

# 香 港 人 權 監 察

## HONG KONG HUMAN RIGHTS MONITOR

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Submission to the LegCo Subcommittee on Human Rights Protection Mechanisms  
on the Research Report

"Human rights commissions in Northern Ireland, Australia, South Korea, and India"  
for the Meeting on 28 April 2008

### Introduction

1. There is no human rights commission in Hong Kong, which has attracted criticisms from various United Nations (UN) treaty bodies for many years. For example in March 2006, the UN Human Rights Committee (UNHRC) in its Concluding Observations on the HKSAR's second report stated that "(UNHCR) regrets that the HKSAR has not implemented a number of recommendations contained in its previous concluding observations. It remained concerned regarding the limited mandate and powers of the Ombudsman, including its lack of oversight function of the police, and the Equal Opportunities Commission (EOC). The HKSAR should consider the establishment of an independent human rights institution compliant with the Paris Principles".
2. Despite the recommendations of UN treaty bodies in recent years, the Hong Kong Administration states its position in its paper to LegCo that "[w]e (the Administration) do not see an obvious need for establishing another human rights institution to supersede existing mechanisms and have no plans or timetable for the establishment of such in the immediate future".<sup>1</sup>
3. A research on human rights commissions in Northern Ireland, Australia, South Korea and India was conducted by the Research and Library Services Division (RLSD) of the Legislative Council. The research was expected to provide more experiences on human rights commissions particularly in the Asia Pacific region.
4. The Monitor advocates the establishment of a human rights commission in Hong Kong. In the light of the research paper prepared by RLSD, the Monitor has prepared this submission to offer our views on the establishing the human rights commission in Hong Kong.

### Government's position on Human Rights Commission

5. In the Administration's paper mentioned above, the Government stated a few reasons not to establish a human rights commission. These reasons included that existing functions served Hong Kong well, the rule of law, the safeguard from The Ombudsman and Equal Opportunities Commission (EOC) and the

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<sup>1</sup> Home Affairs Bureau, Existing human rights protection mechanisms in Hong Kong, February 2007. LC Paper No. CB(2)1014/06-07(03).

role of NGOs and media etc. However, these reasons become unconvincing once we read the examples in the research paper.

6. Besides its human rights commission, all the places studied have a number of other institutions which protect human rights, such as:
  - Equality Commission for Northern Ireland and the Police Ombudsman for Northern Ireland in Northern Ireland;
  - Office of the Federal Privacy Commissioner and the Commonwealth Ombudsman in Australia;
  - The Ombudsman Office in Korea;
  - National Commission for Women, the National Commission for Minorities in India.

All the places studied have established a number of institutions to provide certain protection to human rights. For example in South Korea human rights are guaranteed under its constitution, but the National Human Rights Commission of Korea (NHRCK) was still established. As the Research Report states in its paragraph 6.2.1, “they recognize a need to establish an independent dedicated institution to promote and protect human rights”.

7. The Administration has stated in its paper that “human rights in Hong Kong were founded on the rule of law, an independent judiciary, statutory bodies and institutions, and a comprehensive legal aid system”.<sup>2</sup> In the examples provided in the Research Report, all the selected places have satisfactory rule of law, an independent judiciary, an active media and NGOs to safeguard human rights to a certain extent. However as mentioned in the above paragraph, human rights commissions were established in all selected places.
8. Violation on legal provisions can only be settled in the courts. The advantage of setting up human rights commissions is that, with the power to investigate complaints and resolve complaints by conciliation, etc., “human rights commissions are a more cost-effective and accessible method of resolving conflicts relating to human rights.”<sup>3</sup>
9. The Administration further stated that “none of the international human rights treaties which applied to the HKSAR required the State Parties to establish a central monitoring body for monitoring human rights”.<sup>4</sup> The Paris Principles provides the foundation, recommendations and criteria for the establishment and operation of national human rights institutions. It was adopted by the Commission on Human Rights in 1992, and then approved by the UN General Assembly in 1993. Although the Paris Principles is not a legally binding international treaty, it does embody a whole set of international standards and norms. The Hong Kong Government should follow international standards by setting up a human rights commission.
10. Moreover, inherent in all the six core human rights treaties applicable to Hong Kong, there is an obligation on the state party to provide effective protection of the enshrined rights and effective remedies against rights violations. For example, Article 2(3) of the International Covenant on Civil and Political Rights requires the state party to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”. In an earlier submission to the Subcommittee on Human

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<sup>2</sup> Ibid.

<sup>3</sup> RLSD Report on “Human rights commissions in Northern Ireland, Australia, South Korea, and India”.

<sup>4</sup> Home Affairs Bureau, Existing human rights protection mechanisms in Hong Kong, February 2007. LC Paper No. CB(2)1014/06-07(03).

Rights Protection Mechanisms, the Monitor has already identified a number of human rights issues which do not have any institution other than the court to address. Whether to have a central monitoring body or not, the Government needs to establish a body or a number of bodies to address these issues effectively.

### Highlights of human rights commissions in selected areas

11. The Paris Principles provides the guiding principles for the establishment of a human rights commission, which include:
  - pluralist representation of the social forces;
  - infrastructure suited to the smooth running of its activities;
  - adequate funding;
  - a broad mandate including both promotional and protective powers.The research on the human rights commissions in selected places provide us insights into the compliance of the Paris Principles when setting up a human rights commission in Hong Kong. In dealing with it, some of the good practices or arrangements in selected areas are particularly worthy to follow.
12. The human rights commission should define “human rights” for its jurisdiction. South Korea adopts a very broad definition of human rights. The National Human Rights Commission Act (NHRC Act) defines human rights as any rights and freedoms, including human dignity and worth, as guaranteed by the Korean Constitution and laws, and recognized by the international human rights treaties ratified by South Korea, or protected under international customary law.
13. The criteria for appointment should be clearly stated to minimize any manipulations. The Monitor considers that the criteria of South Korea are most clearly stated. The criteria that “the candidates for the commissioner's post should possess professional knowledge and experience with human rights matters and be recognized to be capable of acting fairly and independently when performing duties relating to the protection and promotion of human rights” is appreciated and should be followed.
14. A human rights commission should be established in accordance with certain procedural guarantees to ensure its pluralist representation.<sup>5</sup> The process of appointing commissioners should be open and transparent and guided by sound criteria based on merit. The appointment process should also have independent oversight.
15. In Northern Ireland, the commissioners of the Northern Ireland Human Rights Commission (NIHRC) are appointed by the Secretary of State of Northern Ireland according to the guidance issued by the Commissioner for Public Appointments in Northern Ireland, which requires the appointments should be governed by the overriding principles of selection based on merit and non-discrimination. The relevant Code of Practice specifying that appointments should be made based on merit and that care must be taken, at every stage, not to discriminate on any grounds.<sup>6</sup> The Commissioner has the mandate to regulate, monitor, report and advise on appointments in Northern Ireland bodies in a way independent of the Government.<sup>7</sup>
16. The human rights commission should enjoy a high degree of financial autonomy as the judiciary. Among the four selected areas, the National Human

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<sup>5</sup> Paris Principles: Composition and guarantees of independence and pluralism.

<sup>6</sup> [http://www.ocpa.gov.uk/Sites/www.ocpa.gov.uk/the\\_code\\_of\\_practice.aspx](http://www.ocpa.gov.uk/Sites/www.ocpa.gov.uk/the_code_of_practice.aspx)

<sup>7</sup> <http://www.ocpa.gov.uk/>

Rights Commission of India (NHRCI) has the power to prepare its own budget. The central government will consider the budget and submits it to Parliament for approval. Moreover, the NHRCI is guaranteed by law to spend the amount as it thinks fit for the performance of its functions.

17. As prescribed by law, broad and comprehensive functions and powers are enjoyed by all the human rights commissions in selected areas, especially the Human Rights and Equal Opportunity Commission of Australia (HREOCA) and NHRCK. Their functions and powers which the institutions protecting human rights in Hong Kong are lacking or enjoying less comprehensively include:
  - to enter and inspect premises (including detention facilities);
  - to provide and recommend compensation/remedies;
  - to conduct investigation on its own initiative (e.g. the current Independent Police Complaints Council).
18. The organizational structure should be broad and clear so the human rights commission can enjoy a comprehensive and obvious division of labour. The NHRCI is divided into six divisions: the Administration Division, the Law Division, the Training Division; the Policy Research, Projects and Programme Division, the Investigative Division and the Information and Public Relations Division.
19. All the human rights commissions in selected areas are responsible for human rights education and enhancement of public awareness. In Northern Ireland, human rights education and training works have been one of the NIHRC's top priorities. Their works include Schools Project, human rights workshops for police officers, production of various human rights guides and collaborative activities with local universities such as student internships and hosting of lectures.
20. Comparatively in the HKSAR, the work on human rights education has been unsatisfactory. After the re-organization of the policy bureau of the Government Secretariat, the work on human rights has been transferred to the Constitutional and Mainland Affairs Bureau (CMAB), while the work on human rights education remains under the Home Affairs Bureau (HAB). This separation may make the work on both sides ineffective.
21. The work on human rights education is further neglected following the disbanding of the human rights education working group under the Committee on the Promotion of Civic Education (CPCE) in HAB. However, the Monitor is disappointed that we cannot see any planning, policies or strategies on human rights education in the CPCE. Moreover, a survey on human rights awareness among Hong Kong people was supposed to be conducted last year, but it was terminated because of the re-organization of the policy bureau. The establishment of a human rights commission with the mandate on human rights education and training would be much more beneficial and effective.

#### Issues for future research

22. The Monitor would like to thank the RLSD for its efforts in conducting the Research. It provides us with a general background on the human rights commissions in selected areas, namely Northern Ireland, Australia, South Korea and India. However, the Monitor considers that some further researches can be conducted in order to provide us a full picture on the various human rights commissions.

23. One of the issues the Monitor is concerned about is the workload of the human rights commission. A number of commissioners should be appointed on a full-time basis to handle the heavy workload on protection and promotion of human rights. Besides NIHRC which is stated to have one full-time chief commissioner and nine part-time commissioners, practices in other areas are not mentioned in the Report. The Monitor thus suggests future efforts to study the workload of the human rights commissions.
24. Another issue is how the different systems of appointment of the commissioners and other factors affect the independence of the different human rights commissions.
25. Besides their respective human rights commissions, a number of other institutions for the protection of human rights also operate in all the selected areas. Without knowing the mandate of the various institutions protecting human rights, and also their division of labour and interaction with the human rights commission, we will not be able to understand and assess the effectiveness of the human rights mechanisms as a whole.
26. It is also highly desirable to learn more about how human rights commissions were set up in other jurisdictions and the lessons we can learn from them. For instance, the process may be by way of merger of two or more existing institutions, the expansion of powers and functions of an existing body, or the establishment of one from scratch.

#### The way forward

27. The Monitor in many years holds the opinions that it is necessary to improve the existing human rights protection mechanisms by establishing the human rights commission. In February 2007 the Monitor published a research report on the need to establish a human rights commission in Hong Kong<sup>8</sup>. In February 2008 the Monitor further updated the information and submitted a summary of the report to the Asian Forum for Human Rights and Development (Forum-Asia), which is attached with this submission as Appendix I. A comparison of human rights commissions among Hong Kong (EOC as human rights commission in Hong Kong) and other 11 Asian countries prepared by Forum-Asia is attached as Appendix II. The Monitor urges the Government to adopt the UN recommendations to establish an independent human rights commission to enhance the human rights protection mechanisms. The Monitor also urges the Legislative Council to monitor the Administration on their process of human rights commission establishment.

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<sup>8</sup> LegCo paper CB(2)1069/06-07(01).

Asian NGOs Network on National Human Rights Institution (ANNI)

**Monitoring Report on the  
Performance of National Human Rights Institutions**

*12<sup>th</sup> Annual Meeting of the Asia Pacific Forum of  
National Human Rights Institutions (APF)  
Sydney, Australia (24 – 27 September, 2007)*

**HONG KONG**

**“HONG KONG MULLS ITS OPTIONS”**

By

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## ***a. INTRODUCTION***

The debate on the establishment of a human rights commission first appeared during the enactment of the Hong Kong Bill of Rights Ordinance, Cap. 383 (BORO) in June 1991. The BORO is a domesticated local replica of most of the provisions of the International Covenant on Civil and Political Rights (ICCPR) with the reservations entered into on behalf of Hong Kong by the British Government in the colonial days.

Over the following decade, some legislators and various NGOs have repeatedly demanded the establishment of a HRC but to no avail. Various UN committees have called at least nine times for the establishment of the commission (Appendix I). This would have satisfied HK's obligation to implement the applicable international human rights instruments. Instead, the Government created the Equal Opportunities Commission (EOC) to mediate discrimination but on limited grounds (Appendix II). To date, the HKSAR Government has not agreed to set up a commission.

In February 2007, the Deputy Chairman of the Home Affairs Panel of the Legislative Council (LegCo) opined during a meeting that 'the existing arrangements and mechanism for protection of human rights in Hong Kong with the following shortcomings were far from adequate - (a) there was no central mechanism in compliance with the Paris Principles to examine the overall human rights situation in Hong Kong, coordinate policies which might have human rights implications under the purview of various bureaux, monitor the implementation of the United Nations (UN) human rights treaties applicable to Hong Kong, and examine any inconsistency between local legislation/administrative decisions and treaty obligations; (b) under the existing institutional arrangement, the Home Affairs Bureau only played the role of coordinating with relevant bureaux the reporting work required under the respective human rights treaties and the attendance of their representatives at meetings of this Panel for discussion on reports submitted under various UN treaties; and (c) the power of the existing human rights statutory bodies was limited in scope.'<sup>1</sup>

The same month, the Home Affairs Panel decided to set up a Subcommittee on Human Rights Protection Mechanisms under its jurisdiction.<sup>2</sup>

## **II. CURRENT HUMAN RIGHTS PROTECTION MECHANISMS IN HONG KONG**

The Hong Kong Special Administrative Region (HKSAR) Government's response to the UN Human Rights Committee's recommendation of setting up a human rights commission is as follows: '[...] our position remains that that Hong Kong's current human rights framework, underpinned as it is by the rule of law, an independent judiciary, a comprehensive legal aid

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<sup>1</sup> Paragraph 24, Minute of the LegCo Home Affairs Panel meeting on 9 Feb 2007 (LC Paper No. CB(2)1501/06-07). Visited the web-page of the Home Affairs Panel of the LegCo on 20 July at <http://www.legco.gov.hk/english/index.htm>

<sup>2</sup> The term of reference of the Sub-committee is to ' (a) to monitor and examine the operation and effectiveness of existing institutional framework for promotion and protection of human rights in Hong Kong; (b) to examine possible means for enhancement of the effectiveness of the institutional framework of human rights promotion and protection in Hong Kong, including the setting up of a statutory Hong Kong Human Rights Commission; and (c) to monitor and examine the implementation of the Concluding Observations or Concluding Comments in respect of Hong Kong issued by United Nations human rights treaty bodies.' Paragraph 37, *ibid.* The Subcommittee on Human Rights Protection Mechanisms has held four meetings since its first meeting on 23 March 2007. Its minutes and papers can be found at <http://www.legco.gov.hk/english/index.htm>

system, our three human rights institutions - namely the Equal Opportunities Commission (EOC), the Ombudsman, and the Office of the Privacy Commission, and a free and vigilant media corps, provides sufficient protection and support for human rights in the SAR. We therefore see no obvious need for another human rights institution and have no plans or timetable for the establishment of such an institution in the immediate future.’<sup>3</sup>

To what extent does the HKSAR justify that there is no obvious need for such a commission? We examine the limitations of various human rights protection mechanism as follows.

### 1. *The Legislative Actions*

- a. The LegCo conducts an examination of the compatibility of a bill on table with the BORO and the ICCPR 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 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<sup>4</sup> but a Sub-Committee on Human Rights Protection Mechanism was set up in early 2007 to study the matter.<sup>5</sup>

### 2. *The Judiciary System*

- a. The independence of judiciary has been undermined. *Ng Ka Ling v. Director of Immigration*<sup>6</sup> is the first case that referred to the Standing Committee of the National People’s Congress for re-interpretation of the Basic Law after the Court of Final Appeal had handed down its judgment.<sup>7</sup> 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

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<sup>3</sup> Paragraph 5, ‘Initial response to the Concluding Observations of the United Nations Human Rights Committee on the Second Report of the Hong Kong Special Administrative Region (HKSAR) in the light of the International Covenant on Civil and Political Rights’ in May 2006 (Paper No. 5/2006, Human Rights Forum). Visited the web-page of the Human Rights Forum on 20 July 2007 at [http://www.cmab.gov.hk/en/issues/human\\_forum.htm](http://www.cmab.gov.hk/en/issues/human_forum.htm) See also *Legislative Council (LegCo), “Implementation of International Human Rights Treaties: Monitoring Mechanisms,”* LegCo paper No. CB(2)1957/02-03(03)

<sup>4</sup> Background brief prepared by Legislative Council Secretariat” at 5.

<sup>5</sup> See notes 1 and 2.

<sup>6</sup> *Ng Ka Ling v. Director of Immigration* [1999] 1 HKLRD 577.

<sup>7</sup> In the Concluding Observations of the Human Rights Committee on the First HK report in 1999, ‘[t]he Committee is seriously concerned at the implications for the independence of the judiciary of the request by the Chief Executive of HKSAR for a reinterpretation of article 24 (2)(3) of the Basic Law by the Standing Committee of the National People’s Congress (NPC) (under article 158 of the Basic Law) following upon the decision of the Court of Final Appeal (CFA) in the *Ng Ka Ling* and *Chan Kam Nga* cases, which placed a particular interpretation on article 24 (2)(3). The Committee has noted the statement of the HKSAR that it would not seek another such interpretation except in highly exceptional circumstances. Nevertheless, the Committee remains concerned that a request by the executive branch of government for an interpretation under article 158 (1) of the Basic Law could be used in circumstances that undermine the right to a fair trial under article 14.’ See Paragraph 10, Paragraph 9 in CCPR/C/79/Add.117 dated 15 November 1999



threatens the rule of law in Hong Kong.

- b. 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.
- c. Recently, there were many judicial review challenging the decisions of public bodies. Many of them alleged the violation of human rights. A human rights commission would not duplicate the function of the judiciary. An independent judiciary and national human rights institution (NHRI) 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. NHRIs, though can provide easy, friendly and inexpensive access to justice for victims of human rights violations.

### 3. *The Array of Specialized Bodies*

- a. According to the Paris Principles, NHRIs shall be independent<sup>8</sup> and given “as broad a mandate as possible.”<sup>9</sup>
- b. The specialized bodies currently in force in Hong Kong with narrow mandate cannot provide effective protection of human rights.<sup>10</sup>
- c. On 8 June, the LegCo passed a motion that “urges the Government to set up a Commission on children to fulfill the obligations under the Convention on the Rights of the Child (CRC).<sup>11</sup> The United Nations Committee on the Rights of the Child also recommends the HKSAR to set up a HRI to monitor children’s rights and implement the CRC<sup>12</sup>
- d. HKSAR also lacks a high-level mechanism with appropriate powers to implement the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Women’s Commission is just an advisory

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<sup>8</sup> Id, Article C.

<sup>9</sup> The Paris Principles, Article A(2).

<sup>10</sup> Moreover, the independence and pluralism of these government watchdogs have been called into question. The existing institutional framework cannot satisfy the requirements of the Paris Principles. 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.

<sup>11</sup> The motion is without legislative effect: “urges the Government to set up a Commission on children to fulfill the obligations under the Convention on the Rights of the Child (CRC) to safeguard the well-being of children, and ensure that children’s perspectives are fully taken into account in the progress of formulating government policies.”

<sup>12</sup> On 30 September 2005, paragraph 17 of the Concluding Observations by the United Nations Committee on the Rights of the Child on China’s report states that: “[t]he Committee recommends that the State party establish, in the mainland, Hong Kong and Macau SARs respectively, a national human rights institution which includes a clear mandate for the monitoring of children’s rights and the implementation of the Convention at national, regional and local levels and in accordance with the Principles relating to the Status of National Institutions (The Paris Principles) contained in General Assembly resolution 48/134 of 20 December 1993. While drawing the State party’s attention to the Committee’s General Comment No. 2 (2002) on the role of independent national human rights institutions, the Committee notes that such institutions should have a mandate to receive, investigate and address complaints from the public, including individual children, and be provided with adequate financial, human and material resources. In the case of Hong Kong SAR, such an institution could be a specialized branch of the existing Ombudsman’s office.”

body with little power.<sup>13</sup>

#### 4. 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<sup>14</sup>. Indeed, it enjoys certain independence as the law expressly stated that “[t]he Commission shall not be regarded as a servant or agent of the Government or as enjoying any status, immunity or privilege of the Government.”<sup>15</sup>
- b. Under the Sex Discrimination Ordinance, the EOC Chair and members are appointed by the Chief Executive. Actually, the only restriction is that every appointment shall be notified in the Gazette.<sup>16</sup> The appointment process has long been criticized for not open, not transparent, and excluding civil society participation.<sup>17</sup>
- c. Appointment scandals: Whether the degree of independence of specialized commissions in Hong Kong complies with the Paris Principles is questionable. The government’s refusal to re-appoint Ms. Anna Wu, 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 activism of the EOC.<sup>18</sup> It was suspected that the relationship between the government and Ms Wu spoilt as a result of the EOC’s remarkable success in litigations against

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<sup>13</sup> In Feb 1999, paragraph 318 of the Concluding comments of the UN Committee on the Elimination of Discrimination against Women on the initial report of HKSAR under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provided that the Committee recommended the HKSAR Government to “establish a high level central mechanism with appropriate powers and resources to develop and co-ordinate a women-focused policy and long-term strategy to ensure effective implementation of the Convention.” In January 2001, the HKSAR set up a Women’s Commission as an advisory body under a bureau. On 11 May 2001, paragraph 33 of the Concluding Observations of the UN Committee on Economic, Social and Cultural Rights on HK report states that “[t]he Committee urges the HKSAR to provide the Women’s Commission with sufficient powers and resources to improve the status of women in Hong Kong and to integrate gender in its policy-making and to ensure wider participation of women in all spheres of public life.”

<sup>14</sup> The Race Discrimination Bill was introduced to the LegCo in December 2006 and is expected to be passed in July 2008.

<sup>15</sup> Section 63(7) of the Sex Discrimination Ordinance, visited the website on 20 July 2007 at <http://www.legislation.gov.hk/eng/home.htm>. Indeed, The funding of EOC was proposed by the Executive and then passed by the Legislature. Different from the former municipal Council, it enjoyed its financial independence by having a proportion of rates (a form of land tax). After the economic crisis in 1997, the Government had to reduce the salary of civil servants and all the related organization like EOC in early 2000s. Indeed, the judiciary is able to maintain its salary without any salary cut greatly due to its financial independence. In 2005, the Government claimed that the expenditure of overseas visit of EOC should be approved by the relevant Government Bureau, EOC opposed as it clearly undermined its independence. In about March 2006, EOC gave back \$13,000,000 to the Government as EOC had surplus. It was because the Government treated EOC as an ordinary body receiving government funding so it has to refund a proportion among its surplus. This also undermines the financial independence of EOC.

<sup>16</sup> Section 63(3)(9) of the Sex Discrimination Ordinance

<sup>17</sup> The appointments were often criticized as appointed those who do not have track records on human rights and equal opportunities. The NGOs fought for the participation in the selection process by nominating candidates for EOC in 2004 and 2007 but received no response from the Government.

<sup>18</sup> 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.

the government, including the Education Department, over whether the allocation system of secondary school was discriminatory to girls.<sup>19</sup> Instead of re-appointing Ms. Wu, the Government appointed Mr. Michael Wong, a retired judge from the Court of Appeal, despite his lack of experience in the equality issues.<sup>20</sup>

- d. Subsequent scandals have attracted widespread criticism of deliberate undermining of EOC's independence by the government and of the policy of appointing persons who are closely linked to the Government.<sup>21</sup>
- e. In handling complaints, the EOC does not have adjudicative power, so it may mediate; if mediation fails, the matter may be resolved by going to court.<sup>22</sup>

## 5. 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).<sup>23</sup> 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.<sup>24</sup> 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 Mr. Andrew So was not re-appointed in 1998. Mr. 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 this. It was widely reported that the Government was

<sup>19</sup> *Equal Opportunities Commission v Director of Education* [2001] 3 HKLRD 690.

<sup>20</sup> Since Anna Wu left EOC in July 2003, the HKSAR appointed three persons in order, namely Mr. Michael Wong, Ms Patricia Chu and Mr. Raymond Tang within 18 months. The EOC becomes very unstable and faces difficulties in tackling discrimination.

<sup>21</sup> Ravina Shamdasani, "Watchdog faces pressure to resign: Firing breached human rights treaties, says academic", *South China Morning Post* (24 Oct 2003), C3.

<sup>22</sup> The discrimination laws are complicated and involved substantial legal costs so EOC proposed to set up a tribunal in order to deal with the dispute in a quick, cheap and efficient manner since about 2003. The latest development is that the Administration declined to set up an equal opportunities tribunal but EOC continue studying and promoting its establishment. According to Article 80 of the Basic Law, '[t]he courts of the HKSAR at all levels shall be the judiciary of the Region, exercising the judicial power of the Region.' Hence, only the judiciary has the power to adjudicate under the framework of separation of powers. EOC cannot set up its own tribunal and may only persuade the Executive, the Legislature and the judiciary such proposal. If all of them agree to establish a new tribunal, it is the Executive which drafts the law and then pass by the Legislature. The tribunal must be under the judiciary. The latest development was told by Raymond Tang to us on 12 July 2007 during a meeting between EOC and an alliance of NGOs: Civil Human Rights Front.

<sup>23</sup> Ombudsman Ordinance, Section 7(1)(a).

<sup>24</sup> Alice Tai Yuen Ying, "Letter to Hong Kong Human Rights Monitor" (OMB/CR/31\_V, 9 January 2007), at 1.

unhappy with Mr. So's vigorous investigation into maladministration and his attempts to expand the Ombudsman into a broad-based human rights body.<sup>25</sup>

- c. The Ombudsman is reviewing its function and performance and no report is published yet.

## 6. The Office of the Privacy Commissioner for Personal Data (PCO)

- a. Limited jurisdiction: The mandate of the PCO is severely limited by the Personal Data (Privacy) Ordinance (Cap 486).<sup>26</sup> It does not provide for any conciliation measures, legal advice or legal aid, and does not have powers to bring legal proceedings.
- b. In January 2006, the Commissioner Raymond Tang left the office and joined the EOC as Chairperson. It set a poor example when the Commissioner left a human rights body within the term of office. This affected the stability and independence of the human rights body.
- c. The recent leakage of the complainants' personal information via the internet from the Independent Police Complaints Council (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.
- d. Budgetary constraint since 2003: Net cash flow for the operating activities of the PCO has gradually been reduced from HK\$3,231,478 in 2003, \$3,170,642 in 2004 to \$2,602,341 in 2005.<sup>27</sup> 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. As to the Government recurrent subvention for PCO, it has been reduced from \$ 35,096,287 in 2003, \$33,276,000 in 2004, \$31,439,000 in 2005 to \$31,439,000 in 2006. This amounts to a 10% decrease in the Government subvention.<sup>28</sup>

## 7. The Police Complaints Mechanism

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<sup>25</sup> Gren Manuel, "A New Watchdog in the Jungle," *South China Morning Post* (27 December 1998).

<sup>26</sup> The PDPO has a limited remit cannot effectively protect the right to privacy enshrined under the Basic Law and ICCPR.

<sup>27</sup> *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.

<sup>28</sup> The letter of PCO dated 20 Aug 2007 responded to our draft report on NHRI dated 10 Aug 2007. In the letter, PCO suggested the above paragraph 12c be amended as: "[t]he recent incident on leakage of the complainants' personal information via the internet by the IPCC showed that the Privacy Commissioner for Personal Data took prompt and proactive measures to investigate with a view to ensuring strict compliance of privacy law by the Government and public bodies."

- a. The Complaints Against Police Office (CAPO) is not independent from the Police Force.<sup>29</sup>
- b. The IPCC is not a statutory body. It has no power to investigate complaints against the police or to impose penalty.
- c. In response to such comments, the HKSAR proposed to make some improvements by incorporating the IPCC.<sup>30</sup>

## 8. The Commissioner for Covert Surveillance

- a. The Commissioner 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.”<sup>31</sup>
- b. There is criticism that the first 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.<sup>32</sup> At this stage, it remains to be seen whether Justice Woo will protect the right to privacy in a just and proactive manner.

**Overall, there is no public body with overall responsibility for the strategic enforcement of human rights law in Hong Kong.**

In the words of Ms. Wu: “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.”<sup>33</sup>

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<sup>29</sup> In the Concluding Observations of the Human Rights Committee on the First HK report in 1999, ‘[t]he Committee takes the view that the Independent Police Complaints Council has not the power to ensure proper and effective investigation of complaints against the police. The Committee remains concerned that investigations of police misconduct are still in the hands of the police themselves, which undermines the credibility of these investigations. The HKSAR should reconsider its approach on this issue and should provide for independent investigation of complaints against the police.’ See Paragraph 11, see note 7

<sup>30</sup> The Executive published the IPCC Bill in Gazette on 29 June 2007 as Legal Supplement No. 3. The main object of this Bill is to incorporate the existing IPCC and to provide for the Council’s functions of observing and monitoring the handling and investigation of reportable complaint by Commissioner of Police and its power as such statutory body. See Explanatory Memorandum of the Bill, visited the gazette wit-site on 20 July 2007 at [http://www.gld.gov.hk/cgi-bin/gld/egazette/gazettefiles.cgi?lang=e&year=2007&month=6&day=29&vol=11&no=26&header=0&acurrentpage=2&df=0&agree=1&gaz\\_type=](http://www.gld.gov.hk/cgi-bin/gld/egazette/gazettefiles.cgi?lang=e&year=2007&month=6&day=29&vol=11&no=26&header=0&acurrentpage=2&df=0&agree=1&gaz_type=)

<sup>31</sup> Id, Section 40(b)(iv).

<sup>32</sup> Stephen Vines, “Watching the Watchers,” *The Standard* (11 August 2006), available at [http://hk-mail.singtao.com/news\\_detail.asp?we\\_cat=5&art\\_id=24805&sid=9264402&con\\_type=1&d\\_str=20060811](http://hk-mail.singtao.com/news_detail.asp?we_cat=5&art_id=24805&sid=9264402&con_type=1&d_str=20060811)

<sup>33</sup> Anna Wu (1995) “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. Anna Wu is the second EOC Chair (1999-2003).

NHRIs contribute to the development of good governance, foster a culture of human rights<sup>34</sup>, 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 education programmes have a far-reaching impact on human rights protection in the long run.

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.

### **III. Latest developments**

#### **1. Human rights portfolio suffered due to governmental restructuring**

Mr. Donald Tsang took up his second term as Chief Executive of Hong Kong on 1 July 2007. On the same date, there was a reshuffle of policy portfolio among different government policy bureaus. The policy portfolio on human rights was transferred from the Home Affairs Bureau (HAB) to the Constitutional and Mainland Affairs Bureau (CMAB). In spite of assurances by the government, human rights work of the Government had been adversely affected. The human rights education working group under the Committee on the Promotion of Civic Education (CPCE) was disbanded in December 2007 and a survey on public perception on human rights proposed by the working group and commissioned by HAB was abruptly terminated by the Government without reasonable justification.

#### **2. The legislation of Race Discrimination Bill**

**The Race Discrimination Bill** was introduced into LegCo by the Government in late 2006. It contains many serious problems. Among them, it departs from the existing equal opportunities legislation in that a substantial part of Government acts will not be covered and that there is no provision to bring the exercise of government functions and powers under the regulation of the Bill. The Equal Opportunities Commission will therefore be denied jurisdiction over all these government acts and exercise of government functions and powers not covered by the Bill because it will have no jurisdiction over acts not covered by the Bill.

In the Concluding Observations of the UN Committee on the Elimination of Racial Discrimination (CERD) after its consideration of the report by China in 2001, CERD 'recommended that the Government of the State party and the local authorities of the HKSAR review the existing unsatisfactory situation thoroughly and that appropriate legislation be adopted to provide appropriate legal remedies and prohibit discrimination based on race, colour, descent, or national or ethnic origin, as has been done with regard to discrimination on the grounds of gender and disability.'

In a letter to China dated 24 August 2007, CERD expressed its concern that the Race Discrimination Bill does not appear to be in conformity with the Committee's recommendation. It requested the State Party to submit information on the Bill under its

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<sup>34</sup> 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.

Follow-up Procedure. Unfortunately, China has failed to submit the information required within the deadline.<sup>35</sup>

Immediately before CERD's 72<sup>nd</sup> Session, the Hong Kong Special Administrative Region (HKSAR) Government announced its readiness to introduce amendments to the Bills but only in respect of the application of the law to bind the government and the definition of indirect discrimination. Furthermore, no detailed amendments were publicized, making it totally uncertain whether the amendments would be cosmetic or not.

On 7 March 2008, CERD issued a letter to the Chinese Government under its Early Warning Procedure, criticizing the Race Discrimination Bill on its narrow definition of racial discrimination, limited applicability to actions of public authorities and institutions, and the omission of racial discrimination on the basis of language, nationality and residency status. It set 19 July 2008 as the deadline for the HKSAR to amend the Bill to bring it in line with Hong Kong's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. A government paper to LegCo published subsequently makes it clear that the HKSAR Government, while claiming to intend to amend the Bill to bind the Government, maintains "to expand the scope of the Bill to cover all government functions would cause uncertain and potentially far-reaching adverse implications on the Government's ability to make and implement policies: any policy or practice could be challenged in the courts" and the Government refused to let the Bill bind government exercise of functions and powers.

### **3. The establishment of Family Council: rights of women and children being sidelined**

In May 2001 the UN Committee on Economic, Social and Cultural Rights, while welcoming the establishment of the Women's Commission that January, also urged the HKSAR government to provide sufficient power and resources to the Council (Appendix I).

In September 2005, the UN Committee on the Rights of the Child called on the establishment of a Commission for Children in Hong Kong (Appendix I). On 8 June 2007, a non-binding motion was passed in the Legislative Council to urge the HKSAR government to set up a Commission on Children (Appendix II).

In the 2007 Policy Address, the Chief Executive Donald Tsang stated that, 'I announced in my last Policy Address the establishment of a Family Council. The Council will be set up this year and will be chaired by the Chief Secretary for Administration. It will implement policies and initiatives relating to family support in the next two years.'

Following the Policy Address, Tsang Tak-shing, the Secretary for Home Affairs Bureau, announced that the Government would consult the Family Council and the Elderly Commission, the Women's Commission and the Commission on Youth on how to fully integrate them into the structure of Family Council by 31 March 2009.<sup>36</sup> In other words, the Government will dismantle the Women's Commission in March 2009, and this has been criticized as a regress on implementing CEDAW, and to undervalue the importance of women's affairs.

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<sup>35</sup> It is not clear whether the Hong Kong Special Administrative Region Government has failed to prepare the requested information, or that China, as the State Party, has refused to transmit the information prepared by the HKSAR Government.

<sup>36</sup> Speech of Tsang Tak-shing, the Secretary of Home Affairs Bureau on 25 October 2007. (Chinese only)

On the other hand, various NGOs have submitted a joint-statement to the Welfare Services Panel of the Legislative Council, expressing their disappointment because ‘there is no mention of children throughout the Terms of Reference of the Family Council, while elderly, youth and women have been included.’<sup>37</sup>

These recent developments indicate that the HKSAR Government has given low priority to the promotion and protection of human rights. It does not bode well for the prospect of it agreeing to the establishment of a human rights institution in the foreseeable future.

#### IV. PROPOSAL FOR HKHRC

- **Mandates**

Jurisdiction: “Human rights” should be defined with reference to the following six UN human rights treaties which currently apply to the HKSAR<sup>38</sup> and includes other domestic legislations.<sup>39</sup>

The institutional framework for promotion and protection of human rights in Hong Kong (“the institutional framework”) should be capable of investigating complaints against both public authorities and private individuals<sup>40</sup>; and handling complaints and conducting investigations against all the law enforcement agencies in the absence of other independent commissions monitoring them.

- **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;

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<sup>37</sup> Submission to Welfare Services Panel of the Legislative Council: Our views on the Family Council by the Alliance for Children’s Commission on 6 February 2008.

<sup>38</sup> They include (a) The International Covenant on Economic, Social and Cultural Rights; (b) The International Covenant on Civil and Political Rights; (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.

<sup>39</sup> They include The Hong Kong Bills of Rights Ordinance (BORO); The anti-discrimination Ordinances (Including the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, and the Family Status Discrimination Ordinance and potentially the forthcoming Race Discrimination Ordinance) and 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.

<sup>40</sup> *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 (the “Assessing the Effectiveness of NHRIs”); Commonwealth Secretariat, “National Human Rights Institutions: Best Practice,” (London: 2001) at 18 (the “Best Practice”).



- iii. To actively organize promotional events and encourage community initiatives;
- iv. To advocate for education programmes at primary, secondary and tertiary levels;
- 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***

- vi. To comment on (a) legislation proposals with respect to their compliance with international and domestic human rights obligations and their implications for human rights,<sup>41</sup> (b) the inadequacies and defects of existing legislation and to report to the relevant government agencies or the legislature<sup>42</sup> and assist in the drafting new legislation<sup>43</sup>;
- vii. To provide advice on national policies<sup>44</sup>, administrative regulations and practices<sup>45</sup>, national policies to international human rights issues<sup>46</sup> and judicial processes<sup>47</sup> with potential human rights implications;
- viii. To call for acceptance and application of international treaties<sup>48</sup> and incorporation of international treaties to which Hong Kong is a party into domestic laws and practices;<sup>49</sup>
- ix. To comment on human rights violations in the private sectors<sup>50</sup> and the development of national action plan on human rights<sup>51</sup>;
- x. To assist the HKSAR Government in the course of preparing scheduled reports to the UN and to comment on the report in public.

***c. Investigating human rights violation and handling complaints***

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<sup>41</sup> *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 (the Handbook).

<sup>42</sup> *Id.*, paragraph 196.

<sup>43</sup> *Id.*, paragraph 197.

<sup>44</sup> *Id.*, paragraph 200.

<sup>45</sup> *Id.*, paragraph 204.

<sup>46</sup> *Id.*, paragraph 206.

<sup>47</sup> *Id.*, paragraph 205.

<sup>48</sup> *Id.*, paragraph 209.

<sup>49</sup> *Id.*, paragraph 210.

<sup>50</sup> *Id.*, paragraph 203.

<sup>51</sup> *Id.*, paragraph 215.

Handle complaints where the alleged violation falls within the remit of the six major applicable international treaties, the BORO, the anti-discrimination Ordinances and any other legislation with reference to the Basic Law. The complaints-handling function of the institutional framework for protecting human rights in Hong Kong should not be restricted to discrimination cases.

- **The Powers of the HKHRC:**

- i. The power to visit and to inspect places;
- ii. 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);
- iii. The power to conduct investigation upon receipt of complaints and investigations *suo moto* (power to pursue the subject of inquiry on its own initiative);
- iv. The power to compel evidence;
- v. The power to impose financial administration sanctions for failure to co-operate;
- vi. The power to protect witnesses;
- vii. 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);
- viii. The power to provide direct legal advice and assistance in strategic cases;
- ix. The power to bring cases in its own name;
- x. The power to intervene in legal proceedings as *amicus curiae* (a “friend of the court”).

- **Working Mechanisms**

The two most important features for an NHRI to function effectively are high-quality members and staff and independence.<sup>52</sup> Independence is the most important effectiveness

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<sup>52</sup> Commonwealth Secretariat, “National Human Rights Institutions: Best Practice,” (London: 2001) at 18 (the “Best Practice”) at 14. It also stated that “Individual members should possess the requisite expertise, integrity, experience and sensitivity to adequately protect and promote human rights. NHRI must be free to perform their mandates and functions without outside restraint or improper influence.”

factor of NHRIs.<sup>53</sup> Effective NHRIs should act independently of the Government, party politics, and all other entities and situations.

Independence can be achieved through legal and operational autonomy; financial autonomy, appointment and dismissal procedures, accountability and relationships with other institutions; and composition of personnel.<sup>54</sup>

### **Legal and operational autonomy**

- a. Established by a statute,
- b. Directly report to the Chief Executive or the LegCo, and
- c. Enjoy full-fledge operational autonomy - Executives cannot issue any directives or administrative orders to the HKHRC.

### **Financial autonomy**

- a. No direct control of funding from the Executive<sup>55</sup>;
- b. A body of the LegCo, for example a standing panel<sup>56</sup>, should be responsible for overseeing the formulation of the budget of the HKHRC; and
- c. Sufficient funding.

### **Appointment and dismissal procedures**

- a. 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 LegCo, officials of the relevant government departments, NGOs, judges, human rights experts and professionals should be established.<sup>57</sup>
- b. Commissioners should be selected on the basis of “proven” expertise, knowledge and experience in the promotion and protection of human rights.
- c. Commissioners should be accorded a rank and salary comparable to that of senior judicial officials.<sup>58</sup>

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<sup>53</sup> Best Practice at 5.

<sup>54</sup> Handbook, paragraphs 6-8.

<sup>55</sup> HKSAR is now considering the mechanism of funding to the judiciary from the executive that may ensure judicial independence. HRI should enjoy the financial autonomy equivalent to or no less than those enjoyed by our judiciary.

<sup>56</sup> Before 1 July 2007, HKSAR Home Affairs Bureau was responsible for human rights matters. After that, the newly arranged bureau called Mainland and Constitutional Affairs Bureau takes care of human rights matters. We are worried that those government officials deal with mainland affairs may be easier to be influenced by the Central Authorities on human rights issues.

<sup>57</sup> Best Practice at 9.

<sup>58</sup> Best Practice at 13.

- d. The terms of office Commissioners should be a fixed term of 5-7 years, with the chance of reappointment of an additional term of the same duration.
- e. Commissioners should enjoy immunity from civil and criminal proceedings for actions performed in their official capacity,<sup>59</sup> subject only to laws related to judicial review.<sup>60</sup>
- f. 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.<sup>61</sup>
- g. To enable NHRI members to undertake their duties as independent professionals, they should be appointed to full-time positions. It should consist of at least three leading members who serve on a full-time basis. The salaries of members of HRI should be linked to, and reviewed in line with, the salaries of members of the judiciary.<sup>62</sup>

### **Accountability and relationships with other institutions<sup>63</sup>**

- a. The NHRI should actively evaluate its effectiveness and incorporate its results together with its strategic plan in its annual report.
- b. The Legislature should hold in-depth discussion on the NHRI annual report.
- c. The NHRI should hold public hearings and forum to discuss its annual report.
- d. The Executive should respond in a timely manner to recommendations made by the NHRI.<sup>64</sup>
- e. The NHRI should play a role complementary to that of the courts.
- f. The decisions of NHRI should be subject to judicial review.

### **The composition of personnel of the HRI**

- a. The Paris Principles require that the composition of commissioners reflects a degree of sociological and political pluralism, representing the views of NGOs, trade unions, professional organizations and trends in philosophical and religious

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<sup>59</sup> Handbook paragraph 81; Best Practice at 17.

<sup>60</sup> Best Practice at 17.

<sup>61</sup> Handbook, paragraph 80.

<sup>62</sup> Best Practice at 13, 14.

<sup>63</sup> We basically accept the proposals set out in Chapter IV of the Best Practice is a good reference on this issue. We highlight some important points in the above only.

<sup>64</sup> There is a very obvious example that the HKSAR executive does not act timely to the recommendations of the HRI. In Feb 1999, the EOC recommended various amendment proposals (they are mainly obvious loopholes and some technical irregularities) to the Sex and Disability Discrimination Ordinances. In Oct 2000, the HKSAR agreed in principle on many proposals. Indeed, up to now, HKSAR refuses to have any plan to amend the law. She even refuses to draft the Race Discrimination Bill on the basis of the EOC proposal. HKSAR only agrees to make one amendment to Sex Discrimination Ordinance: render hostile learning environment unlawful (in sexual harassment) and also proposes hostile learning environment in racial harassment in unlawful.

thought<sup>65</sup>. Additionally, the composition should reflect “gender balance, the ethnic diversity of the society and the range of vulnerable groups” in the society.<sup>66</sup>

- 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.”<sup>67</sup>

## V. RECOMMENDATION

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

### The dual-commission model

- a. This establishes a general HRC 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 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. 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 HRC.<sup>68</sup> Because of the deeply-rooted racism and the political disputes between the Republic of Ireland and the United Kingdom, the 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 HRC 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.

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<sup>65</sup> Handbook paragraph 82; See also the Paris Principles, Section 4.

<sup>66</sup> Best Practice at 15.

<sup>67</sup> 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.

<sup>68</sup> 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].

- e. However, a clear division of labour and a co-operative working relationship between the two commissions is achievable. To do so, the relationship and allocation of functions between the two commissions must be clearly set out and delineated in writing.<sup>69</sup>

### **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. However, the single human rights commission granted with too wide a scope of power and functions, may perpetuate internal tension across strands and lose focus on the equality rights. As a result, some major jurisdictions adopting the single commission model have established several specialized independent commissions.
- c. In Australia and New Zealand, the Privacy Commissioner and Children's Commissioner which are independent from the central HRC, were established in the late 1990s.
- d. In New Zealand, when the Human Rights Commission Act 1977 was introduced, the Ombudsman was made a member of the HRC. The Human Rights Act in 1993 revoked the right of the Ombudsman to act as a Commissioner.
- e. 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 opined that it would be more effective for these separate offices to operate outside the commission structure.<sup>70</sup>

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. 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."<sup>71</sup>

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.

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<sup>69</sup> UCL Survey at 47.

<sup>70</sup> *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](http://www.justice.govt.nz/pubs/reports/2000/hr_reevaluation/index.html) at 14.

<sup>71</sup> Best Practice at 4. It is obvious that Hong Kong is not a place with limited resources. Economically, Hong Kong is a developed region. Hence, we prefer the dual commission model.

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.

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 co-operation 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.

The dual-commission model also provides a two-tier protection for human rights. In the dual-commission model, the equality agenda is less likely to be compromised by the concurrent political climate and emergency of political human rights issues.

Firstly, under the notion of “one country, two systems”, plenty of constitutional issues wait to be resolved. Freestanding human rights issues, particularly those related to the relationship between the Chinese Central Authorities and the HKSAR Government, can be very politically sensitive and may subsequently attract intervention from the Chinese Central Government. The caseload of freestanding human rights issues will likely be very heavy.<sup>72</sup>

Secondly, given the track record of human rights actions of the HKSAR Government in the scandals relating to appointments to the EOC, the Privacy Commissioner and Ombudsmen, the HKSAR Government may attempt to control the HKHRC and other HRIs. 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.

Thus, the dual-commission model would be more capable of addressing both equality rights and freestanding human rights than the single-commission model. Though we prefer the dual-commission model, we will not insist on a particular model and oppose other options. Most important of all, the HKSAR should move forward and admit that there is a genuine need for such an independent human rights commission.

### **Short-term Alternatives to setting up of the HKHRC**

This section discusses alternatives to the establishment of the HKHRC and the effectiveness of each. It may serve as a road map leading to establishment of HKHRC or as a measure to improve the human rights protection mechanism when the HRC can be realized within a short period of time.

- **An activated Office of Ombudsman**
  - a. In the absence of an explicit human rights mandate, a classic Ombudsman can involve international human rights norms by actively interpreting the 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

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<sup>72</sup> Patrick Yu, the former Commissioner of RDC in Northern Ireland is fully in support of the dual-commissions model.

which the activated Ombudsman effectively promotes and protects human rights is highly dependent on the holder's knowledge of human rights and political orientation. There lacks institutional guarantee that the Ombudsman will pursue promotion and protection in pure human rights cases in the absence of an explicit human rights mandate.

- c. Activating the Office of the Ombudsman is the most conservative alternative because it involves no institutional improvement. As such, it is not very desirable alternative for Hong Kong given the frequent appointment scandals, whereby the government has been suspected to control the orientation of the independent statutory committees by appointing pro-government, conservative and rights-unfriendly commissioners and members.
- **Enlarging the jurisdiction of the current Office of Ombudsman**
    - a. For long, the Council of Europe and various academics have encouraged entrusting the Ombudsmen with human rights matters.
    - b. A human rights Ombudsman enhanced by amendment of laws 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 Office of 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 performance of private sector does not receive the attention that it deserves.
    - e. To make matters worse, the impact of privatisation has significantly affected the work of the Ombudsman in the sense that an increasing amount of government work is and will continue to be out of the scope of the Ombudsmen.<sup>73</sup> That means an increasing area of public administration will not be covered by the Ombudsman.
    - f. 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. To overcome difficulties, transforming the existing Ombudsman into the HKHRC could result in transfer of knowledge and the skills. This means that the HKHRC should be able to take up the role as an effective NHRI within a shorter period of time.
  - **Creating a research-based local human rights center**

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<sup>73</sup> John Hatchard at 12.



- 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. For examples, these centers exist in Denmark, Germany and Norway.
  - b. The Danish Institute for Human Rights, the NHRI in Denmark, is part of the Danish Centre for International Studies and Human Rights. The work of the Danish Institute for Human Rights includes research, analysis, information distribution, education, documentation, and complaints handling, as well as a large number of national and international programmes.
  - c. The weakness of research-based human rights centers is that they lack complaints-handling power and enforcement power. These centers do not possess the legal power to ensure that the government and private entities comply with either domestic or international human rights laws. Nevertheless, in the long run, research-based human rights centers can have an impact on public policy by arousing public concern through publication of in-depth studies.
  - d. Whether the recommendation to form a research-based human rights center will 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 powers are essential to spark the awareness of protection for human rights. As such, this alternative is less desirable than that of the human rights Ombudsman.
- **Setting up an advisory panel/committee under the Legislature/Chief Executive**
    - a. As an interim arrangement to the establishment of the HKHRC, an advisory working group could be set up under the Legislature or its standing Panel,<sup>74</sup> or alternatively, directly under the Chief Executive.<sup>75</sup>
    - b. Between an advisory working group set up under the Legislature and one set up under the Chief Executive, the advisory former is preferable. A working group will usually have a higher level of transparency. As a result, civil society can more easily access it to express opinion. Its open meetings would also allow information to be released, hence arousing public interest and educating the community on the issues.

### **Weighing the options**

Activation of the Office of Ombudsman without amending 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 desirable in Hong Kong where the commitment to human rights protection remains limited in scope and weak in magnitude.

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<sup>74</sup> Since 1 July 2007, the Mainland and Constitutional Affairs is established to be responsible for human rights affairs. Home Affairs Bureau is no longer responsible for human rights affairs after that date. In 2007-2008, the LegCo may have corresponding change in the terms of reference of the Penal.

<sup>75</sup> An example of a high level body chaired by the Chief Executive is the **Commission on Strategic Development**.

The expansion of the jurisdiction of the Office of Ombudsman alone is not satisfactory in light of trend of privatization of public services. Research-based human rights centers are not desirable either because they lack powers to handle complaint and to make any order.

Nevertheless, the expansion of the jurisdiction of the Office of Ombudsman to cover human rights violations, alongside a new researched-based human rights institute, is a desirable alternative. A human rights Ombudsman and a research-based human rights center can supplement each other and hence promote and may protect human rights in a similar way as the dual-commission model.

If this proposal is also rejected, then the expansion of the jurisdiction of the Office of Ombudsman to encompass human rights violations, accompanied by establishment of an advisory working group under the LegCo or Home Affairs Panel, could facilitate a culture of respect for human rights.

In 2007-08, the most important matter for civil society to address will be to push the government to move its position on the NHRI through the newly established Sub-committee on Human Rights Protection Mechanism under the Legislature. Next is the need to fight for universal suffrage of the Chief Executive and the Legislature in the spirit of public consultation.<sup>76</sup>

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HONG KONG HUMAN RIGHTS MONITOR

17 MARCH 2008

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WE WANT TO SHOW OUR GRATITUDE TO THOSE ACADEMIA, NGOS AND HRC WHICH

COMMENTED OUR DRAFT REPORT, IN PARTICULAR,

PROFESSOR MICHAEL DAVIS, PROFESSOR RAJ KUMAR,

AMNESTY INTERNATIONAL (HK SECTION), THE ASSOCIATION FOR THE ADVANCEMENT OF

FEMINISM IN HK, CIVIL HUMAN RIGHTS FRONT, FORUM ASIA,

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<sup>76</sup> In July 2007, the Green Paper on the Constitutional Development was published on 11 July 2007 (available at <http://www.cmab-gpcd.gov.hk/en/consultation/index.htm>) for public consultation up to 10 October 2007. It sets out many options for Hong Kong people to express their views on the electoral arrangements of Chief Executive and the LegCo.

HK WOMEN COALITION ON EQUAL OPPORTUNITIES, AND  
THE OFFICE OF THE PRIVACY COMMISSIONER FOR PERSONAL DATA.

**APPENDIX I: UN Recommendations on the setting up of HRI**

1. In the Concluding Observations of the Human Rights Committee on the First HK report on the implementation of the International Covenant on Civil and Political Rights in 1999 (the first report after the establishment of the HKSAR in 1997), '[t]he Committee remains concerned that there is no independent body established by law to investigate and monitor human rights violations in HKSAR and the implementation of Covenant rights.'<sup>77</sup>
2. In the Concluding Observations of the Committee on the Elimination of Discrimination against Women on the Report by China in 1999, the Committee recommended that the HKSAR Government 'establish a high-level central mechanism with appropriate powers and resources to develop and coordinate a women-focused policy and long-term strategy to ensure effective implementation of the Convention.'<sup>78</sup>
3. In the Concluding Observations of the Committee on Economic, Social and Cultural Rights considering the First HKSAR Report in 2001, '[t]he Committee regrets that the HKSAR has not implemented a number of the recommendations in its concluding observations of 1996, despite the delegation's assurance that these must be given effect. The Committee wishes to reiterate in particular its concern on the following issues: ...d) The failure of the HKSAR to establish a national human rights institution with a broad mandate and its failure to establish adequate alternative arrangements for the promotion of economic, social and cultural rights;' 'The Committee urges the HKSAR to establish a national human rights institution consistent with the Paris principles (1991)<sup>79</sup> and the Committee's General Comment No. 10. Until such an institution is established, the Committee urges the HKSAR to enhance its measures for the promotion of economic, social and cultural rights.'<sup>80</sup> 'The Committee urges the HKSAR to provide the Women's Commission with sufficient powers and resources to improve the status of women in Hong Kong and to integrate gender in its policy-making and to ensure wider participation of women in all spheres of public life.'<sup>81</sup>

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<sup>77</sup> Paragraph 9 in CCPR/C/79/Add.117 dated 15 November 1999. All the Concluding Observations on HKSAR reports can be found over the website at [http://www.cmab.gov.hk/en/press/reports\\_human.htm](http://www.cmab.gov.hk/en/press/reports_human.htm)

<sup>78</sup> Paragraph 318 in A/54/38 dated 5 February 1999.

<sup>79</sup> "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> (the Paris Principles). *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.

<sup>80</sup> Paragraphs 15 and 32 in E/C.12/1/Add.58 dated 11 May 2001

<sup>81</sup> Paragraph 17 in E/C.12/1/Add.58 dated 11 May 2001.

4. In the Concluding Observations of the Committee on Economic, Social and Cultural Rights considering the Report by China in 2005, '[t]he Committee regrets that HKSAR has not implemented a number of the recommendations contained in its concluding observations of 2001. The Committee wishes to reiterate in particular its concern on the following issue:...(b) the absence of a human rights institution with a broad mandate, while noting HKSAR's position that the Equal Opportunities Commission has comparable functions'. 'The Committee once again urges HKSAR to implement the Committee's relevant suggestions and recommendations contained in its concluding observations of 2001 (E/C.12/1/Add.58), as well as the current ones, and to undertake whatever relevant concrete measures may be necessary towards their implementation.'<sup>82</sup>
  
5. In the Concluding Observations of the Committee on the Rights of Child on the Report by China in 2005, "[t]he Committee notes the information that various ministries on the mainland may receive complaints from the public, but it is concerned at the lack of an independent national human rights institution with a clear mandate to monitor the implementation of the Convention. It similarly regrets the absence of an independent national human rights institution with a specific mandate for child rights on the mainland and the Hong Kong and Macau SARs.'<sup>83</sup> 'The Committee recommends that the State party establish, on the mainland and the Hong Kong and Macau SARs, national human rights institutions with a clear mandate to monitor children's rights and implement the Convention at national, regional and local levels in accordance with the Principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles) annexed to General Assembly resolution 48/134 of 20 December 1993. Drawing the State party's attention to the Committee's general comment No. 2 (2002) on the role of independent national human rights institutions, the Committee notes that such institutions should have a mandate to receive, investigate and address complaints from the public, including individual children, and be provided with adequate financial, human and material resources. In the case of the Hong Kong SAR, such an institution could be a specialized branch of the existing Ombudsman's Office.'<sup>84</sup>
  
6. In March 2006, in the Concluding Observations of the Human Rights Committee on the HK report, '[i]t (the Human Rights Committee) remains concerned regarding the limited mandate and powers of the Ombudsman, including its lack of oversight function of the police, and the Equal Opportunities Commission (article 2). The HKSAR should consider the establishment of an independent human rights institution compliant with the Paris Principles.'<sup>85</sup>

## **APPENDIX II: Events in the debate on the establishment of a human rights commission and its substitute body, the EOC**

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<sup>82</sup> Paragraphs 78 and 90 in E/C.12/1/Add.107 dated 13 May 2005

<sup>83</sup> Paragraph 16 in CRC/C/CHN/CO/2 dated 24 November 2005.

<sup>84</sup> Paragraph 17 in CRC/C/CHN/CO/2 dated 24 November 2005.

<sup>85</sup> Paragraph 8 in CCPR/C/HKG/CO/2 dated 30 March 2006

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. <sup>86</sup>
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. <sup>87</sup>
July 1993	Former legislator Ms. Anna Wu (LegCo Member 1992-95) initiated a Legislative Council motion debate on the enactment of antidiscrimination legislation and the establishment of a Human Rights and Equal Opportunities Commission. <sup>88</sup> The motion gained the support from the Legislative Council at that time. <sup>89</sup>
March 1994	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 <sup>90</sup> , 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. <sup>91</sup>
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	HKSAR 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, and various specialist institutions, including the Ombudsman, the Privacy Commission, and the Equal Opportunities Commission. <sup>92</sup>

<sup>86</sup> LegCo’s meeting, “Official Record of Proceedings,” (5 June 1991) at 52.

<sup>87</sup> Id at 29.

<sup>88</sup> LegCo’s meeting, “Official Record of Proceedings,” (14 July 1993) at 4591-5.

<sup>89</sup> Id at 4633.

<sup>90</sup> 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.

<sup>91</sup> Legislative Council, “Official Record of Proceedings,” (21 April 1994) at 3299.

<sup>92</sup> *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.

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. <sup>93</sup>
September 2004	"Legislating Against Racial Discrimination: a Consultation Paper" was released. <sup>94</sup> This provided an opportunity for a review on the implementation mechanism of the anti-discrimination 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." <sup>95</sup>
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:-  "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. <i>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.</i> 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. <i>Options for further development are under exploration, though we are not – as yet ready to commit to a timetable.</i> " <sup>96</sup>
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. <sup>97</sup>
Oct 2006	The HKSAR announced that a Family Council would be established.
Dec 2006	The HKSAR Government introduced the Race Discrimination Bill into the Legislative Council.
Feb 2007	The Home Affairs Panel of the Legislative Council decided to set up a Subcommittee on

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

<sup>93</sup> *Legislative Council, Panel on Home Affairs*, "Minutes of meeting," (14 May 2004), LC Paper No. CB(2)2663/03-04 Ref: CB2/PL/HA.

<sup>94</sup> *Home Affairs Bureau*, the Hong Kong Special Administrative Region Government, "Legislating Against Racial Discrimination: A Consultation Paper," (September 2004).

<sup>95</sup> *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>

<sup>96</sup> 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).

<sup>97</sup> *Legislative Council, Panel on Home Affairs*, (May 2006) LC Paper No. CB(2)2219/05-06(01) at 2.

	Human Rights Protection Mechanisms under it.
Jun 2007	A motion “That this Council urges the Government to set up a Commission on Children to fulfill the obligations under the United Nations Convention on the Rights of the Child, safeguard the well-being of children, and ensure that children’s perspectives are fully taken into account in the process of formulating government policies” was passed by the Legislative Council with unanimous votes from all the attending legislators.
Jul 2007	The policy area of human rights was transferred from the Home Affairs Bureau to the Constitutional and Mainland Affairs Bureau (CMAB). Human rights education remains the responsibility of the HAB, but the human rights education working group was disbanded.  The HKSAR Government decided to terminate, without any proper justifications, the work on the perception survey on human rights after the transfer of the policy portfolio on human rights.
Aug 2007	The UN Committee on the Elimination of All Forms of Racial Discrimination expressed that the Race Discrimination Bill does not appear to be in conformity with the Committee’s recommendation. The Committee requested the state party to provide information and to explain the Race Discrimination Bill. <sup>98</sup>
Oct 2007	The HKSAR Government announced that the Family Council would be set up this year, and to it would study how to integrate the Elderly Commission, the Women’s Commission and the Commission on Youth into the structure of Family Council by 31 March 2009. <sup>99</sup>
Jan 2008	Over 60 individuals and organizations co-signed a joint statement, requesting the HKSAR Government to make substantive improvements to the proposed Race Discrimination Bill, and urged the Legislative Council Bills Committee to consider rejecting the Bill should there be no substantive improvements.
Mar 2008	The UN Committee on the Elimination of All Forms of Racial Discrimination discussed the problematic Hong Kong Race Discrimination Bill as scheduled in spite of China’s failure to provide the information on the Bill within the prescribed period. In the light of the pending UN CERD meeting, the HKSAR Government indicated to NGOs without details its intention to amend the Bill regarding its application to the government and the definition of indirect discrimination.
Mar 2008	On 7 March 2008, CERD issued a letter to the Chinese Government, criticizing the Hong Kong Race Discrimination Bill on its narrow definition of racial discrimination, limited applicability to actions of public authorities and institutions, and the omission of racial discrimination on the basis of language, nationality and residency status.

### **APPENDIX III: Consultative exercises**

By August 2007 we have conducted the consultation in many ways. We have sent emails to over 100 NGOs, all the Legislative Council members, various specialized institutions including the Equal Opportunities Commission, The Office of Ombudsman, The Office of the Privacy Commissioner for Personal Data and the The Commissioner for Covert Surveillance, and the HKSAR Government for comment. The draft report had been uploaded to our website (<http://www.hkhrm.org.hk>) for public consultation. Various meetings were held within the NGO community, and with Professor Michael Davis and Professor Raj Kumar, to discuss the draft report. Our chairperson, Chong Yiu Kwong attended a television

<sup>98</sup> Letter dated 24 August 2007 from CERD to the Permanent Representative of the Permanent Mission of China to the UN at Geneva.

<sup>99</sup> Speech of Tsang Tak-shing, the Secretary of Home Affairs Bureau on 25 October 2007. (Chinese only)

programme (RTHK) on 17 August 2007 to explain this draft report.

END-



## Appendix II

	Hong Kong	India	Indonesia	Malaysia	Maldives	Mongolia	Nepal	Philippines	South Korea	Sri Lanka	Thailand	Timor Leste
Full Name	Equal Opportunities Commission	National Human Rights Commission	Human Rights National Commission (Komnas HAM)	Human Rights commission (SUHAKAM)	Human Rights Commission	National Human Rights Commission	National Human Rights Commission	Philippines Commission on Human Rights	National Human Rights Commission	Human Rights Commission	National Human Rights Commission	Office of the Ombudsman (Provedor) for Human Rights and Justice
Founding Year	1996	1993	1993	2000	2003	2001	2006	1987	2001	1997	2001	2006
Enabling Law	- Sex Discrimination Ordinance, 1995 - Disability Discrimination Ordinance, 1995 - Family Status Discrimination Ordinance, 1997	Protection of Human Rights Act, 1993	- Act No. 39 of 1999 on Human Rights - Act No. 26 of 2000 on Human Rights Court	Human Rights Commission of Malaysia Act 1999	Constitution, Human Rights Commission Act 2005	Law on National Human Rights Commission 2000	- The Interim Constitution - Human Rights Commission Act 1997	Philippines Constitution of 1987 (Article XIII, Section 17)	National Human Rights Commission Act, 2001	Human Rights Commission of Sri Lanka Act No 21 of 1996	National Human Rights Commission Act B.E. 2542, 1999	Law No. 7/2004
Status at APF	No	Full member	Full member	Full member	Associate member	Full member	Full member	Full member	Full member	Full member	Full member	Full member
Status at ICC and date of next accreditation review	Not compliance with Paris Principles (2000 review) 10 Mar 2008	- A Status - 2011 - NHRCI's chairperson is a Regional Co-ordinator for the Committee	A Status  2012	A Status  First half of 2008		A Status  Second half of 2008	A Status  In October 2008	A Status  2012	- A Status - Second half of 2008 - NHRCK's chairperson is a vice-chairman of ICC	B Status  2012	A Status  Second half of 2008	
No. of Commissioners	- Chairperson - 16 members	- Chairperson - 3 Members - 2 Ex-officio members	35	17	- Chairperson - 5 members	- Chief commissioner - 3 members	- Chairperson - 4 members	5	11	- Chairman - 5 members	- Chairperson - 10 members	- 1 Ombudsman - 2 Deputy Ombudsman
Terms of Office	2 years	5 years	5 years	3 years	5 years	6 years	5 years	7 years	3 years	3 years	6 years	4 years
No. of Staff	72	326 as on March 2005	150			14	30	14	208 staff		- 80 civil servants - 70 employees	
Funding sources	HKSAR Government Budget	Central Government Budget	National budget	National budget	State budget	State budget	State budget	National budget, the commission can also get grants from private institutions	State budget	State budget	State budget	State budget
Annual Budget	\$73.5 million (2008-09)	Rs. 1070 Lakhs under non-plan funding, Rs 188 Lakhs under Plan funding during 2004-2005	763,6 trillion rupiah per 2007. (1 USD = Rp 9000)	RM 7.6 million in 2006		- 81 000 USD in 2006 - 106 000 USD in 2007	US\$ 1.06 million for 2007-2008	216.491 million Pesos in 2007	22 billion USD in 2007		120 million baht	

% of Government budget	0.03	0.001					0.04	0.21%	0.01			
Other specialized Institutions	- The Office of the Ombudsman - The Office of the Privacy Commissioner for Personal Data (PCO) - The Independent Police Complaints Council - The Commissioner for Covert Surveillance	- National Commission for Minorities - National Commission for Women - National Commission for Right to Information - National Commission for Child Right - 18 States' Human rights Commissions	National Commission on Women	Parliamentarian Standing Committees on Ethnic and privileges, on Human Rights and on Women		- Parliamentarian Sub Committee on Human Rights - National Authority for Children	- National Dalit Commission - National Women Commission - HRs and Social Justice Committee of Parliament	- Barangay Human Rights Action Court - Commission on the Role of Filipino Women - Office of the Ombudsman	- Ministry of Gender Equality & Family  - Korea Immigration Service			