

## Regional and national human rights mechanisms and the Asia-Pacific

### Regional mechanisms

- 4.1 The Australian Human Rights Centre provided a useful definition of a regional convention in the following terms:

A regional convention is an indication that fundamental commonalities bind a group of states. Because of these commonalities, states are prepared to subscribe to a joint articulation of human rights and are prepared to be held accountable by a regional monitoring body for violations of those rights.<sup>1</sup>

- 4.2 There is typically broad support for the idea of having a regional mechanism in place to uphold the promotion and safeguarding of fundamental human rights in a way that is appropriate to the distinctive conditions of a given region. They are an important complement to international and national human rights systems.

- 4.3 In essence, a regional mechanism is a forum for reviewing a human rights situation and, when needed, putting pressure on its regional members to observe the human rights standards that the region itself has determined as important. Regional mechanisms may comprise an establishing charter, an executive body or commission, and a form of judicial body or court.<sup>2</sup>

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1 AHRC, *Submission no. 4*, p. 2.

2 SCIL, *Submission no. 5*, p. 5.

4.4 The Committee noted the comment from the RRRT that:

The UN encourages the establishment of regional human rights mechanisms because the experience from other regions with such mechanisms is that they are better able to take account of regional conditions and peculiarities.<sup>3</sup>

4.5 The AHRC observed that:

Europe, the Americas and Africa have established regional treaties stipulating key norms and setting up machinery or mechanisms which range from regional human rights commissions to regional human rights courts. The common feature of these regimes is that they review the human rights situation in states within the region and apply pressure to achieve accountability. They afford remedies in the absence of national remedies or where the national mechanisms are inadequate or do not provide the necessary redress.<sup>4</sup>

4.6 SCIL informed the Committee that regional frameworks can deliver the following benefits:

- implementing international human rights standards and enhancing their relevance and legitimacy in the region;
- providing an effective medium through which specific regional issues and concerns could be cooperatively targeted and addressed;
- facilitating the development of complementary human rights norms that are of regional concern and filling the lacunae in the reach and influence of international human rights institutions;
- helping to build awareness of, respect for, and a continuing dialogue on human rights;
- providing support for regional governments with less established national human rights mechanisms; and
- strengthening the independence and institutional capacity of national human rights institutions.<sup>5</sup>

4.7 Along similar lines, the HRLRC supported the development of regional mechanisms for the following reasons:

- regional arrangements allow for norms, institutions and processes to be designed to fit the distinctive characteristics of

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3 RRRT, *Submission no. 13*, p. 13.

4 AHRC, *Submission no. 4*, p. 3.

5 SCIL, *Submission no. 5*, pp. 3-4.

the region and can provide specialised resources and promote the development of valuable region-specific expertise;

- the localised knowledge and legitimacy of such institutions means that regional mechanisms are uniquely placed to identify and respond to human rights abuses;
- a regional mechanism could support national engagement in the international human rights system by providing resources and know-how that are currently not available to many Pacific Island countries due to financial constraints;
- if properly funded, a regional human rights mechanism could facilitate human rights education programs which are currently not financially viable; and
- regional mechanisms provide a forum independent of government in which the implementation of human rights objectives may be pursued in a transparent environment less susceptible to political interference than national human rights bodies.<sup>6</sup>

4.8 However, it was also argued that there is an underlying tension between being able to fully subscribe to universal human rights standards while also addressing regional variations and concerns. Submitters stressed that regionalism ‘must not be promoted in such a way as to undermine universalism’.<sup>7</sup>

4.9 This concern about the potential ‘watering down’ of human rights standards to accommodate regional conditions have been, and will continue to be, a thorny agenda item for discussions on regional (or sub regional) mechanisms for the Asia-Pacific.

4.10 Prior to recent movements on the development of the ASEAN Intergovernmental Commission on Human Rights – the ASEAN human rights body – the Asia-Pacific was the only region not covered by any regional human rights mechanism.

## Africa

4.11 The foundation document for the African human rights mechanism is the *African Charter on Human and Peoples’ Rights* (ACHPR). The ACHPR was adopted in June 1981, by the then Organisation of African Unity – which became the Africa Union in 2001 – and came into force on 21 October 1986. The preamble reaffirmed its members’ commitment to:

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6 HRLRC, *Submission no. 15*, p. 35.

7 Castan Centre, *Submission no. 10*, p. 6.

...coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.<sup>8</sup>

4.12 Each state party to the Charter must report, biennially, on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed in the ACHPR. The Charter provided for the establishment of the African Commission on Human and Peoples' Rights to promote human and peoples' rights and ensure their protection in Africa. Its major functions are the:

- protection of human and peoples' rights;
- promotion of human and peoples' rights; and
- interpretation of the African Charter.<sup>9</sup>

The Asia-Pacific Forum noted that the African Commission's role also involves considering individual complaints of violations of the Charter.<sup>10</sup>

4.13 A protocol under the African Charter makes provision for the establishment of an African Court on Human and Peoples' Rights. The African Commission will play a role in the preparation of cases for submission to the Court. The APF observed that the court would be integrated with the African Court of Justice:

The Court of Justice of the African Union is intended to be the "principal judicial organ of the Union", to take over the duties of the African Commission on Human and Peoples' Rights, as well as act as the supreme court of the African Union, interpreting all necessary laws and treaties. The Protocol establishing the African Court on Human and Peoples' Rights entered into force in January 2004 but its merging with the Court of Justice has delayed its establishment.<sup>11</sup>

4.14 In contrast to the European and inter-American human rights systems, whose judicial bodies were more integral to their development, the African Court is a belated development that is yet to commence operation.

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8 Source: [http://www.achpr.org/english/info/charter\\_en.html](http://www.achpr.org/english/info/charter_en.html), viewed 25 June 2009. A comparison of the rights contained in the African Charter and those under the UDHR, ICCPR and the ICESCR are available at: [http://www.diplomacy.edu/africancharter/acharter\\_relation.asp](http://www.diplomacy.edu/africancharter/acharter_relation.asp), viewed 25 June 2009.

9 DFAT, *Submission no. 17*, p. 8.

10 APF, *Submission no. 21*, p. 6.

11 APF, *Submission no. 21*, p. 6.

- 4.15 Existing courts in the international system specifically to address African matters are the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone – a joint project of the United Nations and the Government of Sierra Leone.

## The Americas

- 4.16 The inter-American human rights system comprises its main instruments in the *American Declaration of the Rights and Duties of Man* (1948) and the *American Convention on Human Rights* (1969), other supporting instruments,<sup>12</sup> the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.<sup>13</sup>
- 4.17 The inter-American human rights system coexists with the UN human rights mechanisms. The Inter-American Commission on Human Rights (IACHR), established in 1959, is an autonomous organ of the Organisation of American States (OAS) and is responsible for the promotion of the observance and defence of human rights in the region. The following are the key features and functions of the IACHR:
- representing all 35 OAS members and seven members who act independently;
  - a permanent body that meets in ordinary and special sessions several times a year;
  - investigating individual petitions which allege human rights violations;
  - observing the general human rights situation in the member States and publishing special reports regarding the situation in a specific State, when it considers it appropriate;
  - recommending to the member States of the OAS the adoption of measures which would contribute to human rights protection; and
  - submitting cases to the Inter-American Court of Human Rights and appears before the Court in the litigation of cases.<sup>14</sup>
- 4.18 The Inter-American Court of Human Rights, established in 1979, is made up of jurists – elected and serving in an individual capacity – with recognised expertise in human rights. The Court is responsible for:

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12 Including the *Inter-American Convention on Forced Disappearance* (1994), *Inter-American Convention to Prevent and Punish Torture* (1985), and the *Convention on the Prevention, Punishment and Eradication of Violence against Women* (1994).

13 RRRT, *Submission no. 13*, Annex C.

14 DFAT, *Submission no. 17*, p. 8.

...enforcing and interpreting the provisions of the American Convention on Human Rights. It hears and rules on specific cases of human rights violations referred to it and it issues opinions on matters of legal interpretation brought to its attention by other OAS bodies or member states.<sup>15</sup>

## Arab states

- 4.19 An attempt was made to put in place a human rights charter for the Arab states with the adoption of a charter on 15 September 1994. However, no states ratified that charter, which was criticised for failing to meet international human rights standards.<sup>16</sup>
- 4.20 The original charter was revised and the current *Arab Charter on Human Rights* was adopted by the Council of the League of Arab States<sup>17</sup> on 22 May 2004, paving the way for a regional human rights mechanism for the Arab states.<sup>18</sup> The Arab Charter came into force in March 2008, with the states agreeing to 'place human rights human rights at the centre of the key national concerns of Arab States' and to 'entrench the principle that all human rights are universal, indivisible, interdependent and interrelated'.<sup>19</sup>
- 4.21 The APF observed that:
- The revised Charter is a substantial improvement on the original document, especially on issues such as state of emergency, fair trial, slavery, sexual violence, disability and trafficking. Some provisions in the new Charter, however, are still inconsistent with international human rights law, e.g. provisions for death penalties for minors; right to life derogated in states of emergency and no references to cruel, inhuman and degrading punishment, although torture is prohibited.<sup>20</sup>
- 4.22 The Castan Centre similarly expressed concerns that too many of the rights contained in the Arab Charter were 'subject to lawful restrictions',

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15 APF, *Submission no. 21*, p. 7.

16 APF, *Submission no. 21*, p. 8.

17 League of Arab States members are Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen.

18 APF, *Submission no. 21*, p. 8.

19 Castan Centre, *Exhibit no. 14*, p. 2.

20 APF, *Submission no. 21*, p. 8.

thus creating the potential that a given right need not be observed as long as legal provision was made to allow for this.<sup>21</sup>

4.23 The Arab Charter provides for the establishment of an Arab Human Rights Committee that would:

- consist of seven independent and impartial committee members of parties to the charter (elected by secret ballot);
- consider the triennial reports that member states are required to submit to the Council of the League's Secretary-General, on progress made in their state on giving effect to the rights and freedoms in the Charter;
- submit an annual report on its activities, with any comments and recommendations to the Secretary-General; and
- be provided with all the necessary financial and human resource and facilities that are required to discharge its functions effectively.<sup>22</sup>

4.24 It is too early to tell what impact the Arab Charter will have on improving human rights in the region. Since it came into force, the first Arab Conference on Human Rights was held in Doha, Qatar in December 2008. Outcomes of the conference included:

- encouraging all Arab countries to ratify and comply with international human rights treaties, as well as the Arab Charter on Human Rights;
- participants calling for a regional human rights work plan involving the Arab League, national governments and civil society organisations;
- urging Arab governments to develop a supportive legal framework and to establish mechanisms for improved protection of human rights, including an Arab Tribunal for Human Rights; and
- recommending the establishment of an Arab Fund, under the umbrella of the Arab League, to promote human rights.<sup>23</sup>

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21 Castan Centre, *Transcript*, 15 April 2009, p. 11.

22 Castan Centre, *Exhibit no. 14*.

23 Source: <http://www.asiapacificforum.net/news/call-for-arab-countries-to-boost-human-rights-protection.html>, viewed 29 January 2009.

## Europe

4.25 The Council of Europe, founded in 1949, is an international organisation working towards European integration. It works through convention and international treaties to set the common legal and human rights standards and the human rights code for its membership.<sup>24</sup>

4.26 The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), the *European Social Charter* (1961)<sup>25</sup> and the European Court of Human Rights form the foundation of the European human rights system. Other instruments include *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1987) and the *Framework Convention on National Minorities* (1995).

4.27 The European Court of Human Rights 'supervises compliance with the Convention and thus functions as the highest European court for human rights and fundamental freedoms'. All Council of Europe member states have signed the European Convention and so come under the Court's jurisdiction.<sup>26</sup>

4.28 In its submission, the RRRT reproduced the United Nations Development Program assessment that:

The European human rights system is by far the most developed of the regional systems. Distinguished by its preference for judicial approaches, it has gone the furthest in developing judicial processes. The European system also enjoys the highest rate of state compliance with its decisions.<sup>27</sup>

4.29 Another organisation addressing human rights issues at the regional level in the Organisation for Security and Co-operation in Europe (OSCE). The OSCE is the largest regional security organisation in the world, working on early warning, conflict prevention, crisis management and post-conflict rehabilitation. It recognises that lasting security is not possible without respect for human rights and fundamental freedoms. OSCE institutions are, therefore, active in human rights protection:

The OSCE monitors and reports on the human rights situation in each of its 56 participating States, particularly in the areas of freedom of assembly and association, the right to liberty and to a fair trial, and the use of the death penalty. It provides training and

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24 DFAT, *Submission no. 17*, p. 8.

25 Revised in 1996.

26 DFAT, *Submission no. 17*, p. 9.

27 RRRT, *Submission no. 13*, Annex C.



education across the field of human rights, including for government officials, law-enforcement officers, rights defenders and students.<sup>28</sup>

## The Asia-Pacific

4.30 In its submission to the Committee, the APF observed that:

Unlike Europe, the Americas and Africa, the Asia-Pacific does not have a regional inter-governmental human rights mechanism. Perhaps reflecting its immense size and diversity, neither [do] Asia and the Pacific have a pan-regional inter-governmental human rights machinery which parallels those established in other regions of the world.<sup>29</sup>

## Association of Southeast Asian Nations

4.31 Until recently, the Asian and Pacific regions did not have any formal regional human rights mechanism. However, ASEAN now has a subregional human rights body covering its member countries.

4.32 ASEAN was established in 1967 to: accelerate economic growth, social progress and cultural development in the region; and to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries in the region and adherence to the principles of the United Nations Charter. Its original membership – Indonesia, Malaysia, Philippines, Singapore, and Thailand – has since expanded to include Brunei Darussalam, Cambodia, the People's Democratic Republic of Laos, Myanmar and Vietnam.<sup>30</sup>

4.33 On 20 July 2009, the terms of reference for an ASEAN human rights body were adopted at the 42<sup>nd</sup> ASEAN Ministerial Meeting of Foreign Ministers. It was agreed that the ASEAN Intergovernmental Commission on Human Rights (AICHR) would be formed. The formal establishment of the Commission took place at the 15<sup>th</sup> ASEAN Summit in Phuket, Thailand in October 2009.<sup>31</sup>

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28 DFAT, *Submission no. 17*, p. 9.

29 APF, *Submission no. 21*, p. 16.

30 Source: <http://www.aseansec.org/>, viewed 22 September 2009.

31 Source: [http://www.15thaseansummit-th.org/PDF/24-04\\_Declaration\\_on\\_the\\_Inauguration\\_of\\_the\\_AICHR.pdf](http://www.15thaseansummit-th.org/PDF/24-04_Declaration_on_the_Inauguration_of_the_AICHR.pdf), viewed 26 October 2009.

4.34 The AICHR will cover the ASEAN countries and it is anticipated that progress by the body on human rights issues will be incremental.<sup>32</sup>

Its terms of reference outlines AICHR's purpose:

- to promote and protect human rights and fundamental freedoms of the peoples of ASEAN;
- to uphold the right of the peoples of ASEAN to live in peace, dignity and prosperity;
- to contribute to the realisation of the purposes of ASEAN as set out in the ASEAN Charter in order to promote stability and harmony in the region, friendship and cooperation among ASEAN Member States, as well as the well-being, livelihood, welfare and participation of ASEAN peoples in the ASEAN Community building process;
- to promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities;
- to enhance regional cooperation with a view to complementing national and international efforts on the promotion and protection of human rights; and
- to uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.<sup>33</sup>

4.35 Some are optimistic about having an ASEAN human rights body. For example, the APF noted that in her address at the 2007 Annual Workshop for Asia-Pacific regional cooperation on human rights, Ms Louise Arbour, the then UN High Commissioner for Human Rights, commented:

I believe that an ASEAN Human Rights Mechanism can articulate a common approach to a complex problem, an approach that will assist ASEAN Member States, from a position of shared regional values, to address shortcomings in their national frameworks...Finally, I believe that an ASEAN human rights mechanism will serve as the inspiration and model for further progress within the other sub-regions of this broad and diverse Asia-Pacific region.<sup>34</sup>

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32 Source: <http://www.aseansec.org/PR-Another-Step-Forward-for-Regional-HR-Cooperation.pdf>, viewed 1 September 2009.

33 Source: <http://www.asean.org/DOC-TOR-AHRB.pdf>, viewed 1 September 2009.

34 APF, *Submission no. 21*, pp. 21-22.

- 4.36 However, concern remains about the perceived limitations of the AICHR's mandate. During the development process, concerns were expressed about the limited scope of the mandate,<sup>35</sup> and that ASEAN countries would continue to observe the tradition of non-interference in members' domestic affairs, thus limiting the effectiveness of monitoring functions.<sup>36</sup>
- 4.37 In welcoming remarks at the 8<sup>th</sup> Workshop on the ASEAN Regional Mechanism on Human Rights in July 2009, comments by the Chairperson of the Malaysian Working Group for an ASEAN Human Rights Mechanism, Data Param Cumaraswamy, appeared to confirm that the body's terms of reference would not meet many interest groups' expectations. He stated:
- At this juncture, it is really no secret that civil society, the Working Group included, and even some governments perhaps, would have preferred a much stronger, a much more balanced, human rights body than what the imminent one will most likely be. We would have preferred a [Terms of Reference] document more legal than political in nature.<sup>37</sup>
- 4.38 The National Human Rights Institutions (NHRIs) of Indonesia, Malaysia, the Philippines and Thailand (the ASEAN NHRI forum) prepared a joint position paper – following formal discussions in Jakarta on 27 August 2009 – on the new AIHRC. The ASEAN NHRI forum congratulated ASEAN on the adoption of the terms of reference for the AIHRC and acknowledged the significance of this step, but also drew attention to what it identified as deficiencies in the AIHRC mandate, including: its lack of independence, its protection power severely circumscribed by the terms of reference, and its promotional functions dependent on the political will of member states. They suggested that the AICHR should establish a process for regular engagement with the region's NHRIs, and that AICHR should be supported by a separate, permanent and professional secretariat.<sup>38</sup>

#### Background on the development of an ASEAN human rights body

- 4.39 In November 2007, the ASEAN Charter was signed by the 10 ASEAN nations. Article 14 of the Charter provided for the establishment of an

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35 For example, see RegNet, *Submission no. 3*, pp. 4-5; SCIL, *Submission no. 5*, p. 5; and FORUM-ASIA, *Submission no. 12*, pp. 2-3.

36 For example, see ACTU, *Submission no. 16*, p. 8 and AHRC, *Submission no. 4*, pp. 4-5.

37 Source: <http://www.aseanhrmech.org/downloads/Dato%20Param%20Cumaraswamy.pdf>, viewed 22 September 2009.

38 APF website: <http://www.asiapacificforum.net/news/asean-nhris-call-for-engagement-with-regional-rights-body.html>, viewed 1 October 2009.

ASEAN human rights body (AHRB) 'in conformity with the purposes and principles of the ASEAN Charter [in] relation to the promotion and protection of human rights and fundamental freedoms'.<sup>39</sup>

4.40 FORUM-ASIA noted that the ASEAN Charter contained a number of references to human rights:

- ASEAN will "[adhere] to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms." (Preamble)
- The purpose of ASEAN is "to strengthen democracy enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN." (Purpose)
- ASEAN and its member state shall act in accordance with the "respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice." (Principles)<sup>40</sup>

4.41 The ASEAN Eminent Persons Group was set up to make practical recommendations on the creation of a human rights charter. At the outset, it commented that 'the establishment of an ASEAN human rights mechanism is a worthy idea that should be pursued'.<sup>41</sup>

4.42 During the development process the likely effectiveness of the emerging human rights body was questioned. Illustrative of this concern is the academic paper which queried whether the mechanism would have a 'tongue but no teeth'.<sup>42</sup>

4.43 FORUM-ASIA felt that the development of an AHRB could be an important human rights milestone for the region. However, in its submission, FORUM-ASIA highlighted a number of its concerns coming out of its engagement with the process for the creation of the body:

- Although the ASEAN Charter recognises the importance of human rights in its Preamble and the Principles, there is however no specific mention of the Universal Declaration of Human Rights. It is therefore of utmost importance to ensure that the Term of Reference (TOR) of the AHRB will specifically recognise the Universal Declaration of Human Rights and international human rights laws as a source of guidance for its mandate and work on human rights.

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39 APF, *Submission no. 21*, p. 21.

40 FORUM-ASIA, *Submission no. 12*, Annex 1, p. 3.

41 APF, *Submission no. 21*, p. 20.

42 Durbach, A., Renshaw C. and Byrnes, A., *Exhibit no. 1*.

- The TOR must take long term vision into account to include ensuring that the TOR is not drafted in finite terms that would obstruct its development in the future. We believe that the TOR should set out the plan or road map, commensurate with benchmarks for its development. Once the benchmarks are met, the gradual improvement of ASEAN human rights mechanism and system may be undertaken. Nevertheless, AHRB should start from their commitment which was made in 1993 on human rights.
- Ultimately, AHRB should develop a comprehensive human rights treaty or treaties reflecting the international human rights laws and standards. However, there had been a resistance stand point from civil society groups during the 2nd Regional Consultation on ASEAN and human rights in Jakarta from 4-7 August 2008 on having [an] ASEAN human rights convention. There is a fear that the ASEAN will compromise the international human rights standards with the so called “Asian values”, and ASEAN principles of non-interference.<sup>43</sup>
- The ongoing process of establishing the ASEAN Commission on the promotion and protection for the rights of women and children (ACWC) should finally [be] subsumed within the AHRB to mainstream women’s rights and children’s rights in the main human rights organ of ASEAN. We also believe that AHRB shall be open for the creation of other sub-commissions, including sub-commission on migrant workers, indigenous peoples, ethnic minorities, people with disability and others.<sup>44</sup>

4.44 The draft AHRB terms of reference emerged from the 8<sup>th</sup> Workshop on the ASEAN Regional Mechanism on Human Rights in July 2009. The summary of proceedings also contained a number of conclusions. In particular, the Committee noted the following:

- The Workshop recognizes that while member-states of ASEAN still have diverse records on human rights, it is encouraging that ASEAN itself, as a rules-based regional organization, has increasingly paid attention to human rights.
- The Workshop recognizes that a main challenge for ASEAN is to develop from an inter-executive association into an inter-peoples and people-oriented organization.
- The Workshop envisages a regional system on human rights which is progressively capable of effectively promoting and protecting human rights.

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43 FORUM-ASIA, *Submission no. 12*, p. 2.

44 FORUM-ASIA, *Submission no. 12*, p. 3.

- The Workshop encourages civil society to continue to engage the AHRB and other ASEAN organs, and to make its opinions count in shaping the human rights architecture of ASEAN.
- The Workshop notes that while there appears to be an imbalance between the promotion and protection functions of the AHRB, there are openings in the ToR which can be taken advantage of, and forward-looking strategies may be adopted to advance human rights in the region.
- The Workshop reiterates that the AHRB has to be seen in the context of the ASEAN Charter. Although the AHRB is the main venue for asserting human rights, stakeholders should make use of all other platforms within ASEAN for the purpose of human rights promotion and protection.<sup>45</sup>

4.45 Also coming out of the workshop was the recognition that:

...the AHRB will depend not only on a preset roadmap, but also on how ASEAN will evolve as a community.<sup>46</sup>

### De facto mechanisms

4.46 The new ASEAN human rights mechanism aside, the rest of the region still remains uncovered by any formal regional human rights mechanism. There are, however, what could be described as 'de facto' mechanisms currently operating at the regional and subregional levels.<sup>47</sup>

### The Commonwealth

4.47 The Commonwealth is a collection of 53 countries that have joined together to work cooperatively towards democratic and development goals. Its membership comprises some of the world's richest and poorest countries, and includes some Asian and South Pacific nations.<sup>48</sup>

4.48 Promoting human rights is an important part of the Commonwealth's mandate. In particular, it is tackling human rights issues through the Commonwealth Human Rights Initiative (CHRI). The CHRI, formed in 1987, is:

...an independent, non-partisan, international non-governmental organisation, mandated to ensure the practical realisation of

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45 Working Group for an ASEAN Human Rights Mechanism, Summary of Proceedings, p. 5. Available at: <http://www.aseanhrmech.org/news/participants-anticipates-more-engagements-with-human-rights.htm>, viewed 22 September 2009.

46 Ibid.

47 DFAT, *Submission no. 17*, p. 6.

48 Source: <http://www.thecommonwealth.org/>, viewed 6 July 2009.

human rights in Commonwealth countries. The CHRI's mandate is to promote awareness of and adherence to the Harare Principles, the Universal Declaration of Human Rights and other internationally recognised human rights instruments and declarations made by the Commonwealth Heads of Government as well as domestic instruments supporting human rights in the Commonwealth.<sup>49</sup>

4.49 The CHRI works towards the practical realisation of human rights in the Commonwealth. In the Pacific, for example, the CHRI has been working to deepen and build its presence in the region, leading to the strengthening of its involvement and influence with governments, media, non-government organisations and civil society groups on human rights issues.<sup>50</sup> The CHRI's major program areas are the right to information, constitutions, and police and prison reforms.<sup>51</sup>

4.50 RegNet made the point that:

In working with governments on the ground [the CHRI] have managed to achieve quite a lot that the UN has found difficult and indeed, on a bilateral basis, it has been quite difficult to achieve.<sup>52</sup>

4.51 The Commonwealth also provides practical assistance to the region through the Commonwealth Joint Office.<sup>53</sup> The Joint Office in New York assists small nations, including Nauru, Samoa, Solomon Islands and Tuvalu, to participate in United Nations discussions by providing the office as a base for small nations to operate, when having permanent missions would be prohibitive.<sup>54</sup>

#### Asia-Pacific Forum of National Human Rights Institutions

4.52 The APF is seen by many as a de facto mechanism, or at the least the closest thing to a human rights mechanism, covering the Asia-Pacific region. NHRIs, since 2006, have had formal rights to participate directly in

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49 DFAT, *Submission no. 17*, p. 5.

50 CHRI, *Annual Report 2007-2008*, p. 40.

51 Source: <http://www.humanrightsinitiative.org/>, viewed 6 July 2009. Information about CHRI activities are available on its website and in its annual reports. It also produces a biennial report on a specific human rights issue of concern to the Commonwealth.

52 RegNet, *Transcript*, 7 April 2009, p. 55.

53 The Commonwealth Joint Office is funded by a number of Commonwealth countries including Australia, Canada and the United Kingdom.

54 DFAT, *Submission no. 17*, p. 1.

the work of the UN Human Rights Council and its subsidiary mechanisms (see figure 3.2).<sup>55</sup>

4.53 The Asia-Pacific Forum, established in 1996, is a member-based organisation that supports the establishment and strengthening of national human rights institutions in the region. The APF's primary functions are:

- Strengthening the capacity of individual APF member institutions to enable them to more effectively undertake their national mandates.
- Assisting governments and non-government organisations to establish NHRIs in compliance with the Paris Principles.
- Promoting regional cooperation on human rights issues.<sup>56</sup>

Table 4.1 Membership of the Asia-Pacific Forum

Full Members	Full Members	Associate Members <sup>57</sup>	Candidate Members
Afghanistan	New Zealand	Maldives	—
Australia	Palestinian (Independent Commission for Human Rights)	Sri Lanka	
India	Philippines		
Indonesia	Qatar		
Jordan	Republic of Korea		
Malaysia	Thailand		
Mongolia	Timor Leste		
Nepal			

Source APF website<sup>58</sup>

4.54 As listed in Table 4.1, there are currently 15 Paris Principles compliant NHRIs that are members of the APF. Australia and New Zealand both have accredited NHRIs. Other regional members falling within the scope of this inquiry include Indonesia, Korea, Malaysia, the Philippines, Sri Lanka, Thailand and Timor-Leste. However, with the troubled case of the Fiji Human Rights Commission losing its compliance with Paris

55 APF, *Submission no. 21*, p. 10.

56 APF, *Submission no. 21*, p. 13.

57 Associate and Candidate APF membership apply to those that do not currently comply with the Paris Principles.

58 Source: <http://www.asiapacificforum.net/members>, viewed 2 September 2009. Note: Fiji resigned from the APF in 2007.



Principles, there are currently no accredited NHRIs in the Pacific.<sup>59</sup> The APF also anticipate being joined by Bahrain, Bangladesh, Pakistan, Papua New Guinea and Samoa, who have all made a commitment to establish an NHRI.<sup>60</sup>

- 4.55 The APF is funded through a diversified base of donors, including UN agencies, governments, foundations, NGOs, individuals, and from membership fees. The Australian Government provides the APF with approximately 30 per cent of its funding. The Committee noted the APF's advice that:

The Australian Government has supported the work of the APF, both financially with the provision of regular financial support through AusAID and politically through Government statements in a variety of international fora, since its establishment in 1996.<sup>61</sup>

- 4.56 According to APF, it:

...advances human rights in the Asia-Pacific through its member institutions and, by facilitating the formation and growth of NHRIs through the provision of training, networking and resource sharing, plays a key role in developing regional and sub-regional human rights dialogues, networks and practical programmes of support...Its work also includes the development of jurisprudence for the Asia-Pacific through the APF's Advisory Council of Jurists.<sup>62</sup>

- 4.57 It further commented that:

In the absence of a formal inter-governmental Asia-Pacific regional human rights mechanism, the APF, through its member NHRIs, is uniquely positioned to directly influence the development of human rights law and practice in the Asia-Pacific.<sup>63</sup>

- 4.58 A number of submitters agreed that the APF is the closest thing that Asia and the Pacific had to a wider regional rights body. The Castan Centre observed that:

The APF is effectively operating as a surrogate 'regional body', in the absence of a more formal regional system. It is of course a very different 'body' to those that operate in more formal systems, such

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59 Australian Human Rights Commission, *Submission no. 19*, p. 16.

60 APF, *Submission no. 21*, p. 12.

61 APF, *Submission no. 21*, p. 15.

62 APF, *Submission no. 21*, pp. 12-13.

63 APF, *Submission no. 21*, p. 13.

as the American or European Court of Human Rights. It operates in a more informal, grassroots manner. It also covers an idiosyncratic 'Asia-Pacific' area, including for example Afghanistan whilst currently excluding all Pacific islands. However, the formation of a mechanism on the basis of Paris-compliant NHRIs rather than strict geographic concerns is not illogical.<sup>64</sup>

4.59 The APF informed the Committee that it 'already functions, in an informal sense, as the sole existing pan Asia-Pacific human rights mechanism', and is the only existing regional human rights body which includes an Asia-Pacific membership.<sup>65</sup>

4.60 However, the Commission cautioned that while the APF was the only existing regional human rights body with Asia-Pacific membership, '...it is important to recognise that the APF is not a formal intergovernmental body like the regional human rights bodies in Europe, the Americas and Africa'.<sup>66</sup>

4.61 The Castan Centre commented that:

...at the moment [the Asia-Pacific Forum] is very much an informal network of national human rights institutions. They are doing very good work in terms of engagement and fact-finding in investigation, and they are engaging in some very interesting research projects, but they do not really go any further than that. They are not an enforcement body. They are an advocacy body to some extent, but it is very much a federation of national institutions, and the national institutions themselves have very different mandates from one country to another. So it is extremely loose, and it is an extremely good start, but it is a long way short of the version that they have under the Council of Europe or something of that sort.<sup>67</sup>

4.62 The AHRC is currently conducting a three-year study (2008-2010) into the work of the Asia-Pacific Forum, examining its impact on the capacity of NHRIs. Based on its research, the AHRC saw the Asia-Pacific NHRIs network as having made human rights contributions in the region through:

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64 Castan Centre, *Submission no. 10*, p. 8.

65 APF, *Submission no. 21*, p. 4.

66 Australian Human Rights Commission, *Submission no. 19*, p. 16.

67 Castan Centre, *Transcript*, 15 April 2009, p. 14.

- increasing domestic civil society awareness and understanding of human rights via educational and training initiatives;
- increasing the investigation and reporting of complaints of human rights abuses, affording them visibility and the potential for regional and/or international condemnation;
- the development of innovative forms or models of redress appropriate to specific societal or state needs;
- assisting in the implementation of government policies, laws and programs consistent with international human rights treaties;
- the development of regional NHRI, or national human rights institution, networks, which facilitate important transnational collaboration on issues of human rights concern – for example, trafficking and migrant workers; and
- the incremental dissemination of human rights principles and standards into domestic jurisdictions where state governments might have otherwise resisted their reception if instigated by other sources, for example, a United Nations resolution.<sup>68</sup>

4.63 The APF advised that it:

...is currently collaborating with the regional office of the UN Development Program (UNDP) to develop and trial a capacity needs assessment project to support NHRIs in the Asia-Pacific. The project aims to develop an approach that will see NHRIs and UNDP country teams undertake their own needs assessments and then share their ideas in order to identify achievable and sustainable steps to build the capacity of NHRIs. This joint project with the UNDP is seen as an important initiative that will provide a more solid basis for international support for NHRIs and for the institutions themselves to develop and work more effectively.<sup>69</sup>

4.64 The APF indicated that:

...[it] will continue, within available capacity, to respond to requests for assistance and support from a variety of regional stakeholders as Pacific States lead and shape the issues and considerations which must be taken into account in the continuing debate around national and regional mechanisms. As with options

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68 AHRC, *Transcript*, 18 February 2009, pp. 3-4.

69 APF, *Submission no. 21*, p. 14.

for national human rights mechanisms, regional mechanisms can take a variety of forms.<sup>70</sup>

### Pacific Islands Forum

- 4.65 The PIF, originally founded in 1971 as the South Pacific Forum, is a regional economic and political intergovernmental organisation for the Pacific. It is the focal point for cooperation on regional issues. Its membership includes Australia, the Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.
- 4.66 An Eminent Persons Group was appointed by PIF Leaders in 2003. They developed a vision – adopted by PIF the following year – for:
- ...a region of peace, harmony, security and economic prosperity...respected for the quality of its governance, the sustainable management of its resources, the full observance of democratic values and for its defence and promotion of human rights.<sup>71</sup>
- 4.67 The Pacific Plan, subsequently endorsed by the PIF leaders in 2005, and revised in 2007, was to give effect to this vision. It identified 15 strategic objectives to achieve the goals of economic growth, sustainable development, good governance, and security. It included a call for the strengthening of human rights mechanisms within the region. Some direct efforts have been made on fostering dialogue on this issue in the region. For example, a symposium entitled ‘Strategies for the Future: Protecting Human Rights in the Pacific’ was held in April 2008:
- One key outcome of this was the garnering of support for the establishment of a Working Group to carry out further work on the development of a Pacific human rights charter and mechanism, within the scope of the Pacific Plan.<sup>72</sup>
- 4.68 The Commission noted that the PIF secretariat and the APF have been working:
- ...towards establishing the position of a human rights adviser within the PIF structure. According to the APF, this new role will provide the PIF with much-needed human rights capacity and

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70 APF, *Submission no. 21*, p. 29.

71 Quoted by the APF in *Submission no. 21*, p. 25.

72 DFAT, *Submission no. 17*, p. 6.

capability which will benefit member States across the Pacific region.<sup>73</sup>

4.69 The Australia-West Papua Association (Sydney) suggested that:

As a PIF member Australia should be supporting the Forum financially to set up a mechanism to improve the human rights situation in the Pacific region.<sup>74</sup>

#### Pacific Regional Rights Resource Team

4.70 The RRRT is guided by the Pacific Leaders' vision and the Pacific Plan, and strongly advocates for the establishment of a Pacific regional rights mechanism. It provides human rights training, technical support, and policy and advocacy services tailored specifically for the Pacific region; filling the gap when nations and NGO lack capacity in these areas.<sup>75</sup> It works primarily in the Cook Islands, Fiji, Kiribati, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.<sup>76</sup>

4.71 It was originally established in 1995 as a United Kingdom Department of International Development project for women's legal literacy, but has since expanded to more general human rights work, and moved under the umbrella of the Secretariat of the Pacific Community in 2008. Its core support comes from New Zealand's International Aid and Development Agency (NZAID) and the Australian Agency for International Development (AusAID).

4.72 The RRRT described itself as:

...a regional indigenous human rights body, with a dedicated focus on the broad range of civil, political, economic, social and cultural rights, and covers many of the functions of a regional human rights mechanism. However, it does not monitor individual violations of rights nor receive and investigate complaints.<sup>77</sup>

4.73 The RRRT commented that:

...[it] works with Members of Parliament, judges, magistrates, senior decision makers in government, institutions, civil society groups and NGOs. Evaluators of the RRRT project say that RRRT

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73 Australian Human Rights Commission, *Submission no. 19*, p. 17.

74 Australia-West Papua Association (Sydney), *Submission no. 24*, p. 4.

75 RRRT, *Submission no. 13*, p. 8.

76 DFAT, *Submission no. 17*, pp. 7-8.

77 RRRT, *Submission no. 13*, p. 1.

uses a unique combination of persuasive and challenging techniques, and avoids the traditional 'naming, blaming and shaming' methods favoured by most human rights organizations, leading to innovative and successful partnerships with both Governments and NGOs.<sup>78</sup>

### Other organisations

4.74 There are also other organisations whose work influence human rights concerns in the Asia-Pacific region, including multilateral organisations, non government organisations (NGOs), churches, trade unions and civil society groups.

4.75 The Australian Bahá'í Community asserted that:

NGO capacity is an important consideration in considering human rights mechanisms in the Asia-Pacific region.<sup>79</sup>

4.76 The HRLRC agreed that:

NGOs are in a position to witness and advocate for victims of abuses and are also best placed to discern where changes need to be made. If adequately resourced, NGOs can also provide training, convene fora and organise other activities designed to promote a continuing dialogue and developments around human rights.<sup>80</sup>

4.77 The Department of Foreign Affairs and Trade, in its Human Rights Manual, stated:

Concern for human rights and fundamental freedoms is not the reserved domain of States...Given their independence, commitment and diversity, NGOs play a legitimate, well-established and respected role both domestically and internationally in the promotion and protection of human rights...The work of the Australian Government in the human rights field is reinforced by the ongoing relationship which exists between the government and human rights NGOs. While the views and methodologies of NGOs do not always coincide with those of Government, the input which NGOs bring to the domestic and international human rights debate is both legitimate and an important source of positive dialogue.<sup>81</sup>

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78 RRRT, *Submission no. 13*, Annex A, p. 1.

79 Australian Bahá'í Community, *Submission no. 14*, p. 5.

80 HRLRC, *Submission no. 15*, p. 32.

81 Quoted by the Australian Bahá'í Community, *Submission no. 14*, p. 5.

4.78 The Australian Bahá'í Community commented that:

It should also be noted that with very limited resources, human rights NGOs, particularly those working on women's rights, have effectively operated at a regional level in the Asia-Pacific. Two prominent examples are Asia-Pacific Women's Watch and the Asia-Pacific Forum on Women, Law and Development. Increased support for these regional networks of NGOs would enable them to play a greater role.<sup>82</sup>

4.79 The HRLRC noted that NGOs have played an increasingly important role within the UN human rights system, for example through the preparation of shadow reports for treaty bodies, and promoting dialogue between states and independent human rights experts.<sup>83</sup>

4.80 The Australian Bahá'í Community suggested that:

The positive contribution of NGOs applies equally at national, regional and international levels. Additional measures to assist NGOs throughout the Asia-Pacific region to develop their strength and competence, such as training, funding and other forms of capacity building, should be considered in the context of this inquiry.<sup>84</sup>

4.81 HRLRC reproduced and endorsed recommendations of the 1998 report, by the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Improving But...Australia's Regional Dialogue on Human Rights*, including:<sup>85</sup>

Recommendation 6:

The Australian Government should conduct an audit of NGOs doing human rights work in the Pacific and implement policies that strengthen and support these organisations. This may involve, among other things, building on existing programs such as AusAID's Human Rights Fund and the Human Rights Small Grants Scheme. Government policies aimed at promoting human rights in the region should be developed and implemented in partnership with these organisations.<sup>86</sup>

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82 Australian Bahá'í Community, *Submission no. 14*, p. 4.

83 HRLRC, *Submission no. 15*, p. 29.

84 Australian Bahá'í Community, *Submission no. 14*, pp. 5-6.

85 HRLRC, *Submission no. 15*, p. 3. A copy of the report is available on the Committee's website: <http://www.apf.gov.au/house/committee/jfadt/index.htm>.

86 HRLRC, *Submission no. 15*, p. 4.

4.82 However, just as with the smaller nations themselves, NGOs also face the challenge of limited funding. UNIFEM informed that Committee that it was working to help address this issue by:

...trying to assist them to gain funding, UNIFEM has set up what is called the Pacific Facility Fund. That helps NGOs to get their governance requirements to a level where they can apply for and successfully administer grant funding. You all know that DFAT has a human rights grants program at a very small level; even those very small grants entail quite a heavy load of administration and accounting for money spent and quite a level of bureaucracy. UNIFEM is trying to make sure that Pacific NGOs have the capacity to deal with those sorts of governance requirements.<sup>87</sup>

4.83 The Uniting Church informed the Committee that:

Regionally there is the Christian Conference of Asia. It has a very strong focus on human rights and on gender empowerment. It is particularly looking at discrimination against women across the region and how churches both contribute to and can be a part of dealing with those issues. It also has a focus on environmental issues. As churches, we are active participants within that regional forum, the Christian Conference of Asia.<sup>88</sup>

4.84 UNIFEM also noted that:

A lot of the mechanisms in the Pacific, in particular at the civil society level, are arranged around the churches; so the Pacific Council of Churches is a very important organisation. But it is extremely difficult in the Pacific to engage across all the islands and across all the groupings – from Melanesia, Polynesia and Micronesia – in an effective manner, so that is the challenge.<sup>89</sup>

4.85 In his experience of the region, the Uniting Church representative observed that:

In the communities where the church has been strong traditionally, there is a strong yearning for that continuing relationship, but there is a real sense of reluctance in the broader community about the work of the church there. It is seen to be the West having influence there, and we have to be constantly aware of that.

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87 UNIFEM, *Transcript*, 7 April 2009, pp. 3-4.

88 Uniting Church, *Transcript*, 15 April 2009, pp. 34-35.

89 UNIFEM, *Transcript*, 7 April 2009, p. 4.



Having said that, when you look at the church in the Pacific and in Asia, in terms of numbers and the direction in which the church is growing, it is becoming an Asian and a Pacific church. To a certain extent, we have a degree of decline here in Australia. Look at bodies like the Christian Conference of Asia and Pacific Conference of Churches: it is the Asian and the Pacific churches, particularly the Asian and the African churches, that are now dominating the world scene.<sup>90</sup>

4.86 Amnesty commented that:

...there has been a proliferation of NGOs, particularly in the more democratic South-East Asian countries. That is evidence of a developing human rights culture and also, just generally, a culture of a stronger civil society.<sup>91</sup>

4.87 Amnesty emphasised that any mechanism that may emerge in the region should be in cooperation with civil society.<sup>92</sup> The NCYLC, similarly, recognised the importance of civil society groups and recommended that:

By ensuring programmes and initiatives include and are increasingly run by civil society (rather than exclusively by governments and development agencies) the benefits are entrenched and civil society is given legitimacy and made more sustainable.<sup>93</sup>

4.88 Trade unions also have the potential to impact on human rights in the region, particularly in the area of workers' rights. The Australian Council of Trade Unions (ACTU) informed the Committee that it:

...has had long experience in relations with trade unions in countries across the Asia-Pacific and has been involved in various regional and subregional human rights fora. Obviously, taking up the fundamental rights of workers and of trade unions is something that we see as an act of solidarity with colleagues in Asia-Pacific countries, and many of them appreciate the work of unions in countries like Australia, where perhaps labour laws or, indeed, the parliamentary system is more open to considering human rights concerns. For us, certainly regional cooperation across the trade union spectrum is important, but to also see those

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90 Uniting Church, *Transcript*, 15 April 2009, pp. 37-38.

91 Amnesty, *Transcript*, 7 April 2009, p. 14.

92 Amnesty, *Submission no. 26*, p. 4.

93 NCYLC, *Submission no. 25*, p. 10.

issues raised seriously as a part of government policy is very important.<sup>94</sup>

- 4.89 In its evidence, the ACTU advised that trade unions had contributed to the development of the ASEAN Social Charter.<sup>95</sup> The ACTU is also involved in addressing wider human rights issues through Union Aid Aboard - Australian People for Health, Education and Development Abroad (APHEDA), which was created in 1984 as the ACTU's overseas aid agency. The ACTU indicated that APHEDA was also doing work on HIV education:

In many countries in the Pacific the cultural and, indeed, social awareness around HIV is limited or based on traditional concepts of transmission of HIV, so that has provided specific challenges, but in Papua New Guinea, for example, where it is a huge issue – and in a number of other countries where it is seen as an emerging issue – the ACTU, through its overseas aid and development agency, Union Aid Abroad-APHEDA, has been involved in workplace based education programs for many years.<sup>96</sup>

- 4.90 When discussing the work of the International Labour Organisation, the ACTU contended that while the focus is:

...specifically about labour law and improvement of labour law or working conditions in those countries. But as a fundamental human rights issue, we see the capacity of the ILO's work across the region as a very clear mechanism to promote fundamental workers' rights. Indeed, to have the kind of social dialogue where non-government actors including trade unions can have input to the members of parliament and to government institutions and structures is something that we should not take for granted in the region. To ensure both the capacity of those organisations to address human rights issues as a structure but also to fund and resource those kinds of consultations is something that we would encourage, and encourage the Australian government to think about, in the relations with those countries at a government to government level.<sup>97</sup>

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94 ACTU, *Transcript*, 15 April 2009, p. 52.

95 ACTU, *Submission no. 16*, p. 3.

96 ACTU, *Transcript*, 15 April 2009, p. 55.

97 ACTU, *Transcript*, 15 April 2009, pp. 52-53.

4.91 The ACTU also highlighted the value of the NGO sector:

...for raising concerns that might not otherwise be understood in government circles or not necessarily engaged with at a government-to-government level. Through the ACTU, we engage in many NGO consultations, domestically and internationally. We do liaise with the Asia-Pacific Forum of Human Rights Institutions. We do not have a formal role, but we, and indeed other unions in the region, have input into those discussions.<sup>98</sup>

## National mechanisms

4.92 It is also important to have mechanisms for human rights to be upheld and issues addressed at the national level. The APF commented that:

It is the national framework/system for the promotion and protection of human rights which most interrelates, and is accessible to, individuals. The system consists of a variety of mechanisms. The more formal machinery or mechanisms include the judicial system, parliamentary committees, national human rights institutions and/or ombudspersons. The non-formal actors include members of civil society, such as NGOs, active media and concerned individuals. Generally, they act as checks-and-balances to ensure equilibrium in the use of State power and to advocate and/or provide redress where there are grievances in relation to the implementation of human rights. Their roles vary in scope and content – and the quality of their impact varies according to the context in which they live.<sup>99</sup>

4.93 The UN consider the key features of human rights protection at the national level to be:

- Democracy: democratic institutions and processes that enable participation;
- The rule of law: including the incorporation of international human rights standards in the national constitution and laws;
- An independent and corruption-free judiciary that applies international human rights standards and jurisprudence;

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98 ACTU, *Transcript*, 15 April 2009, p. 57.

99 APF, *Submission no. 21*, p. 8.

- Good governance: effective structures of government at central, regional and local levels that recognise, respect and apply human rights standards;
- Specialised human rights institutions and formal procedures for accountability;
- Human rights information and education;
- An active civil society: i.e. citizens that engage, organise and participate; [and]
- A focus on the most vulnerable parts of the population.<sup>100</sup>

## Constitutional protections

4.94 One avenue for human rights protection at the national level is to have human rights and fundamental freedoms enshrined in a constitution. However, evidence to the Committee suggests that constitutional provisions for human rights protection are not necessarily reflected in the day-to-day reality of nation states.

4.95 Many Pacific nations already have some human rights reflected in their constitutions or legal frameworks. However, the HRLRC questioned the effectiveness of existing provisions:

When I have been speaking to people, I have heard that these legal frameworks, like the human rights within constitutions and national laws, are not necessarily helpful for a lot of people within the Pacific who do not access the centralised government based legal systems. Instead, they solve most of their day-to-day issues and problems under the customary laws or via the chieftains within the villages.<sup>101</sup>

4.96 The HRLRC further commented that:

...high-level legal frameworks might not be the best way to promote human rights in these societies. It suggests to me that it has to be something that is more around, or at least supplemented by, very strong education programs and those sorts of things.<sup>102</sup>

4.97 The Commission observed that most of the Pacific constitutions only guaranteed civil and political rights and did not address economic, social and cultural rights.<sup>103</sup>

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100 APF, *Submission no. 21*, p. 9.

101 HRLRC, *Transcript*, 15 April 2009, p. 25.

102 HRLRC, *Transcript*, 15 April 2009, p. 27.

103 Australian Human Rights Commission, *Submission no. 19*, p. 19.

- 4.98 In particular, the Fijian Constitution includes ‘recognition of the human rights and fundamental freedoms of all individuals and groups, safeguarded by adherence to the rule of law, and our respect for human dignity’ and section 42 provides for the establishment of Fiji’s Human Rights Commission.<sup>104</sup>
- 4.99 However, given the current state of affairs in Fiji, this is a clear example that constitutional provisions offer no guarantees that democratic principles and human rights standards will be adhered to. In April 2009, the Fijian President suspended the Constitution of Fiji, dismissed all judges and constitutional appointees and assumed governance of the country.<sup>105</sup> A new reformed constitution is anticipated in 2013 and an election is not expected until 2014.
- 4.100 The Vietnam Committee on Human Rights raised the case of Vietnam. While the Constitution ‘formally guarantees human rights such as freedom of expression, religion, assembly and association’, in practice the exercise of these freedoms are restricted by conditioning them on compliance with state policies and interests:
- Article 70 states that “All citizens shall enjoy freedom of belief and religion”, but that “no-one can misuse beliefs and religions to contravene the laws and State policies”. Since State policies are established and enforced by the one-Party State which has extensive control over the executive, legislative and judiciary powers, these provisions gravely limit the scope and exercise of human rights.<sup>106</sup>

## Ombudsman offices

- 4.101 The primary focus of an Ombudsman’s office is to investigate cases of administrative misconduct; addressing individual grievances and working to improve administrative practice. However, concerns about the difficulties of establishing national human rights commissions, have prompted the suggestion that the role of other domestic bodies, such as Ombudsman offices, could be enhanced to take on a great role in promoting and protecting human rights at the national level.<sup>107</sup>

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104 Source: [http://www.servat.unibe.ch/icl/fj00000\\_.html](http://www.servat.unibe.ch/icl/fj00000_.html), viewed 3 September 2009.

105 Source: <http://www.theaustralian.news.com.au/story/0,24897,25316239-601,00.html>, viewed 3 September 2009.

106 Vietnam Committee on Human Rights, *Submission no. 32*, p. 1.

107 Australian Human Rights Commission, *Submission no. 19*, p. 22.

4.102 In their submission to the Committee, some Pacific NGOs were adamant that Ombudsman offices:

...are not expected nor equipped to perform the broader roles envisaged for a human rights commission, such as public education about human rights, assisting courts or parties in litigation involving human rights issues, or assisting governments with their reporting or implementation obligations under human rights Conventions.<sup>108</sup>

4.103 In particular, Amnesty disagreed with including human rights commission functions within the Pacific Ombudsman Network:

...because we see the Ombudsman as playing quite a different function to a Human Rights Commission. There is no reason that the two functions could not be co-located to provide resource savings, but we think there are serious issues with trying to merge the two functions.<sup>109</sup>

4.104 So while they perform functions contributing to the protection of human rights, Ombudsman offices may not be ideal substitutes for human rights institutions at the national level.

## National Human Rights Institutions

4.105 NHRIs are bodies that have been established by a State – either by legislation or constitutional provision – with a specific mandate to promote and protect human rights. National human rights systems complement regional and international systems.

4.106 The Paris Principles set out the minimum standards that an NHRI must meet in order to be effective in its role. They came out of the first NHRIs conference held in Paris in October 1991, and were adopted by the UN General Assembly in December 1993. NHRIs must have:

- a clearly defined and broad-based mandate, based on universal human rights standards;
- independence guaranteed by legislation or the constitution;
- autonomy from government;
- pluralism, including membership that broadly reflects the society the institution serves;

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108 FWRM, FWCC and CCF, *Submission no. 33*, p. 2.

109 Amnesty, *Transcript*, 7 April 2009, p. 11.

- adequate powers of investigation; and
  - sufficient resources.<sup>110</sup>
- 4.107 A complaints function – to hear complaints about human rights breaches – is a feature of some NHRIs. However, this is not a requirement under the Paris Principles.<sup>111</sup> NHRIs may take various forms, but their functions generally include:
- reviewing national laws, policies and programmes to ensure that they are consistent with human rights standards;
  - monitoring a States’ compliance with its own laws and with international human rights standards and recommending changes when necessary;
  - education: raising community awareness and understanding of human rights issues; and
  - complaints handling: receiving, investigating and/or mediating complaints of discrimination or human rights abuses.<sup>112</sup>
- 4.108 First established in the 1970s, there are now approximately 90 NHRIs in operation around the world. However, only around two-thirds of these are accredited as compliant with the Paris Principles.<sup>113</sup>
- 4.109 The International Coordinating Committee for the Promotion and Protection of Human Rights administer the Paris Principles and the accreditation of NHRIs. The Committee noted the Commission’s advice that:
- Over the last three years the accreditation process has undergone reform and now rigorously applies a body of principles recorded in the General Comments developed by the [International Coordinating Committee] Sub-Committee on Accreditation.
- All accredited NHRIs are presently going through the process of re-accreditation which applies these principles and will in future be required to go through a re-accreditation process every five years.<sup>114</sup>

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110 APF, *Submission no. 21*, p. 10.

111 Australian Human Rights Commission, *Submission no. 19*, p. 7.

112 APF, *Submission no. 21*, pp. 9-10.

113 APF, *Submission no. 21*, p. 9. A current list of NHRIs globally is available at: <http://www.nhri.net/NationalDataList.asp?MODE=1&ID=5>, viewed 3 September 2009.

114 Australian Human Rights Commission, *Submission no. 19*, pp. 6-7.

4.110 The APF observed that:

Models of NHRIs vary and the characteristics of a particular NHRI will, to some extent, reflect the political system of the State, its domestic legal system and cultural setting. In practice, all are 'administrative' bodies – that is, they do not have the power to 'make' laws or 'enforce' laws. NHRIs operate independently from government...[but the] degree of independence which each NHRI enjoys will depend on a range of factors, including its legal framework, its membership and its financial resources.<sup>115</sup>

### Advantages of NHRIs

4.111 The UN human rights system recognises the positive roles that NHRIs can play in the promotion and protection of human rights. As well as acknowledging the importance of regional and subregional mechanisms, the 1993 *Vienna Declaration and Programme of Action* encourages the establishment and strengthening of NHRIs.

4.112 The Commission contended that:

...establishing NHRIs in Pacific Island countries is the most effective way of enhancing human rights protection for people living in the Pacific.<sup>116</sup>

4.113 The Commission suggested that NHRIs have significant benefits and privileges that other domestic bodies working on human rights lack, such as:

- status within the community;
- capacity to act as an official body to receive and remedy individual complaints;
- ability to provide legal assistance in human rights matters to disadvantages persons;
- power to pursue systemic responses to human rights issues;
- access to expert technical assistance from OHCHR and regional networks;
- participation in the UN Human Rights Council; and

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115 APF, *Submission no. 21*, p. 9.

116 Australian Human Rights Commission, *Submission no. 19*, p. 22.



- expertise in international human rights law.<sup>117</sup>
- 4.114 ASEAN has endorsed the need to develop NHRIs. The APF noted that the conclusions of the 7<sup>th</sup> Workshop on the ASEAN Region Mechanism on Human Rights highlighted the need:
- For ASEAN member countries that have not already done so to establish NHRIs;
  - To involve/consult with NHRIs in the development and operation of the ASEAN human rights body; and
  - For a more formal dialogue between ASEAN and ASEAN NHRIs.<sup>118</sup>
- 4.115 The High Level Panel on the establishment of the ASEAN human rights body in August 2009 acknowledged that the success and effectiveness of the new body would 'depend on the relationships it established with NHRIs, civil society groups and other stakeholders'.<sup>119</sup>
- 4.116 The Castan Centre encouraged the development of NHRIs and commented that:
- The development of such bodies at a local level is arguably a necessary prerequisite to a regional mechanism.<sup>120</sup>
- 4.117 The APF noted that in Asia:
- ...the four existing ASEAN NHRIs continue to play a role not only in the possible establishment of other NHRIs in the region but also, and significantly, have provided a crucial 'building block' – and a critical mass of capability and capacity – to enable progression of the debate around a sub-regional mechanism.<sup>121</sup>
- 4.118 Along similar lines, the RRRT commented:
- There are two potential models for the way forward. The first is setting up a national human rights commission in each PICT, and the second, is a regional human rights mechanism. Both ought to be explored.

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117 Australian Human Rights Commission, *Submission no. 19*, pp. 22-23.

118 APF, *Submission no. 21*, p. 21.

119 APF website: <http://www.asiapacificforum.net/news/asean-nhris-call-for-engagement-with-regional-rights-body.html>, viewed 1 October 2009.

120 Castan Centre, *Submission no. 10*, p. 7.

121 APF, *Submission no. 21*, p. 28.

We do not see the two models as mutually exclusive but rather that the establishment of one promotes advancement of the other; both are mutually reinforcing.<sup>122</sup>

4.119 The APF agreed that:

Under ideal circumstances, both are desirable and – with the possible exception of very small Pacific States – both may be attainable over time.<sup>123</sup>

### Concerns about NHRIs

4.120 While the Uniting Church acknowledged that NHRIs offer an independent check on the human rights performance of government, it noted that ‘the performance of such bodies within the Asia-Pacific region is mixed’.<sup>124</sup> For example:

In the case of Sri Lanka, the submitting bodies are concerned that the Government of Sri Lanka has undermined the independence of the Human Rights Commission by the President making appointments directly onto the Commission, rendering the body weak and ineffective as a check on gross human rights abuses committed by members of the security forces and paramilitary groups aligned to the security forces.<sup>125</sup>

4.121 However, there are concerns that complying with the Paris Principles can be too onerous for many states, especially smaller nations that are still developing. In particular, the requirements for it to be sufficiently resourced and for independence from government are challenges. For example, groups have expressed their concerns that the ‘independence and efficacy [of NHRIs] in many countries has been seriously challenged’.<sup>126</sup>

4.122 Establishing and maintaining NHRIs are challenges for many of the smaller countries in the region. In the Pacific in particular:

It is difficult for countries like Tuvalu (pop 9561), Tokelau (pop 1466), Niue (pop 1679), Cook Islands (pop 11,900) or even Tonga (pop 97,784) to fully comply with [the minimum standards of the Paris Principles]...

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122 RRRT, *Submission no. 13*, pp. 4-5.

123 APF, *Submission no. 21*, p. 28.

124 Uniting Church, *Submission no. 20*, p. 3.

125 Uniting Church, *Submission no. 20*, p. 23.

126 Amnesty, *Submission no. 26*, p. 2.

The problem of resource constraints faced by most Pacific Island countries will mean that the Paris Principles relating to the status of national human rights institutions will be hard to meet. One of the Principles requires national institutions to have adequate funding for its staff and premises so that it is independent of government control. The publication of the Pacific Islands Forum Secretariat (PIFS) and the NZ Human Rights Commission, *Pacific Pathways*, recognises these difficulties and acknowledges that PICTs may need to give their “own unique expression to the international standards (the Paris Principles) for NHRIs.” Not all Pacific countries will be able to satisfy these excellent criteria. A regional commission on the other hand will have increased autonomy, more distance from government and so better be able to satisfy the Paris Principles.<sup>127</sup>

4.123 The AHRC stressed that:

The establishment of an NHRI and its compliance with the *Paris Principles* does not provide a panacea for the human rights problems that any country faces; nor do all NHRIs, even those formally in compliance, necessarily show the level of independence and vigour that might be desirable. The effectiveness and impact of a NHRI is the result of many factors, including not just the efforts of the NHRI’s members and staff, but also of the government’s attitude to human rights and the NHRI and the broader political and social context. Furthermore, a NHRI is generally just one of a number of actors which contribute to the observance of human rights in any country – parliaments, courts, ombudsmen and similar offices, the media, and civil society organisations are all necessary components of an effective system for the protection of human rights.<sup>128</sup>

4.124 To address some of the resource and capacity constraints, the Commission recommended:

That a ‘building blocks’ approach to the development of NHRIs in Pacific States be adopted, gradually increasing the role and functions of the NHRI as resources and capacity become available. This approach should include education and awareness-raising

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127 RRRT, *Submission no. 13*, p. 17.

128 AHRC, *Submission no. 4*, p. 12.

programs on the meaning of human rights and their interaction with custom.<sup>129</sup>

4.125 The Committee also noted the HRLRC's advice that:

...it may not be appropriate for each Pacific Island country to have its own NHRI...The Australian Government should be sensitive to context and capacity when developing its policy on NHRIs in the Pacific.<sup>130</sup>

### Australian Human Rights Commission

4.126 As an accredited NHRI and APF member, the Commission:

...undertakes an international education and training role, with a specific focus on the Asia-Pacific region. This work builds the capacity and experience of the Commission in promoting and raising awareness about human rights, which enhances its domestic activities in this area.<sup>131</sup>

4.127 The Commission's core budget is devoted to fulfilling its domestic mandate and so must source funding for human rights activities in the region from external sources.

4.128 A significant area of achievement for the Commission has been in providing technical assistance. The Human Rights Technical Cooperation Program (HRTC) came out of the Australian Government's human rights dialogue with China, and is provided through AusAID, which has entered into a Record of Understanding with the Commission to manage the overall implementation of this program.<sup>132</sup>

4.129 The Commission commented that:

...[it] has engaged with some of the most authoritarian regimes in the region, and in the area of technical cooperation has developed a management style and process that sustains human rights engagement. The engagement with China is the most substantial illustration of this. Australia, through the Australian Human Rights Commission, is the only nation that has been able to sustain a government-to-government program that deals specifically with human rights in China. While other governments have programs

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129 Australian Human Rights Commission, *Submission no. 19*, p. 4.

130 HRLRC, *Submission no. 15*, p. 31.

131 Australian Human Rights Commission, *Submission no. 19*, p. 13.

132 Australian Human Rights Commission, (Supplementary) *Submission no. 27*, p. 3.

with China in broader governance related areas, Australia's is the only bilateral program with an explicit human rights focus. The success and longevity of the program reflects its non-confrontational management style, the emphasis on building of relationships, and the program's alignment with the priorities of the partner government.<sup>133</sup>

4.130 The Commission's recent participation in the region to enhance human rights mechanism in the Pacific has included:

- attending the Strategies for the Future: Protecting Rights in the Pacific Conference in Samoa, April 2008;
- presenting at the Australasian Law Reform Agencies Conference on the Potential Role of National Human Rights Institutions in the Pacific in Vanuatu, September 2008;
- participating in the Pacific Disability Forum's Council Meeting and National Women with Disabilities Forum in Samoa;
- conducting training, on behalf of the APF, on Convention on the Rights of Persons with Disabilities and advocacy to government, and a workshop on the international framework protecting the rights of women with disability; and
- participating in regional Pacific networks among Indigenous peoples, such as in preparation for the UN Permanent Forum on Indigenous Issues.<sup>134</sup>

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133 Australian Human Rights Commission, *Submission no. 19*, p. 29.

134 Australian Human Rights Commission, *Submission no. 19*, p. 15.

