

香港人權監察

HONG KONG HUMAN RIGHTS MONITOR

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SUBMISSION TO THE PANEL ON HOME AFFAIRS

SUMMARY

A PROJECT ON THE ESTABLISHMENT OF A HUMAN RIGHTS COMMISSION IN HONG KONG

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Introduction

1. *National Human Rights Institutions* (NHRIs) are independent bodies that promote and monitor the state's implementation of and compliance with its international obligations of human rights protection. They are normally responsible for dealing with human rights complaints lodged by the public, making recommendations to government, promoting conformity of national laws and practices with international standards, conducting inquiries into human rights violations, and publicizing human rights in the community.
2. *The Paris Principles*, released by the Geneva Centre for Human Rights in 1991, and subsequently endorsed by the 1992 Commission on Human Rights and the 1993 Vienna Conference, set forth the basic standards of competence, responsibility, composition, and mode of operation for NHRIs.¹²
3. In 1993, the Vienna Declaration affirmed *the constructive and important role* of NHRIs for the promotion and protection of human rights.³ According to the Paris

¹ "The Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights" (1991), General Assembly resolution 48/134, Annex, available at

<http://www.ohchr.org/english/law/parisprinciples.htm> [hereinafter the Paris Principles].

² Vienna Declaration and Programme of Action, United Nations World Conference on Human Rights, UN GAOR, UN (Doc. A/CONF157/23(1993)), Article 36.

³ Id.

Principles No.3, a NHRI serves an important function in enforcing and promoting human rights protection by:

- (a) Advising the Government, Parliament and any other competent body on the compatibility of any (i) legislative or administrative provisions; (ii) public policy with international human rights treaties; and (iii) the preparation of reports on human rights issues;
- (b) Ensuring effective implementation of international human rights instruments signed by the state;
- (c) Encouraging ratification of international human rights treaties and their implementation;
- (d) Contributing to the State's reports to UN bodies;
- (e) Cooperating with the UN, and the regional and national human rights institutions of other countries;
- (f) Assisting in the formulation of human rights education and research programmes;
- (g) Publicizing human rights and increasing public awareness of human rights and efforts to combat all discrimination.

4. The objectives of this report are:

- (a) To examine the effectiveness of the existing framework of human rights promotion and protection in Hong Kong;
- (b) To inform the Legislative Council, the Government, and the public about the functions of NHRIs and the international standards, *inter alia*, the Paris Principles adopted by the United Nations, to assess the effectiveness of NHRIs;
- (c) To generate public discussion about the loopholes of and possible improvements to the existing framework.

5. The Structure of the Report:

- (a) Chapter I: the justifications of the imminent need for the establishment of a Human Rights Commission in Hong Kong (HKHRC)
- (b) Chapter II: the appropriate functions and corresponding powers of the HKHRC
- (c) Chapter III: enhancement of the effectiveness and efficiency of the HKHRC
- (d) Chapter IV: the best framework for human rights protection in the context of Hong Kong

(e) Chapter V: internal structure and division of work of the HKHRC

(f) Chapter VI: the alternatives to the establishment of the HKHRC

6. The debate on the establishment of a human rights commission first appeared during the legislation of the Bills of Rights Ordinance (BORO) in early 1990s. During the following decade, some legislators and various NGOs urged for the establishment of a human rights commission several times but to no avail. UN human rights treaty bodies have also repeatedly urged the Government to set up a human rights commission. Instead, the Government created the Equal Opportunities Commission (EOC) to mediate discrimination, but only on limited grounds. The Government has not agreed to set up a commission so far.
7. Significant events in the debate on the establishment of a human rights commission and its substitute body, the EOC, are summarized in the Appendix.

Chapter I: The Case for a Human Rights Commission in Hong Kong

8. According to the HKSAR Government, the implementation of international human rights treaties in Hong Kong are currently monitored through the United Nations reporting process, legislative actions, judicial reviews, and various specialized bodies including the Equal Opportunities Commission (EOC), the Office of the Privacy Commissioner for Personal Data (PCO), the Ombudsman and the Complaints Against Police Office (CAPO).⁴

9. *United Nations reporting process*

- (a) The UN subcommittee hearings, which take place every 5 years with part-time commissioners, are inadequate. These hearings cannot ensure the full implementation of international human treaties, and not all human rights violations are of a magnitude that attracts international attention.
- (b) As Dr. Ramcharan, the UN Deputy High Commissioner for Human Rights, states, “the UN and the international community are there to bring the states of the world and the international human rights movement together, but they will never replace protection within countries”.⁵

10. *The Legislative Actions*

- (a) The Legislative Council conducts an examination of the compatibility of a bill on table with the BORO during the first and second debates of the bill. But this examination is dictated by political considerations, and human rights have not been given the weight they deserve.
- (b) Responding to the continuous calls for enhancing human rights protection, the Panel of Home Affairs of the Legislative Council once discussed whether a

⁴ *Legislative Council*, “Implementation of International Human Rights Treaties: Monitoring Mechanisms,” LegCo paper No. CB(2)1957/02-03(03).

⁵ Dr. Bertrand Ramcharan, “For effective national protection systems, Statement on the International Launch of Article 2,” *Asian Legal Resource Centre (ed.)*, (April 2002) Vol. 1, No. 2 at 9.

working group mandated to regularly assess the Government's progress in implementing recommendations of the UN committees should be set up. This suggestion was rejected in the Panel's meeting in May 2003.⁶

11. ***The Independence of Judiciary***

*Ng Ka Ling v. Director of Immigration*⁷ is the first case that referred to the NPCSC for re-interpretation of the Basic Law after the CFA had handed down its judgment. The HKSAR Government's assertion that the Standing Committee has the power to interpret the Basic Law without, before, during or after a court case severely threatens the rule of law in Hong Kong.

- (a) Litigation involves substantial amount of legal cost and delay which is unaffordable to ordinary citizens. As such, most victims of human rights violation will leave their complaints private.

12. ***The Array of Specialized Bodies***

- (a) According to the Paris Principles, NHRIs shall be independent⁸ and given "as broad a mandate as possible."⁹
- (b) It is submitted that the specialized bodies currently in force in Hong Kong cannot provide complete protection of the human rights enshrined under the Basic Law, the ICCPR and the ICESCR. Moreover, the independence and pluralism of these government watchdogs have been called into question by ? . Do you need the previous sentence? The existing institutional framework cannot satisfy the requirements of the Paris Principles.
- (c) In sum, the jurisdictional restrictions and defects in the appointment system have severely hampered the effectiveness of the specialized bodies in the promotion and protection in human rights.

13. **The Equal Opportunities Commission (EOC):**

- (a) Limited jurisdiction: The EOC can only enforce the Sex Discrimination Ordinance (Cap 480), the Disability Discrimination Ordinance (Cap 487), the Family Status Discrimination Ordinance (Cap 527), and the forthcoming Racial Discrimination Ordinance.
- (b) Appointment scandals: Whether the degree of independence of existing specialized commissions in Hong Kong complies with the Paris Principles is questionable. The government's refusal to reappoint Ms. Anna Wu, who was perceived as an assertive figure in promoting equality, for a second three-year term in 2003 has been widely regarded as an attempt to play down the

⁶ Background brief prepared by Legislative Council Secretariat" at 5.

⁷ *Ng Ka Ling v. Director of Immigration* [1999] 1 HKLRD 577.

⁸ Id, Article C.

⁹ The Paris Principles, Article A(2).

activism of the EOC.¹⁰ It was suspected that the relationship between the Government and Anna Wu spoiled as a result of the EOC's remarkable success in the litigation against the Education Department on the issue whether the allocation system of secondary school was discriminatory to girls.¹¹ Instead of Ms. Anna Wu, the Government later appointed Mr. Michael Wong, a retired judge from the Court of Appeal as the Commissioner despite his lack of experience in the equality issues.

- (c) The subsequent scandals have attracted widespread criticism of deliberate Government undermining of EOC's independence and of the policy of only appointing persons who are closely linked to the Government.¹²

14. **The Office of the Ombudsman**

- (a) Limited jurisdiction: The Ombudsman in Hong Kong is primarily mandated to handle cases of poor or improper administration in the bureaus, department, and non-departmental public bodies specified in Schedule 1 of the Ombudsman Ordinance (Cap 397).¹³ Conventionally, pure government's policies *per se* are outside the Ombudsman's jurisdiction. The Ombudsmen, Ms. Alice Tai Yuen Ying, claims that her Office makes comments and offers suggestions if the policies under investigation are considered to be outdated or inequitable.¹⁴ Nevertheless, no institution guarantees that the Ombudsmen must take international human rights treaties into consideration. That policy thereby varies with different Ombudsmen. Most importantly, unless after substantial reforms, the function of the Ombudsman is not for review government policy from a human rights perspective.
- (b) The protection of the independence of Ombudsmen was called into question after non-reappointment of Mr. Andrew So in 1998. Mr. Andrew So, who had actively pursued a human rights perspective and had publicly expressed his wish to remain in office, was not renewed as the Ombudsman despite considerable public support for his renewal. It was widely reported that the Government was unhappy with Mr. So's vigorous investigation into government maladministration and his attempts to expand the Ombudsman into a broad-based human rights body.¹⁵

15. **The Office of the Privacy Commissioner for Personal Data (PCO)**

¹⁰ Carole. J. Petersen, "The Paris Principles and Human Rights Institutions: Is Hong Kong Slipping Further Away from the Mark?" (2003) 33 *Hong Kong Law Journal* 513 at 516-7.

¹¹ *Equal Opportunities Commission v Director of Education* [2001] 3 HKLRD 690.

¹² Ravina Shamdasani, "Watchdog faces pressure to resign: Firing breached human rights treaties, says academic", *South China Morning Post* (24 Oct 2003), C3.

¹³ Ombudsman Ordinance, Section 7(1)(a).

¹⁴ Alice Tai Yuen Ying, "Letter to Hong Kong Human Rights Monitor" (OMB/CR/31_V, 9 January 2007), at 1.

¹⁵ Gren Manuel, "A New Watchdog in the Jungle," *South China Morning Post* (27 December 1998).

- (a) Limited jurisdiction: The mandate of the PCO is severely limited by the Personal Data (Privacy) Ordinance (Cap 486).¹⁶ It does not provide any conciliation measures, legal advice or legal aid. Nor does it have powers to bring legal proceedings.
- (b) The recent leakage of the complainants' personal information via the Internet by the IPCC showed that the PCO is not effective in improving the data protection function of the Government, public bodies, or the civil services in cyber space.
- (c) Budgetary constraint since 2003: Net cash flow for the operating activities of the PCO has been reduced from HKD \$3,231,478 in 2003, HKD \$3,170,642 in 2004 to HKD \$2,602,341 in 2005.¹⁷ This amounts to a 24.2% decrease in the operational budget, meaning that the Commission was unable to pursue certain strategies and areas of concern.

16. The Police Complaints Mechanism

- (a) The Complaints Against Police Office (CAPO) is not independent from the Police Force.
- (b) The Independent Police Complaints Council (IPCC) is not a statutory body. It has no power to investigate complaints against the police or to impose penalty.

17. The Commissioner for Covert Surveillance

- (a) The Commissioner for covert surveillance has insufficient power to punish unlawful covert surveillance. He can only "submit reports to the Chief Executive and make recommendations to the Secretary for Security and heads of departments in case of non-compliance."¹⁸
- (b) There is criticism that the first covert surveillance commissioner, Justice Woo Kwok-hing, is not as independent as he appears to be, given his long term appointment as the head of the Electoral Affairs Commission.¹⁹ At this stage, whether Justice Woo will protect the right to privacy in a just and proactive manner remains to be seen.

¹⁶ The PDPO has a limited remit cannot effectively protect the right to privacy enshrined under the Basic Law and ICCPR.

¹⁷ *The Office of Privacy Commissioner for Personal Data, Hong Kong*, "Annual Report 2002-2003," available at <http://www.pcpd.org.hk/english/publications/annualreport2002.html> at 68; *The Office of Privacy Commissioner for Personal Data, Hong Kong*, "Annual Report 2003-2004," available at <http://www.pcpd.org.hk/english/publications/annualreport2004.html> at 63; *The Office of Privacy Commissioner for Personal Data, Hong Kong*, "Annual Report 2004-2005," available at <http://www.pcpd.org.hk/english/publications/annualreport2005.html> at 79.

¹⁸ *Id.*, Section 40(b)(iv).

¹⁹ Stephen Vines, "Watching the Watchers," *The Standard* (11 August 2006), available at [http://hk-
imail.singtao.com/news_detail.asp?we_cat=5&art_id=24805&sid=9264402&con_type=1&d_str=20060811](http://hk-
imail.singtao.com/news_detail.asp?we_cat=5&art_id=24805&sid=9264402&con_type=1&d_str=20060811)

18. **Overall, there is no public body with overall responsibility for the strategic enforcement of human rights law in Hong Kong.**
19. It is argued that:

“None of these bodies, however, focuses on all the related aspects of human rights. The current approach, instead, splits up the human rights problem and distributes it across a variety of organizations, none of which is dedicated to human rights issues as its principal concern. Thus, complaints handling is served from education about human rights. Continuing this fragmented approach would also slow down the development of standards, policy, and solutions. Protection of human rights should not be a peripheral or a fragmented exercise.”²⁰
20. A human rights commission would not duplicate the function of the judiciary. An independent judiciary and NHRIs in fact supplement and strengthen the roles of each other without unwarranted duplication. The cost and delay of litigation can effectively deter the victims from filing a case to the court. On the other hand, NHRIs can provide easy, friendly and inexpensive access to justice for victims of human rights violations.
21. NHRIs contribute to the development of good governance, foster a culture of human rights²¹, and promote the values of transparency and government accountability. Publicizing human rights abuses can generate public pressure on the government and private individuals to comply with international human rights norms. Human rights educational programmes have a far-reaching impact on human right protection in the long run.
22. The establishment of NHRIs would satisfy HK’s obligation to implement the international human rights instruments which are applicable in HK. Various UN committees have been calling for at least 9 times for the establishment of the HKHRC.

Chapter II: The Functions and Power of the entire framework for human rights promotion and protection

23. Jurisdiction: “human rights” should be defined with reference to the following six UN human rights treaties which currently apply to the HKSAR, including: -
 - (a) The International Covenant on Economic, Social and Cultural Rights;
 - (b) The International Covenant on Civil and Political Rights;

²⁰ Anna Wu, “Why Hong Kong Should Have an Equal Opportunities Legislation and a Human Rights Commission,” *Human Rights and Chinese Values-- Legal, Philosophical and Political Perspectives*, Michael C. Davis (ed.) at 198.

²¹ The United Nations Economic and Social Commission for Asia and the Pacific identified eight major characteristics of good governance: participation, rule of law, transparency, responsiveness, consensus-oriented, equity and inclusiveness, effectiveness and efficiency, and accountability.

- (c) The International Convention on the Elimination of All Forms of Racial Discrimination;
- (d) The Convention on the Elimination of All Forms of Discrimination against Women;
- (e) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and
- (f) The Convention on the Rights of the Child.

and other domestic legislation, including:-

- (g) The Hong Kong Bills of Rights Ordinance;
- (h) The anti-discrimination ordinances²² and
- (i) Any other legislation having incorporated any of the above international human rights treaties.

** Such jurisdiction should be applicable to the functions in relation to promotion and education of human rights and advising and assisting the Government.

24. The institutional framework for promotion and protection of human rights in Hong Kong [hereinafter the institutional framework] should be capable of investigating both the complaints against the public authorities and against the private individuals²³; and handling complaints and conducting investigations against all the law enforcement agencies in the absence of other independent commissions monitoring those agencies.

25. **The Functions of the HKHRC:**

(a) *Promoting awareness and educating about human rights*

- i. To undertake research;
- ii. To work with the media and identify areas of concerns which would benefit from media involvement;
- iii. To actively organize promotional events and encourage community initiatives;
- iv. To advocate for education programmes at primary, secondary and tertiary levels;

²² Including the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, and the Family Status Discrimination Ordinance and potentially the Race Discrimination Ordinance.

²³ *International Council on Human Rights Policy and the Office of the United Nations High Commissioner for Human Rights*, "Assessing the Effectiveness of National Human Rights Institutions," (Switzerland: 2005) ISBN 2-940259-67-4 at 19 [herein after Assessing the Effectiveness of NHRIs]; Commonwealth Secretariat, "National Human Rights Institutions: Best Practice," (London: 2001) at 18 [hereinafter Best Practice].

- v. To press all governmental departments to introduce human rights training for staff and provide human rights training courses for government officials;

(b) *Advising and assisting the Government*

- i. To comment on (i) legislation proposals with respect to their compliance with international and domestic human rights obligations and their implications for human rights,²⁴ (ii) the inadequacies and defects of existing legislation and to report to the relevant government agencies or the legislature²⁵ and assist in the drafting new legislation²⁶;
- ii. To provide advice on national policies²⁷, administrative regulations and practices²⁸, national policies to international human rights issues²⁹ and judicial processes³⁰ with potential human rights implications;
- iii. To call for acceptance and application of international treaties³¹ and incorporation of international treaties to which Hong Kong is a party into domestic laws and practices;³²
- iv. To comment on human rights violations in the private sectors³³ and the development of national action plan on human rights³⁴;
- v. To assist the HKSAR Government in the course of preparing scheduled reports to the United Nations and to comment on the report in public.

(c) *Investigating human rights violation and handling complaints*

- i. To handle complaints where the alleged violation falls within the remit of the six major applicable international treaties, the BORO, the antidiscrimination ordinances and any other legislation with reference to the Basic Law. The complaint-handling function of the institutional

²⁴ *Office of the High Commissioner for Human Rights*, “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 (Geneva: United Nations, 1995), paragraph 195 [Hereinafter the Handbook].

²⁵ *Id.*, paragraph 196.

²⁶ *Id.*, paragraph 197.

²⁷ *Id.*, paragraph 200.

²⁸ *Id.*, paragraph 204.

²⁹ *Id.*, paragraph 206.

³⁰ *Id.*, paragraph 205.

³¹ *Id.*, paragraph 209.

³² *Id.*, paragraph 210.

³³ *Id.*, paragraph 203.

³⁴ *Id.*, paragraph 215.

framework for protecting human rights in Hong Kong should not be restricted to discrimination cases only.

26. The Powers of the HKHRC:

- (a) The power to visit and to inspect places;
- (b) The power of inquiry (the power of the NHRIs to compel any person or any organization to answer questions regarding compliance with domestic or international human rights requirements either in writing or in person);
- (c) The power to conduct investigation upon receipt of complaints and investigations *suo moto* (power to pursue the subject of inquiry on its own initiative);
- (d) The power to compel evidence;
- (e) The power to impose financial administration sanctions for non-cooperation
- (f) The power to protect witnesses;
- (g) The power to conduct mediation and conciliation;
- (h) The power to make determinations and enforce order (for human rights violations of the Basic Law, ICCPR, the BORO, anti-discrimination ordinances and other kinds of legislation with reference to the ICCPR or the ICESCR);
- (i) The power to provide direct legal advice and assistance in strategic cases;
- (j) The power to bring cases in its own name;
- (k) The power to intervene in legal proceeding as *amicus curiae*, a “friend of the court”.

Chapter III. Enhancing the effectiveness of the entire framework of human rights protection

27. According to the *Handbook*, an elaboration of the Paris Principle to facilitate the its implementation issued by the UN, effectiveness factors of NHRIs include independence, defined jurisdiction and adequate powers, accessibility, cooperation, operational efficiency and accountability.³⁵

³⁵ Handbook, paragraph 6.

28. Independence is the most important effectiveness factor of NHRIs.³⁶ Effective NHRIs should act independently of the Government, party politics, and all other entities and situations. In turn, independence can be achieved through:-
- (a) Legal and operational autonomy,
 - (b) Financial autonomy,
 - (c) Appointment and dismissal procedures, and
 - (d) The composition of personnel.³⁷
29. **Legal and operational autonomy**
- (a) Established by a statute,
 - (b) Directly report to the Chief Executive or the Legislative Council, and
 - (c) Enjoy full-fledge operational autonomy, and the Executives cannot issue any directives or administrative orders to the HKHRC
30. **Financial autonomy**
- (a) No direct control of funding from the executive branch;
 - (b) One of the body of the Legislative Council, for example the Panel on Home Affairs, should be responsible for overseeing the formulation of the budget of the HKHRC;
 - (c) Sufficient funding;
31. **Appointment and dismissal procedures**
- (a) The power of appointment and dismissal should be vested in the Chief Executive, who should be under a statutory duty to appoint commissioners upon the recommendation of an independent statutory recommendation committee. The composition of such an independent statutory recommendation committee should reflect the Paris Principles and should not be comprised of the Executives and political appointees.
 - (b) To handle the selection procedure of the Chief Commissioner of the HKHRC, a steering committee comprising of Secretaries of the relevant Bureaus, members of the Legislative Council, officials of the relevant government departments, NGOs, judges, human rights experts and professionals should be established.³⁸

³⁶ Best Practice at 5.

³⁷ Handbook, paragraphs 6-8.

³⁸ Best Practice at 9.

- (c) Commissioners should be selected on the basis of “proven” expertise, knowledge and experience in the promotion and protection of human rights.
- (d) Commissioners should be accorded a rank and salary comparable to that of senior judicial officials.³⁹
- (e) The terms of office the Commissioners should be five to seven years, with the chance of reappointment of an additional term of the same length.
- (f) Commissioners should enjoy immunity from civil and criminal proceedings for actions performed under official capacity,⁴⁰ subject only to laws related to judicial review.⁴¹
- (g) The power of dismissal and the circumstances under which a member can be dismissed should be of a serious nature and specified in the legislation.⁴²

32. The composition of personnel of the NHRI

- (a) The Paris Principles require that the composition of commissioners reflect a degree of sociological and political pluralism, representing the views of NGOs, trade unions, professional organizations and trends in philosophical and religious thoughts⁴³. Additionally, the composition should reflect “gender balance, the ethnic diversity of the society and the range of vulnerable groups” in the society.⁴⁴
- (b) A pluralistic composition, bearing a broad range of expertise and experience on human rights issues, should also “*ensure that each Commissioner would have the benefit of drawing on the expertise of other Commissioners.*”⁴⁵

Chapter IV. Our Proposed Institutional Framework—A DUAL-COMMISSION Model

33. Principles for designing the framework:

- (a) When determining the institutional framework, a central focus should be that the relevant independent institution(s) will assume all the functions for promoting and protecting human rights recommended in Chapter II in an *effective manner*. In addition, the institutional framework must suit the constitutional setting, legal and political culture and any other relevant special circumstances in Hong Kong.

³⁹ Best Practice at 13.

⁴⁰ Handbook paragraph 81; Best Practice at 17.

⁴¹ Best Practice at 17.

⁴² Handbook, paragraph 80.

⁴³ Handbook paragraph 82; See also the Paris Principles, Section 4.

⁴⁴ Best Practice at 15.

⁴⁵ Eric Metcalfe, “A Human Rights Commission: Structure, Functions and Powers—Joint Committee on Human Rights,” (8 May 2003), JUSTICE’s website, available at <http://www.justice.org.uk/images/pdfs/hrcommission.pdf>, paragraph 18.

34. There are three categories of institutional framework of human rights promotion and protection: namely, (i) the multiple-commission model, (ii) the single and integrated commission model, and (iii) the dual-commission model consisting of a human rights commission and an equal opportunities commission.

35. **The multiple-commission model**

- (a) The multiple-commission model consists of an array of commissions, each mandated narrowly to deal with specific human rights violations. Usually, each commission also monitors a limited number of human rights legislation.
- (b) The proliferation of various specialized equality commissions is undesirable because of the overlap within cases. Discrimination cases usually involve multiple grounds. Specialized commissions mandated to deal with discrimination on a particular ground often fail to distinguish and address the particular problems faced by different groups.
- (c) Because of the intersectional nature of discriminations, a number of specialized antidiscrimination commissions would be involved in a single discrimination case. Although the jurisdictions of various specialized commissions do not overlap as such, the antidiscrimination commissions would need to work with each other. Hence, undesirable conflicts and duplications of jurisdictions would be likely; the Handbook expressly warns against this.⁴⁶ Even if the commissions can cooperate well with each other, the transaction cost is higher in multiple-commissions model as compared to the other two models.

36. **The single and integrated commission model**

- (a) Under a single commission model, there is *one* single and integrated commission mandated broadly to deal with *both* equality *and* human rights issues. The exact powers and functions of that single commission may vary across jurisdictions, but such a commission always assumes the role of overlooking the overall human rights performance of the Government.
- (b) The major advantage of the single commission model is its holistic approach. According to the JCHR, “*the integrated commission may have the ability to adopt a more holistic approach than two separate bodies could*”⁴⁷ and “*could strengthen the ability to promote a culture that respects the dignity, worth and human rights of everyone.*”⁴⁸ [emphasis added]
 - i. The single commission model can bring about a centralized, coordinated and systematic approach in promotion and protection of human rights by emphasizing the interconnectedness of human rights and equality.

⁴⁶ Handbook, paragraph 91, and 94.

⁴⁷ Id, paragraph 200.

⁴⁸ Id, paragraph 203.

- ii. The single human rights commission model can provide coverage of a wide spectrum of human rights.
 - iii. The single commission model can project a stronger voice for human rights protection in society; and provide a single and a definite access point for the public and thereby generate a broader public appeal than separate bodies.⁴⁹
- (c) The single commission model would not overlap jurisdictions with any other NHRI. Hence, the transaction cost of the single-commission model is low.
- (d) The single commission model has weaknesses. The first weakness is that tensions can arise within the commission across different human rights concerns. The broader the remit of a NHRI, the greater the internal tension.
- i. Firstly, the rights of different people may sometimes conflict.
 - ii. Secondly, various strands within a single commission may compete for scarce resources.⁵⁰
- (e) There has been concern as to whether the single commission model is capable of monitoring the implementation of a number of human rights instruments. With such a wide remit, a single human rights commission may lose its focus and ineffectively prioritize different areas of human rights concerns.

37. **The dual-commission model**

- (a) The third possible institutional framework is to establish a general human rights commission and an equal opportunities commission that are responsible for general human rights and equality rights respectively. These two commissions could also divert some of their functions to other independent institutions.
- (b) The dual-commission model guarantees particular focus and resources to the equality agenda irrespective of political, social and economic atmosphere. It can prevent the possible loss of focus on the equality agenda in favour of broader and often more political human rights issues.
- (c) Is this an example? If so, maybe mention that. As a result of the 1998 Good Friday Agreement, the Northern Ireland and the Republic of Ireland have established their respective Equality Commission as well as their Human Rights Commission.⁵¹ Because of the deeply rooted racism and the political disputes between the Republic of Ireland and the United Kingdom, the

⁴⁹ Colm O'Cinneide, "Working Paper Series No. 4: A Single Equality Body, Lessons from abroad," (London: University College London, 2002) ISBN 1 84206 037 6 at 8 [hereinafter UCL Survey].

⁵⁰ JCHR's 6th Report, paragraph 200.

⁵¹ The Good Friday Agreement was signed on 10 April 1998, at Belfast, Northern Ireland, and was agreed upon by representatives of the two governments and eight of the ten parties entitled to take part in the negotiations. Agreement Reached in the Multi-Party Negotiations, (10 April 1998), Rights, Safeguards and Equality of Opportunity, Human Rights, New Institutions in Northern Ireland at 5 [hereinafter Good Friday Agreement].

adaptation of the dual-commission model in the two places has been widely supported.

- (d) The major objection is the considerable overlap of jurisdiction between the human rights commission and the equality commission, particularly in areas such as domestic abuse, forced marriages, and children's rights. The interconnected nature of human rights and equality rights may lead to confusion in the mind of the public and possibly to conflicting decisions from the two commissions.
- (e) However, a clear division of labour and a cooperative working relationship between the human rights commission and the equality commission is achievable. To do so, the relationship and allocation of functions between the two commissions must be clearly set out and delineated in writing.⁵²

38. International trend

- (a) Many commonwealth countries including New Zealand, Australia, Canada and the United Kingdom have moved away from the multiple-commission model in the last decade to the single and integrated commission model.
- (b) In Australia and New Zealand, the Privacy Commissioner and Children's Commissioner are independent from the central human rights commission were established in the late 1990s.
- (c) In New Zealand, when the Human Rights Commission Act 1977 was first introduced, the Ombudsman was made a member of the Human Rights Commission. The Human Rights Act in 1993 revoked the right of the Ombudsman to act as a Commissioner.
- (d) In 2002, the Ministry of Justice in New Zealand reconsidered whether or not the Privacy, Children's and Health and Disability Commissioners should be merged within the Commission. In the end, it felt that it would be more effective for these separate offices to operate outside the commission structure.⁵³

39. It is more cost effective for Hong Kong to follow the single commission model, whereby the HKHRC would take up almost all the functions of the institutional framework as mentioned in Chapter II. Best Practice suggests that:-

“In small and developing states or states with very limited resources, it may be more practical to confer the mandates of both a NHRI and an Ombudsman upon a single institution.”⁵⁴

⁵² UCL Survey at 47.

⁵³ *Ministry of Justice, New Zealand*, “Re-Evaluation of the Human Rights Protections in New Zealand,” (October 2000), available at http://www.justice.govt.nz/pubs/reports/2000/hr_reevaluation/index.html at 14.

⁵⁴ Best Practice at 4.

40. If a single and integrated commission is to be established, the HKSAR Government should consider the extent of decentralization (the areas of concern to be diverted to other independent institutions) and the issue of whether the existing specialized commissions should be absorbed.
41. Given the potential difficulties faced by the single commission model and the recent trend of decentralization in New Zealand and Australia, **a dual-commission model** is perhaps, a more suitable and feasible institutional framework for Hong Kong.
42. The dual-commission model strikes a balance between the multiple-commission and the single commission models. It allocates special focus to both equality rights and freestanding human rights, while providing the two commissions with a manageable remit and a reasonable expectation of cooperation between the two commissions. In other words, the dual-commission aims to benefit from the advantages of the single commission model and to minimize the drawbacks at the same time.
43. The dual-commission model also provides a two-tier protection for human rights. In the dual-commission model, equality agenda is less likely to be compromised by the concurrent political climate and emergency of political human rights issues.
44. Firstly, under the notion of “one country, two systems”, plenty of constitutional issues await to be resolved. Freestanding human rights issues, particularly those related to the relationship between the PRC central government and the HKSAR Government, can be very politically sensitive and may subsequently attract intervention from the PRC government. The caseload of freestanding human rights issues will likely be very heavy.⁵⁵
45. Secondly, given the track record of human rights actions of the Hong Kong Government in the scandals relating to appointments to the EOC, the Privacy Commissioner and the Ombudsmen, the Hong Kong Government may attempt to control the HKHRC and other NHRIs. Even if the Government does not exercise visible control over the HKHRC, the single commission could suffer from self-restraint and pursue less politically sensitive issues like discrimination cases against the private sector, rather than areas involving civil and political rights.
46. Thus, the dual-commission model would be more capable of addressing both equality rights and freestanding human rights than the single-commission model.

Chapter V. The HKHRC in Operation

47. Ombudsman: Transforming it into the HKHRC

- (a) While Hong Kong has a relatively small population and small territorial jurisdiction, it is comparatively unfavorable for Hong Kong to have the ombudsman and the HKHRC co-exist with each other in the framework of human rights promotion and protection. The resources consumed in

⁵⁵ Patrick Yu, the former Commissioner of RDC in Northern Ireland is fully in support of the dual-commissions model.

establishing the institutional structure will constitute a huge percentage of total resources available, whereby freeing more resources for human rights programmes and campaigns may be more preferable.

- (b) The existing Office of Ombudsman, as a body dealing with the complaints against public authorities, is familiar with the culture and standard operation procedure of the Government. Therefore, transforming the existing Ombudsman into the HKHRC can take the benefit of transcending the knowledge and the skills earned from the existing Ombudsman to the HKHRC, which means that the HKHRC should be able to take up the role as an effective NHRI within a shorter period of time.

Chapter VI. Alternatives to the establishment of the HKHRC

- 48. This Chapter aims to discuss the alternatives to the establishment of the HKHRC and accordingly their effectiveness.

49. An activated Office of Ombudsman

- (a) In the absence of explicit human rights mandate, a classical ombudsman can involve international human rights laws by actively interpreting her mandate to take into consideration the human rights laws in processing investigations.
- (b) Without explicit human rights mandate in the enabling legislation, the extent to which the activated Ombudsman effectively promote and protect human rights is highly dependent on the human rights knowledge and the political orientation of the Ombudsman. There lacks institutional guarantee that the Ombudsman will pursue the promotion and protection in pure human rights cases in the absence of explicit human rights mandate.
- (c) This alternative to activate the existing Office of the Ombudsman is the most conservative alternative because it involves no institutional improvement. As such, such alternative is not very desirable in Hong Kong given the frequent appointment scandals whereby the Government has been suspected to control the orientation of the independent statutory committees through appointing pro-government and conservative commissioners.

50. Enlarging the jurisdiction of the current Office of Ombudsman

- (a) Ombudsmen have been encouraged to be entrusted with human rights matters by the Council of Europe and various academics for long.
- (b) A human rights ombudsman enhanced by legislation amendment to cover human rights matters provides a structural guarantee to the protection of human rights. This alternative is more secure than simple activation of the existing Ombudsman without enlarging its scope of work.

- (c) However, an ombudsman as a substitute for a human rights commission may have several limitations. First, it is unclear whether the human rights ombudsman can deal with free-standing human rights violations committed by the public authorities.
- (d) Second, the core business of the office of ombudsman is the pursuit of administrative justice and to provide people with an opportunity to complain about “maladministration” by public officials. As a result, the human rights performances of private sector do not receive the attention that they deserve.
- (e) To make matters worse, the impact of privatisation has significantly affected the work of the ombudsman in the sense that increasing amount of Government’s work is and will continue to be out of the scope of the Ombudsmen.⁵⁶ That means an increasing area of public administration will not be encompassed by the Ombudsman.

51. A research based national human rights center

- (a) National human rights centers have been widely developed in Northern Europe where strong ombudsmen are also present to deal with individual complaints against public authorities.
- (b) The weakness of research based human rights centers is that they lack complaint-handling power and enforcement power. These centers do not possess the legal power to force the Government and private entities to comply with either domestic or international human rights laws in short term. Nevertheless, in long run, research based human rights centers can still impact public policy by arousing public concern through publication of in-depth research in particular human rights areas.
- (c) Whether the recommendation to form a research based human rights center would be adopted and implemented depends heavily on the commitment to human rights protection on the part of the Government. Although the culture of respect for human rights is a new concept to the entire community in Hong Kong and hence remains weak, enforcement power of NHRIs is essential to spark the awareness of protection for human rights in the community. As such, this alternative is less desirable as compared to the human rights ombudsman above.

52. An advisory panel or committee under the legislature or under the Chief Executive

- (a) As an interim arrangement to the establishment of the HKHRC, an advisory working group can be set up under the Legislative Council or the Panel of Home Affairs, or alternatively, directly under the Chief Executive.
- (b) Comparing between an advisory working group set up under the Legislature and one set up under the Chief Executive, the advisory working group under the Legislature is more preferable because the working group will usually

⁵⁶ John Hatchard at 12.

have a higher level of transparency. As a result, the civil society can more easily access the working group and express its opinion. Open meetings of the working group would also allow information to be released to the public at large; and hence arousing public interests and educating the public about the issues.

53. An activation of the existing Office of Ombudsman without amendment of its mandate is the most conservative alternative because it involves no legal or institutional guarantee on human rights protection. As such, this alternative is not very desirable in Hong Kong where the commitment to human rights protection remains limited in scope and weak in magnitude.
54. The expansion of the jurisdiction of the existing Office of Ombudsman alone is not that satisfactory in light of trend of privatization of public services. Alternatively, research based human rights centers are not desirable because they lack power to handle complaint and to enforce their orders.
55. Nevertheless, as a second choice, the expansion of the jurisdiction of the existing Office of Ombudsman to human rights violation, accompanied with a new researched based human rights institute is a desirable alternative and to the establishment of the HKHRC. A human rights ombudsman and a research based human rights center can supplement each other and hence promote and protect human rights in a similar way as the dual-commission model.
56. Alternatively, if the above proposal is also turned down, the expansion of the jurisdiction of the existing Office of Ombudsman to human rights violation, accompanied with the establishment of an advisory working group under the Legislative Council or the Panel of Home Affairs can also facilitate the introduction of the culture of respect for human rights.

APPENDIX

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| June 1990 | The ac hoc group concerning the legislation of the BORO urged the Government to study the feasibility of a Human Rights Commission in Hong Kong. ⁵⁷ |
| June 1991 | During the second reading of the BORO, the ac hoc group was divided on the functions and terms of the Human Rights Commission. Nevertheless, the group believed that speedy legislation of the BORO should be accorded with the highest priority and such disagreement should not delay the passage of the BORO. Hence, the ac hoc group abandoned the proposal to establish the Human Rights Commission and urged the Government to fulfill its promise to study the matter and come up with a conclusion “soon” after the enactment of the BORO. ⁵⁸ |
| July 1993 | Ms. Anna Wu initiated a Legislative Council motion debate on the enactment of antidiscrimination legislation and the establishment of a Human Rights and Equal Opportunities Commission. ⁵⁹ The motion gained the support from the Legislative Council at that time. ⁶⁰ |
| March 1994 | Former legislator Ms. Anna Wu introduced two private member bills, namely the Equal Opportunities Bill, which would have prohibited discrimination in private sector on several different grounds including race, sex, disability, age, and sexuality ⁶¹ , and the Human Rights and Equal Opportunities Commission Bill which called for the establishment of a general human rights commission. |
| April 1994 | Empowered by Clause XXIV of the Royal Instructions to oppose a private member bill on which incurred public expenditure, the former Governor Chris Patten declined to give permission to the Human Rights and Equal Opportunities Commission Bill. During his address to the LegCo on the United Kingdom House of Commons Foreign Affairs Committee’s “ <i>Report on Relations between the United Kingdom and China in the period up to and beyond 1997</i> ”, Patten rejected the need to establish a human rights commission by arguing that human rights can be effectively protected in Hong Kong without establishing a Human Rights and Equal Opportunities Commission and some NHRIs in other jurisdictions had remained toothless. ⁶² |
| October 1994 | Instead of supporting the Equal Opportunities Bill drafted by Anna Wu, the government opposed it by introducing the Sex Discrimination Bill and the Disability Discrimination Bill. |
| 1995 | The Sex Discrimination Ordinance (Cap 480) and the Disability Discrimination Ordinance (Cap 487) were enacted. |
| 1996 | The Equal Opportunities Commission was established to enforce the Sex Discrimination Ordinance and the Disability Discrimination Ordinance. |
| 1997 | The Family Status Discrimination Ordinance (Cap 527) was enacted and the jurisdiction of the EOC is enlarged to include family status discrimination. |
| 1997-2005 | The HK Government rejected the need to establish a general human rights institution by continuously pointing to the independent judiciary, the legal aid system, the vigilant media, |

⁵⁷ LegCo’s meeting, “Official Record of Proceedings,” (5 June 1991) at 52.

⁵⁸ Id at 29.

⁵⁹ LegCo’s meeting, “Official Record of Proceedings,” (14 July 1993) at 4591-5.

⁶⁰ Id at 4633.

⁶¹ Anna Wu, “Equal Opportunities Legislation and a Human Rights Commission for Hong Kong, A Proposal,” March 1994. See also Anna Wu, Human Rights and Equal Opportunities Commission Bill 1994.

⁶² Legislative Council, “Official Record of Proceedings,” (21 April 1994) at 3299.

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| | and various specialist institutions, including the Ombudsman, the Privacy Commission, and the Equal Opportunities Commission. ⁶³ |
| November 1999 | The former High Commissioner of Human Rights, Ms. Mary Robinson, visited Hong Kong and called for the establishment of a NHRI in accordance with the Paris Principles in Hong Kong. |
| May 2004 | The Chairman of the Panel of Home Affairs of the Legislative Council concluded that Panel's Meeting by requesting the Administration to take note of the suggestion of conducting a public consultation on the establishment of a human rights commission in Hong Kong. ⁶⁴ |
| September 2004 | "Legislating Against Racial Discrimination: a Consultation Paper" was released. ⁶⁵ This provided an opportunity for a review on the implementation mechanism of the antidiscrimination laws. |
| April 2005 | In response to a question posed by the UN Committee on Economic, Social and Cultural Rights during the consideration of the initial report of China, the delegation of the HKSAR Government, Mr. Stephen Fisher, noted that the Government was "currently considering the establishment of a human rights commission." ⁶⁶ |
| March 2006 | The Secretary for Home Affairs, Dr Patrick Ho, in the motion debate on "Implementing the recommendations of the United Nations Human Rights Committee" at the Legislative Council said:- <i>"We have acted on past recommendations of the Human Rights Committee and will act on any future ones to the extent that we judge feasible and desirable...An example of a long-standing recommendation that has yet to be put into effect is the establishment of a human rights commission. We have not, as some have asserted, ignored the Committee. We have kept the matter in view, testing its implications against the criteria I have rehearsed and ready to move forward when the conditions are met. Tentative steps have already been taken in that direction with the establishment of new public forums for regular and formal exchange of views between Government and non-governmental organizations. Options for further development are under exploration, though we are not – as yet ready to commit to a timetable."</i> ⁶⁷ |
| March 2006 | In the hearing before the UN Human Rights Committee, the HKSAR Government promised to review the institutional framework for human rights promotion and protection in Hong Kong. Yet, no public consultation of such a review has been conducted and no report has been published. |
| May 2006 | The HKSAR Government have apparently returned to the conservative position and stated that the establishment of a general human rights commission is unnecessary. ⁶⁸ |

⁶³ *Legislative Council, Panel on Home Affairs*, "Background brief prepared by Legislative Council Secretariat Monitoring mechanism for the implementation of United Nations human rights treaties in the Hong Kong Special Administrative Region," (7 May 2003), LC Paper No. CB(2)1999/02-03(02) Ref: CB2/PL/HA, at 3-5. See also *Legislative Council Panel on Home Affairs*, (May 2006), LC Paper No. CB(2)2219/05-06(01) at 2.

⁶⁴ *Legislative Council, Panel on Home Affairs*, "Minutes of meeting," (14 May 2004), LC Paper No. CB(2)2663/03-04 Ref: CB2/PL/HA.

⁶⁵ *Home Affairs Bureau*, the Hong Kong Special Administrative Region Government, "Legislating Against Racial Discrimination: A Consultation Paper," (September 2004).

⁶⁶ *Committee on Economic, Social and Cultural Rights*, "Press Release: Committee on Economic, Social and Cultural Rights Reviews Initial Report of China," (29 April 2005), available at <http://193.194.138.190/hurricane/hurricane.nsf/0/EF0EBFFDB1BD26EFC1256FF5002B3FBE?opendocument>

⁶⁷ Press Release of the HKSAR Government, "LC: SHA's speech in the motion debate on "Implementing the recommendations of the United Nations Human Rights Committee," (1 March 2006).

⁶⁸ *Legislative Council, Panel on Home Affairs*, (May 2006) LC Paper No. CB(2)2219/05-06(01) at 2.