie against the Central Government, State Government, Commission, the State Commission or any Member thereof or any person acting under the direction either of the Central Government, State Government, Commission, or the State Commission in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or any order made thereunder or in respect of the publication by or under the authority of the Central Government, State Government, Commission or the State Commission of any report, paper or proceedings.

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### 39. Members and officers to be public servants

Every Member of the Commission, State Commission and every officer appointed or authorised by the Commission or the State Commission to exercise functions under this Act shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code. 45 OF 1860.

### 40. Power of Central Government to make rules

(1) The Central Government may, by notification, make rules to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :-

- (a) the salaries and allowances and other terms and conditions of service of the Members under section 8;
- (b) the conditions subject to which other administrative, technical and scientific staff may be appointed by the Commission and the salaries and allowances of officers and other staff under sub-section (3) of section 11;
- (c) any other power of a civil court required to be prescribed under clause (f) of sub-section (1) of section 13;
- (d) the form in which the annual statement of accounts is to be prepared by the Commission under sub-section (1) of section 34; and
- (e) any other matter which has to be, or may be, prescribed.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

### 41. Power of State Government to make rules

(1) The State Government may, by notification, make rules to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :-

- (a) the salaries and allowances and other terms and conditions of service of the members under section 26;
- (b) the conditions subject to which other administrative, technical and scientific staff may be appointed by the State Commission and the salaries and allowances of officers and other staff under sub-section (3) of section 27;
- (c) the form in which the annual statement of accounts is to be prepared under sub-section (1) of section 35.

(3) Every rule made by the State Government under this section shall be laid, as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House.

### 42. Power to remove difficulties

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty.

Provided that no such order shall be made after the expiry of the period of two years from the date of commencement of this Act.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each house of Parliament.

### 43. Repeal and savings

(1) The Protection of Human Rights Ordinance, 1993 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of this Act.

ORD.

30 OF 1993.

PROCEDURAL  
REGULATIONS

## National Human Rights Commission (Procedure) Regulations.

No. A-11031/1/94/NHRC. In exercise of the powers conferred by sub-section (2) of Section 10 of the Protection of Human Rights Act, 1993 (No. 10 of 1994), the National Human Rights Commission hereby makes the following regulations, namely :-

### 1. Short Title and Commencement :

(1) These Regulations may be called the National Human Rights Commission (Procedure) Regulations, 1994.

(2) They shall come into force with effect from the 1st day of March, 1994.

### 2. Definitions :

In these regulations unless the context otherwise requires,-

- (a) "Act" means the Protection of Human Rights Act, 1993.
- (b) The "Chairperson" means the Chairperson of the Commission.
- (c) The "Commission" means the National Human Rights Commission.
- (d) "Member" means a Member of the Commission and includes the Chairperson.

### 3. Headquarters of the Commission :

The Headquarters of the Commission shall be located at Delhi.

### 4. Venue of the Meetings :

The Commission shall ordinarily hold its meetings and sittings in its office located at Delhi. However, it may, in its discretion, hold its meetings and sittings at any other place in India if it considers it necessary and expedient.

### 5. Periodicity of meetings :

The Commission shall normally have its regular sittings in the first and third weeks of every month, excepting holidays. However, the Chairperson by himself or at the instance of one or more of the members may direct a

special sitting of the Commission to be convened to consider any specific matter of urgency.

### 6. Secretarial Assistance :

The Secretary-General, along with such other officers of the Commission as may be directed by the Chairperson, or considered necessary, shall attend the meetings of the Commission.

### 7. Agenda :

The Secretary-General shall, in consultation with the Chairperson, prepare the agenda for each meeting of the Commission and shall cause notes thereon to be prepared by the Secretariat. Such notes shall, as far as possible, be self-contained. Specific files covering the agenda items shall be made readily available to the Commission for reference. The agenda papers shall ordinarily be circulated to the Members at least two clear days in advance of every meeting; but when matters are set down only for hearing, cause list of the day of sitting shall be prepared and circulated.

### 8. Procedure for dealing with complaints :

(1) All complaints, in whatever form received by the Commission shall be registered and assigned a number and placed for admission before a Bench of two members constituted for the purpose not later than two weeks of receipt thereof. Ordinarily complaints of the following nature are not entertainable by the Commission.

- (a) in regard to events which happened more than one year before the making of complaints;
- (b) with regard to matters which are sub-judice;
- (c) which are vague, anonymous or pseudonymous;
- (d) which are of frivolous nature; or
- (e) those which are outside the purview of the Commission.

(2) No fee is chargeable on complaints.

(3) Every attempt should be made to disclose a complete picture of the matter leading to the complaint and the same may be made in English or Hindi to enable the Commission to take immediate action. To facilitate the filing of complaints, the Commission shall, however, entertain complaints in any language included in Eighth Schedule of the Constitution. It shall be

open to the Commission to ask for further information and affidavits to be filed in support of allegations whenever considered necessary.

(4) The Commission may, in its discretion, accept telegraphic complaints and complaints conveyed through Fax.

(5) The Commission shall have power to dismiss a complaint in limine.

(6) Upon admission of a complaint, the Chairperson/Commission shall direct whether the matter would be set down for inquiry by it or should be investigated into.

(7) On every complaint on which a decision is taken by the Chairperson/Commission to either hold an inquiry or investigation, the Secretariat shall call for reports/comments from the concerned Government/authority giving the latter a reasonable time therefor.

(8) On receipt of the comments of the concerned authority, a detailed note on the merits of the case shall be prepared for consideration of the Commission.

(9) The directions and recommendations of the Commission shall be communicated to the concerned Government/authority and the petitioner as provided for in sections 18 and 19 of the Act.

(10) The Commission may, in its discretion, afford a personal hearing to the petitioner or any other person on his behalf and such other person or persons as in the opinion of the Commission should be heard for appropriate disposal of the matter before it and, where necessary, call for records and examine witnesses in connection with it. The Commission shall afford a reasonable hearing, including opportunity of cross-examining witnesses, if any, in support of the complaint and leading of evidence in support of his stand, to a person whose conduct is enquired into by it or where in its opinion the reputation of such person is likely to be prejudicially affected.

(11) Where investigation is undertaken by the team of the Commission or by any other person under its discretion, the report shall be submitted within a week of its completion or such further time as the Commission may allow. The Commission may, in its discretion, direct further investigation in a given case if it is of opinion that investigation has not been proper or the matter requires further investigation for ascertaining the truth or enabling it to properly dispose of the matter. On receipt of the report, the Commission on its own motion, or if moved in the matter, may direct inquiry to be carried by it and receive evidence in course of such inquiry.

(12) The Commission or any of its members when requested by the Chairperson may undertake visits for an on-the-spot study and where such a study is undertaken by one or more members, a report thereon shall be furnished to the Commission as early as possible.

#### 9. Minutes of the Meeting :

(a) The minutes of each meeting of the Commission shall be recorded during the meeting itself or immediately thereafter by the Secretary-General or by any other officer as directed. Such minutes shall be submitted to the Chairperson for his approval and upon approval, be circulated to all the Members of the Commission at the earliest and in any case, sufficiently before the commencement of the next meeting.

(b) The conclusions of the Commission in every matter undertaken by it shall be recorded in the form of an opinion. Dissenting opinions, if given, shall also form part of and be kept on record. Action shall be taken on the basis of the majority opinion where there be any difference.

#### (c) Follow-up Action :

Unless specifically authorised, no action shall be taken by the Secretariat of the Commission on the minutes of the meetings until the same are confirmed by the Chairperson.

#### 10. Record of minutes :

A master copy of the minutes of every meeting and opinions of the Commission shall be maintained duly authenticated by the Secretary-General and a copy of the minutes pertaining to each item shall be added to the relevant file for appropriate action. Opinions shall be kept in the respective records and for convenience, copies thereof with appropriate indexing shall be kept in guard files.

#### 11. Report of Action Taken :

Report of follow-up action shall be submitted to the Commission at every subsequent sitting indicating therein the present stage of action on each item on which the Commission had taken a decision in any of its earlier meetings, excepting the items on which no further action is called for.

#### 12. Transaction of business outside the Headquarters :

The Commission or some of the Members may transact business at

places outside its Headquarters as and when previously approved by the Chairperson, provided that if parties are to be heard in connection with any inquiry under the Act, at least two Members shall constitute the bench of the Commission for such purpose.

#### 13. Authentication of orders and decisions :

(1) Orders and decisions of the Commission shall be authenticated by the Secretary-General or any officer of the Commission (authorised by the Chairperson) not below the rank of an Under Secretary.

(2) Copies of enquiry reports or orders passed finally disposing of matters by the Commission shall be furnished free of cost to the petitioner or his representative.

(3) Unless any document is classified by the Commission as confidential, copy thereof would be available to the parties in the matter on payment of a reasonable fee raised to meet the cost. Every effort should be made to provide the copies with utmost expedition and, in any case, not later than one week of the date of request.

#### 14. Annual Report :

The Commission shall furnish its annual report for the period commencing from 1st April of the year to 31st March of the succeeding year to the Central Government and to the State Governments concerned as provided in Section 20 (1) of the Act. The original report shall be signed by the Chairperson and Members of the Commission and appropriately preserved and a duly authenticated copy shall be sent to the appropriate Government by end of May of every year.

#### 15. Special Reports :

The Commission may furnish such special reports on specific matters as may be considered necessary in terms of Section 20 (1) of the Act.

#### 16. Reports on Complaints and Inquiries :

Every report to which section 18 or 19 of the Act applies shall be sent to the concerned Government, authority or person, as the case may be, within one week of completion of the proceedings before the Commission and on receipt of the comments of the concerned Government or authority, the Commission shall publish the report in the manner provided in sections 18 (6) or 19(3) of the Act, as the case may be, within one week of the receipt of the appropriate intimation.

#### 17. Printing of the Report :

The Secretariat of the Commission shall be responsible for the printing of the Annual Report and Special Reports with utmost expedition and in any case, not later than one month of finalisation of the same.

#### 18. Investigation Team :

The Commission shall have its own team of investigation to be headed by a person not below the rank of a Director-General of Police appointed by it and such team shall consist of one Deputy Inspector General of Police, 2 Superintendents of Police, 6 Deputy Superintendents of Police and 24 Inspectors of Police and such other categories of officers as the Commission from time to time decides. The Commission may in any given case appoint an appropriate number of outsiders to be associated with the investigation either as Investigators or Observers.

19. As and when any matter which is not covered by these Regulations arises, it shall be competent for the Commission to make appropriate directions and the Commission may add, delete, amplify and amend these Regulations from time to time.

A PROPOSED ORGANIC LAW

entitled

*The Organic Law on the Human Rights Commission,*

Being an Organic Law to implement Division VIII.3 (*Human Rights Commission*) and other provisions of the *Constitution* and for related purposes,

MADE by the National Parliament to come into operation in accordance with a notice in the National Gazette by the Head of State, acting with, and in accordance with, the advice of the Minister.

PART I - PRELIMINARY.

1. COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS.

This Organic Law, to the extent that it regulates or restricts a right or freedom referred to in Subdivision III.3.C (*qualified rights*) of the *Constitution* namely -

- (a) freedom from arbitrary search and entry conferred by Section 44 of the *Constitution*; and
  - (b) the right to privacy conferred by Section 49 of the *Constitution*; and
  - (c) the right to freedom of information conferred by Section 51 of the *Constitution*,
- is a law that is made for the purpose of giving effect to the public interest in -
- (d) public order; and
  - (e) public welfare; and
  - (f) the protection of children and persons under disability (whether legal or practical); and
  - (g) the development of under-privileged or less advanced groups or areas.

2. INTERPRETATION.

In this Organic Law, unless the contrary intention appears -

"Advisory Commissioner" means an Advisory Commissioner appointed under Section 220A(2) (*The Human Rights Commission*) of the *Constitution*;

"Commission" means the Human Rights Commission established by Section 220A (*The Human Rights Commission*) of the *Constitution*;

"Commissioner" means a Commissioner appointed under Section 220A(2) (*The Human Rights Commission*) of the *Constitution*;

"Committee" means the Human Rights Commission Appointments Committee established by Section 220A(2) (*The Human Rights Commission*) of the *Constitution*;

"President" means the President of the Commission appointed under Section 220A(3) (*The Human Rights Commission*) of the *Constitution*.

"the responsible person" means -

- (a) in the case of the Correctional Service - the Commissioner of the Correctional Service; and
- (b) in the case of the Defence Force - the Commander of the Defence Force; and
- (c) in the case of Police Force - the Commissioner of Police; and
- (d) in the case of any other State Service - the Permanent Head of that State Service; and
- (e) in the case of a Department of the National Public Service - the Departmental Head; and
- (f) in the case of a statutory body - the statutory head of that body; and
- (g) in the case of a Provincial Government - the Government of the Province; and
- (h) in the case of a Local-level Government - the President or Chairman of Local-level Government; and
- (i) in the case of any other governmental body - the Permanent Head of that governmental body; and
- (j) in the case of a natural person - that person.

### 3. QUALIFICATIONS FOR APPOINTMENT.

(1) A person is not qualified for appointment as a Commissioner unless -

- (a) in the opinion of the Committee, he is a person of integrity, independence of mind, resolution and high standing within the community; and
- (b) he has demonstrated experience in human rights matters.

(2) A person is not qualified for appointment as the President of the Commission unless he is -

- (a) qualified for appointment as a Judge of the National Court; or
- (b) a former Judge of the National Court.

(3) A person is not qualified for appointment as an Advisory Commissioner unless -

- (a) in the opinion of the Committee, he is a person of integrity, independence of mind, resolution and high standing within the community; and
- (b) he has demonstrated experience in human rights matters; and
- (c) in the case of one Advisory Commissioner, he is recommended for appointment by the Melanesian Council of Churches; and
- (d) in the case of the other Advisory Commissioners, they are recommended by the Association of Non Governmental Organizations.

(4) At least one of the Commissioners, other than the President, shall have extensive experience in management or administration.

### 4. TERM OF OFFICE.

(1) The term of appointment of -

- (a) a Commissioner; and

(b) an Advisory Commissioner, shall be six years.

(2) A Commissioner and an Advisory Commissioner are eligible for re-appointment.

### 5. DISQUALIFICATIONS FROM OFFICE.

A person is not qualified to be, or to remain a Commissioner or an Advisory Commissioner if he is -

- (a) a member of the Parliament; or
- (b) a member of a Provincial Government; or
- (c) a member of a Local-level Government; or
- (d) an office-holder in a registered political party; or
- (e) an undischarged bankrupt or insolvent; or
- (f) of unsound mind within the meaning of any law relating to the protection of the person and property of persons of unsound mind; or
- (g) under sentence of death or imprisonment.

### 6. SPECIAL CONDITIONS OF EMPLOYMENT.

(1) A Commissioner or an Advisory Commissioner shall not -

- (a) actively engage in politics; or
- (b) subject to Subsection (2), engage either directly or indirectly in the management or control of a corporation or other body of persons carrying on business for profit; or
- (c) except on leave granted by the Head of State, or because of illness, absent himself from duty for more than 14 consecutive days or more than 28 days in any period of 12 months; or
- (d) subject to Subsection (3), acquire by way of gift or otherwise, or use or hold in any other manner any interest in, any property in Papua New Guinea or solicit, accept or receive any other benefit in addition to his terms and conditions of employment.

(2) Nothing in Subsection (1)(b) prevents a Commissioner or an Advisory Commissioner from holding office in a professional body in relation to which his qualifications are relevant.

(3) Subject to any Organic Law made for the purposes of Division III.2 (*leadership code*) of the *Constitution*, a Commissioner or an Advisory Commissioner may purchase, lease or otherwise acquire land in the same manner and subject to the same conditions as any other citizen.

### 7. RESIGNATION.

(1) A Commissioner or an Advisory Commissioner may resign by giving three month's notice in writing of his intention to do so to the Head of State.

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(2) The period of three months specified in Subsection (1) shall be deemed to commence on the twenty-second day after the receipt by the Head of State of the notice except where the Head of State, acting with, and in accordance with, the advice of the Committee, by notice in writing to the member, fixes an earlier date for the commencement.

(3) A Commissioner or an Advisory Commissioner may withdraw his resignation at any time before the period of three months referred to in Subsection (1) commences.

**8. ACTING PRESIDENT, ACTING COMMISSIONER AND ACTING ADVISORY COMMISSIONER.**

A person suitably qualified may be appointed to be an acting President or an acting Commissioner or an Acting Advisory Commissioner -

- (a) to fill temporarily a vacancy; or
- (b) in the case of the absence from duty for any reason of the President or of a Commissioner or of an Advisory Commissioner.

**9. DECLARATION OF OFFICE.**

Before entering upon the duties of their offices, the President, the Commissioners and the Advisory Commissioners shall make the Declaration of Office before the Head of State or a person appointed by the Head of State for the purpose.

**PART II - POWERS, ETC., OF THE COMMISSION.**

**10. POWERS OF THE COMMISSION.**

The Commission has the following powers -

- (a) to investigate violations or alleged violations of human rights on its own volition or on complaint by a person, group or body;
- (b) to investigate particular cases of violation or of systematic violation of human rights and in relation to such cases to do any one or more of the following as to the Commission seems or seem appropriate :-
  - (i) to conciliate and mediate;
  - (ii) to refer cases to the appropriate court or other administrative body;
  - (iii) to make determinations, both binding and advisory;
  - (iv) to provide or grant remedies including compensation and, in the case of dismissal from employment or other appointment, reinstatement;
  - (v) to have determinations made by the Commission registered as orders by an appropriate court;

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- (c) to review existing and proposed legislation for consistency with human rights and to recommend legislative and other measures to protect human rights; and
- (d) to intervene in court proceedings, by leave of or at the request of the court, where human rights issues arise; and
- (e) to seek advisory opinions of the Supreme Court on issues relating to human rights under Sections 18 and 19 of the *Constitution*; and
- (f) to appoint tribunals and other bodies to conduct investigations or undertake enquiries; and
- (g) to do such other things as it is authorized to do under a Constitutional Law or an Act of the Parliament; and
- (h) generally to do all things as may be necessary for it to achieve its purposes and carry out its functions under the *Constitution*.

**11. PROCEDURES OF THE COMMISSION.**

(1) The Commission shall meet at such times and places as are fixed by the President.

(2) An Advisory Commissioner is not entitled to attend a meeting of the Commission unless invited to do so on a particular occasion for a specified purpose.

(3) The President shall preside at all meetings of the Commission.

(4) For the purposes of conducting an inquiry under this Law, the quorum at a meeting of the Commission is two Commissioners.

(5) All matters before a meeting of the Commission shall be decided in accordance with the majority of votes of those Commissioners present and voting.

(6) In the event of an equality of votes on a matter, the President has a casting, as well as a deliberative, vote.

(7) The Commission shall cause minutes of its meetings to be kept.

(8) Subject to this Law, the procedures of the Commission are as determined by it.

**12. ADVISORY COMMISSION MEETINGS.**

(1) The first meeting of Advisory Commissioners after the coming into operation of this Organic Law shall take place at a time and place fixed by the President.

(2) At the first meeting the Advisory Commissioners shall elect one of their number to be Chairman who shall preside at all meetings of the Advisory Committee and who shall hold office until a new Chairman is elected as circumstances require.

(3) After the first meeting, the Advisory Committee shall meet at least four times in each year at such times and places as are fixed by a majority of Advisory Commissioners, whom failing by the Chairman.

(4) The quorum at a meeting of Advisory Commissioners is three.

(5) All matters at a meeting of Advisory Commissioners shall be decided in accordance with the majority of votes of those Advisory Commissioners present and voting, and in the event of an equality of votes on a matter, the Chairman shall have a casting, as well as a deliberative vote.

(6) A Commissioner is not entitled to attend a meeting of the Advisory Commissioners unless invited to do so by the Chairman on the authority of a majority of Advisory Commissioners.

(7) Subject to this Law, the procedures at meetings of Advisory Commissioners are as determined by the meetings.

(8) An Advisory Commissioner shall be paid fees and expenses as determined by the Head of State, acting on advice.

### 13. DELEGATION.

(1) The Commission may, by instrument in writing under the hand of the President, delegate to any Commissioner or officer of the Commission all or any of its powers and functions (other than this power or function or any prescribed power or function) so that the delegated powers and functions may be exercised and performed by the delegate in relation to the matters or class of matters specified in the instrument of delegation.

(2) Every delegation under Subsection (1) is revocable, in writing, at will, and no such delegation affects the exercise of a power or the performance of a function by the Commission.

## PART III - COMPLAINTS AND PROCEEDINGS.

### 14. COMPLAINTS.

(1) A person may make a complaint to the Commission, including a representative complaint on behalf of other persons with a similar cause of complaint, concerning any matter that is within the jurisdiction of the Commission.

(2) A letter to the Commission from a person in custody, or confined in a hospital or in an institution under the control of a governmental body shall not be opened by any person other than a Commissioner or a person authorized by the Commission, and the

person in charge of the place where the correspondent is in custody or is confined shall make all facilities available that may be necessary to have the letter properly forwarded.

Penalty: A fine not exceeding K1,000.00 or imprisonment for a term not exceeding 12 months.

(3) The Commission shall investigate the subject of any complaint received by it, other than a complaint that relates to a matter outside its jurisdiction, unless, in its deliberate judgement, it decides not to do so, before commencing or during the investigation, because -

(a) the complaint is trivial, frivolous, vexatious or not made in good faith; or

(b) the complaint is not within the jurisdiction of the Commission; or

(c) the complainant has available to him another remedy or channel of complaint that he could reasonably be expected to use; or

(d) the complainant has not a sufficient interest in the subject of the complaint; or

(e) the complaint has been too long delayed to justify an investigation; or

(f) the Commission has before it other matters more worthy of its attention; or

(g) the resources of the Commission are insufficient for adequate investigation.

and may defer or discontinue an investigation for any of the same reasons.

(4) No decision by the Commission to decline to investigate or to defer or discontinue an investigation into the subject of a complaint affects the Commission's power to inquire generally into a matter on its own initiative.

### 15. PROCEEDINGS OF THE COMMISSION.

(1) Before investigating any matter within its jurisdiction, the Commission shall inform -

(a) the complainant; and

(b) the person to whom the investigation relates and the responsible person, of its intention to make the investigation.

(2) Every investigation by the Commission under this Law shall be conducted in private.

(3) The Commission may hear or obtain information from any person who the Commission considers can assist and may make whatever inquiries it thinks fit.

(4) Nothing in this Law compels the Commission to hold any hearing and no person is entitled as of right to be heard by the Commission except that -

- (a) where a report of the Commission may affect a State Service, Provincial Government or statutory body, the Commission shall provide reasonable opportunity for the Permanent Head of that Service or the statutory head of that body, as the case may be, to comment on the subject of the investigation; and
- (b) the Commission shall not make any comment in its report that is adverse to or derogatory of any person without -
  - (i) providing him with reasonable opportunity of being heard; and
  - (ii) fairly setting out his defence in its report.

(5) The Commission shall, in its discretion, at any time, during or after any investigation, consult any Minister who is concerned in the matter of the investigation.

(6) On the request of any Minister in relation to any investigation, or in any case where any investigation relates to any recommendation made to a Minister, the Commission shall consult that Minister after making the investigation and before forming a final opinion on the matter it has investigated.

(7) In conducting an investigation the Commission shall not be bound by strict rules of evidence or procedure but shall at all times conform to natural justice.

#### 16. EVIDENCE

(1) Subject to the provisions of this section and of Section 17, the Commission may from time to time require any person who in its opinion is able to give any information relating to any matter that is being investigated by the Commission to furnish to it that information and to produce any documents, papers or things that, in the opinion of the Commission, relate to any matter being investigated by it and that may be in the possession or control of that person.

(2) The Commission may, by instrument in writing, summon any person who in its opinion is able to give any information relating to any matter that is being investigated by the Commission, to attend the Commission at a time and place specified in the summons for examination by it on oath or affirmation.

(3) The Commission may administer an oath or affirmation to a person appearing as a witness before the Commission whether the witness has been summoned or appears without being summoned, and may examine the witness on oath or affirmation.

(4) A witness attending before the Commission has the same privileges and is subject to the same penalties in relation to the giving of information, the answering of questions and the production of documents, papers and things as a witness before the National Court.

(5) Except on the trial of any person for perjury in respect of his sworn testimony, no statement made or answer given by that or any other person in the course of any inquiry by or any proceedings before the Commission is admissible in evidence against any person in any court or at any inquiry or any other proceedings, and no evidence in respect of proceedings before the Commission shall be given against any person.

(6) Where any person is required by the Commission to attend before it for the purposes of this section, the person is entitled to the same fees, allowance and expenses as if he were a witness in the National Court.

#### 17. DISCLOSURE OF CERTAIN MATTERS NOT TO BE REQUIRED.

(1) Where the Prime Minister, after consultation with the President, certifies that the giving of any information or the answering of any question or the production of any documents or papers or things is likely to -

- (a) prejudice the security, defence or international relations of Papua New Guinea (including Papua New Guinea's relations with the Government of any other country or with any international organization) or the investigation or detection of offences; or
- (b) involve the disclosure of proceedings, deliberations or decisions of the National Executive Council, or of any committee of that Council which the Prime Minister certifies relate to matters of a secret or confidential nature, disclosure of which would be injurious to the public interest,

the Commission shall not require the information or answer to be given or, as the case may be, the document, paper or thing to be produced.

(2) Subject to Subsection (1), any law that authorizes or requires the withholding of any document, paper or thing, or the refusal to answer any question, on the ground that the disclosure of the document, paper or thing or the answering of the question would be injurious to the public interest does not apply in respect of any investigation by or proceedings before the Commission.

#### 18. COMMISSIONERS, ETC., TO MAINTAIN SECRECY.

(1) Before entering on the exercise of the duties of his office, a Commissioner and an Advisory Commissioner shall take an oath or make an affirmation in the form in Part I of Schedule 1 before a Judge of the National Court.

(2) Every officer and employee of the Commission shall maintain secrecy in respect of all matters that come to their knowledge in the exercise of their duties and shall, before entering on the exercise of their duties, take an oath or make an affirmation in the form in Part II of Schedule 1 before a Commissioner.

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(3) Notwithstanding the provisions of Subsection (1), the Commission may disclose for the purposes of any investigation being conducted by it and in any report made by it, such matters as in its opinion ought to be disclosed in order properly to investigate the matter before it or establish grounds for its conclusions and recommendations, as the case may be.

(4) The power conferred by Subsection (3) does not extend to any matter that might prejudice the security, defence or international relations of Papua New Guinea (including Papua New Guinea's relations with the Government of any other country or with any international organization) or the investigation or detection of offences, or that might involve the disclosure of the deliberations of the National Executive Council.

**19. PRESERVATION OF SECRECY.**

(1) The Commission may direct that any evidence given before it, or any document, paper or thing produced to it, be not published.

- (2) A person who publishes or discloses to any person -
- (a) any evidence given before the Commission; or
  - (b) any of the contents of any document, paper or thing,

which the Commission has directed not to be published without the consent in writing of the Commission, is guilty of an offence.

Penalty: A fine not exceeding K10,000.00 or imprisonment for a term not 3 years or both.

**20. CONCILIATION.**

(1) The Commission may, before commencing an investigation, or during or after completing an investigation, call a conciliation conference of the parties to the investigation by formally requesting, by post, telephone, facsimile or otherwise, the attendance of each party at a time and place specified, and where a person fails to comply with such a request, the Commission may issue a summons requiring the person to attend a conference at a time and place specified in the summons.

(2) The objectives of a conciliation conference are to identify the matters at issue between the parties and to use the best endeavours of the Commission to secure a settlement between the parties on the matters at issue.

**21. PROCEDURE AFTER INVESTIGATION.**

(1) After completing an investigation, the Commission shall inform the parties of the result of the investigation and may -

- (a) determine that the complaint has not been sustained; or
- (b) determine that the complaint has not been investigated further for one of the reasons specified in Section 14(3); or
- (c) determine that the complaint has been substantiated and make a binding or an advisory determination which may include any one or more of the following:-

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- (i) a determination that a violation of human rights has occurred and should not be repeated or continued;
  - (ii) a determination that the person complained against should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;
  - (iii) a determination that the person complained against should employ, re-employ or promote the complainant;
  - (iv) a determination that the person complained against should pay to the complainant damages by way of compensation for any loss or damage suffered by reason of the conduct complained of;
  - (v) a determination that the termination of a contract or agreement should be varied to redress any loss or damages suffered by the complainant;
  - (vi) a determination that it would be inappropriate for any further action to be taken in the matter; or
- (a) determine that the complaint has been substantiated and refer it to any service, body, person or other appropriate authority with recommendations for action, and may request the authority to notify the Commission as to the steps (if any) the authority intends to take to give effect to the recommendations of the Commission.
- (2) Before making a binding determination under Subsection (1)(c), the Commission shall endeavour to conciliate between the parties.
- (3) Any party dissatisfied with a binding determination made by the Commission under Subsection (1)(c) may appeal to the National Court against the whole or any part of the determination.
- (4) The Commission shall act according to equity, good conscience and the substantial merits of matters before it without regard to technicalities.
- (5) The Commission shall give reasons for its determinations under Subsection (1) and may state any findings of fact on which the determination is based.
- (6) The damage referred to in Subsection (1)(c) includes injury to the complainant's feelings or humiliation suffered by the complainant.
- (7) A determination by the Commission under Subsection (1)(c)(iv) on a representative complaint -
- (a) may provide for payment of specified amounts worked out in a manner specified by the Commission; and
  - (b) where it provides for payment in accordance with Paragraph (a), shall make provision for the payment of the money to the complainants concerned.

- (8) Where the Commission makes a determination under Subsection (1)(c)(iv) on a representative complaint, the Commission may give such directions (if any) as it thinks just in relation to -
- (a) the manner in which a class member is to establish his or her entitlement to the payment of an amount under the determination; and
  - (b) the manner for determining any dispute regarding the entitlement of a class member to the payment.

(9) A determination by the Commission under Subsection (1)(c)(iv) may be registered as an order by an appropriate court.

(10) In this section, "complainant", in relation to a representative complaint, means the class members.

**22. PROCEEDINGS NOT TO BE QUESTIONED OR TO BE SUBJECT TO REVIEW.**  
No proceeding of the Commission shall be held bad for want of form, and, except on the ground of lack of jurisdiction or as provided in Section 21(3), no proceeding or decision of the Commission shall be challenged, reviewed, quashed or called into question in any court.

#### PART IV. - THE SERVICE OF THE COMMISSION.

##### 23. APPOINTMENT OF OFFICERS.

- (1) The Commission -
- (a) shall appoint a Secretary to the Commission; and
  - (b) within the limit of funds lawfully available to it, may appoint such other officers and employees as, in its opinion, are necessary for the efficient performance of the functions of the Commission.

(2) The Secretary and other officers and employees of the Commission constitute the Service of the Commission.

(3) Subject to this Part, to the Regulations and to the *Salaries and Conditions Monitoring Committee Act 1988*, officers hold office on such terms and conditions as the Commission, fixes.

(4) If an officer appointed under this section was, immediately before his appointment, an officer of the National Public Service, his service as an officer of the Commission shall be counted as service in the National Public Service for the purposes of determining his rights (if any) in respect of -

- (a) absence or leave on the ground of illness; and
- (b) furlough or pay in lieu of furlough (including pay to dependants or personal representatives on the death of the officer).

##### 24. CONTROL OF SERVICE.

The Service of the Commission is subject to the control and direction of the Commission.

##### 25. REGULATIONS FOR THE SERVICE OF THE COMMISSION.

The Regulations may make provision in relation to the Service of the Commission and in particular, may -

- (a) subject to the *Salaries and Conditions Monitoring Committee Act 1988*, prescribe the terms and conditions of employment of officers; and
- (b) make provision for the establishment of a superannuation scheme to provide benefits for officers of the Commission on retirement, resignations, retrenchment or death.

##### 26. TEMPORARY AND CASUAL EMPLOYEES.

(1) The Commission may appoint such temporary and casual employees as it thinks necessary for the purposes of this Law.

(2) Employees appointed under Subsection (1) shall be employed on such terms and conditions as the Commission determines.

#### PART V. - FINANCE.

##### 27. APPLICATION OF PUBLIC FINANCES (MANAGEMENT) ACT 1995.

(1) Part VIII of the *Public Finances (Management) Act 1995* (other than Sections 50, 51, 53 and 59) applies to and in relation to the Commission.

- (2) The Funds of the Commission shall consist of -
- (a) any money appropriated by Parliament for the purposes of the Commission and paid to the Commission; and
  - (b) all other moneys lawfully received by the Commission for the purposes of the Commission; and
  - (c) all accumulations of income derived from any such money.

#### PART VI - OFFENCES.

##### 28. FAILURE TO ATTEND OR PRODUCE DOCUMENTS.

A person who, having been summoned to attend the Commission, fails without reasonable excuse, the burden of proof of which lies on him, to attend the Commission or to produce any documents, books or writings in his custody or control that he is required by the summons to produce, is guilty of an offence.

Penalty: A fine not exceeding K1000.00 or imprisonment for a term not exceeding six months.

29. REFUSING TO BE SWORN OR GIVE EVIDENCE

A person appearing as a witness before the Commission who refuses to be sworn or to make an affirmation or to answer any questions relevant to the inquiry put to him by a member of the Commission, or having attended leaves the Commission without the permission of a Commissioner, is guilty of an offence.

Penalty: A fine not exceeding K500.00 or imprisonment for a term not exceeding three months.

30. CONTEMPT OF THE COMMISSION.

A person who wilfully insults a Commissioner or Advisory Commissioner, or wilfully interrupts the proceedings of the Commission, or is in any manner guilty of wilful contempt of the Commission, is guilty of an offence.

Penalty: A fine not exceeding K500.00 or imprisonment for a term not exceeding three months.

31. VICTIMISATION.

(1) A person who wilfully victimises any person on the ground that that person, or any associate of that person -

- (a) intends to make use of his or her rights under this Law, or
- (b) has made use of his or her rights, or promoted the rights of some other person, under this Law; or
- (c) has given information or evidence in relation to any complaint, investigation, or proceeding under this Law; or
- (d) has declined to do any act which would contravene this Law; or
- (e) has otherwise done anything under or by reference to this Law,

is guilty of an offence.

Penalty: A fine not exceeding K10,000.00 or imprisonment for a term not exceeding three years or both.

(2) It shall be a defence for a person charged with an offence under Subsection (1), the burden of proof of which lies on him, that the person victimised was so treated because he had made a false allegation to the Commission or otherwise acted in bad faith.

32. GIVING FALSE EVIDENCE.

A person appearing as a witness before the Commission, who wilfully gives false evidence, is guilty of perjury and is liable to prosecution and punishment accordingly.

33. PROSECUTION FOR OFFENCES.

Proceedings for an offence under this Law -

- (a) shall be brought in the National Court; and
- (b) may not be brought against any person except with the consent in writing of the Commission.

PART VII - MISCELLANEOUS.

34. PRIVILEGES.

(1) A Commissioner or an Advisory Commissioner or an officer or employee of the Commission is not liable for any act or omission done or made *bona fide* and without negligence under or for the purposes of this Law.

(2) A Commissioner or an Advisory Commissioner or an officer or employee of the Commission shall not be called to give evidence in any court, or in any proceedings of a judicial nature, in respect of anything coming to his knowledge in the exercise of his functions.

(3) Anything said or any information supplied or any document, paper or thing produced by any person in the course of any inquiry by or proceedings before the Commission under this Law are privileged in the same manner as if the inquiry or proceedings were proceedings in a Court.

35. POWER OF ENTRY.

(1) For the purposes of this Law, but subject to this section, a Commissioner may, at any reasonable time, enter upon any and inspect the premises and, subject to Section 13 carry out in the premises any investigation that is within its jurisdiction.

(2) Before entering upon any premises the Commissioner shall notify the Permanent Head or statutory head or other person in charge of the premises.

(3) The Prime Minister, may after consultation with the President, from time to time, exclude the operation of Subsection (1) to any premises if he is satisfied that the exercise of the powers conferred by this section is likely to prejudice the security, defence or international relations of Papua New Guinea (including Papua New Guinea's relations with the Government of any other country or with any international organization).

36. REGULATIONS.

The Head of State, acting with, and in accordance with, the advice of the National Executive Council, may make regulations, not inconsistent with this law, prescribing all matters that by this Law are required or permitted to be prescribed for carrying out or giving effect to this Law, and generally for achieving the purposes of this Law, and in particular for prescribing penalties not exceeding K1000.00 and default penalties not exceeding K100.00 for offences against or contraventions of any regulations so made.

37. SAVINGS.

The provisions of this Law are in addition to the provisions of any other enactment, subordinate enactment or any rule of law under which any remedy or right of appeal or objection is provided for any person or any procedure is provided for the inquiry into or investigation of any matter, and nothing in this Law limits or affects any such remedy or right of appeal or objection or procedure.

SCHEDULES.

SCHEDULE I.

Sec. 18.

PART I.

*Oath and Affirmation of Secrecy to be taken or made by Commissioner or Advisory Commissioner.*

OATH.

I, \_\_\_\_\_, a Commissioner/an Advisory Commissioner of the Human Rights Commission, do swear that I will at all times maintain secrecy in relation to the affairs of the Commission and, in particular, that I will not directly or indirectly communicate or divulge any information that comes to my knowledge in the performance of my functions as a member of the Commission, except under compulsion or obligation of law or as provided by law.

So help me God!

AFFIRMATION.

I, \_\_\_\_\_, a Commissioner/an Advisory Commissioner of the Human Rights Commission, do solemnly and sincerely promise and declare that I will at all times maintain secrecy in relation to the affairs of the Commission and, in particular, that I will not directly or indirectly communicate or divulge any information that comes to my knowledge in the performance of my functions as an officer/employee of the Commission, except under compulsion or obligation of law or as provided by law.

So help me God!

PART II.

*Oath and Affirmation of Secrecy to be taken or made by officers and employees of the Commission.*

OATH.

I, \_\_\_\_\_, (an officer or employee of the Human Rights Commission, as the case requires) do swear that I will at all times maintain secrecy in relation to the affairs of the Commission and, in particular, that I will not directly or indirectly communicate or divulge any information that comes to my knowledge in the performance of my functions as an officer/employee of the Commission, except under compulsion or obligation of law or as provided by law.

So help me God!

AFFIRMATION.

I, \_\_\_\_\_, (an officer or employee of the Human Rights Commission, as the case requires) do solemnly and sincerely promise and declare that I will at all times maintain secrecy in relation to the affairs of the Commission and, in particular, that I will not directly or indirectly communicate or divulge any information that comes to my knowledge in the performance of my functions as an officer/employee of the Commission, except under compulsion or obligation of law or as provided by law.