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Submission to Legco Sub-Committee on Human Rights Protection Mechanisms

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Introduction.

1. This submission offers a brief response to the LegCo Report entitled *Human Rights Commissions in Northern Ireland, Australia, South Korea and India*, prepared by the Research and Library Services Division of the Legislative Council Secretariat, March 2008 (hereinafter “LegCo Report”). The Research and Library Services Division is to be complimented on a very comprehensive report on the structure of National Human Rights Institutions (NHRI) in these four jurisdictions. Given the sufficiency of these descriptions, this submission will just highlight a couple areas of particular concern in the Sub-Committee’s deliberations on establishing a human rights commission.

2. Discussions on establishing a comprehensive human rights commission have gone on for two decades in Hong Kong. Original proposals in LegCo, made at the same time that the current Equal Opportunities Commission (EOC) was approved, relied to a considerable extent on the experience of the Australian model included among those under discussion in the LegCo Report.¹ The Hong Kong government has seemingly been reluctant to establish a comprehensive human rights commission because it has judged Hong Kong’s existing system, which

¹ See Anna HungyukWu, “Why Hong Kong Should Have Equal Opportunities Legislation and a Human Rights Commission,” in Michael C. Davis, ed. *Human Rights and Chinese Values* (Oxford: Oxford University Press, 1995) pp. 185-202.

incorporates the rule of law, an independent judiciary, legal aid, an Ombudsman, the EOC and a free press, to be adequate.²

3. The Hong Kong government may fail to appreciate the importance of a human rights commission in securing international human rights. Noting that international human rights instruments do not require the establishment of a human rights commission, the Government seemingly assigns no urgency to the matter. As noted in the LegCo Report, the UN Human Rights Commission (now the UN Human Rights Council) in 1992 endorsed the Paris Principles on minimum standards to meet in establishing national human rights commissions. These same Paris Principles were adopted by the UN General Assembly in 1993. The UN treaty monitoring committees of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on Elimination of Racial Discrimination (CERD) and the Convention on the Rights of the Child (CRC) have all issued general comments on the use of NHRIs. In fact, the Human Rights Committee, under the International Covenant on Civil and Political Rights (ICCPR), has in its concluding observations recommended that the “HKSAR should consider the establishment of an independent human rights institution compliant with the Paris Principles.”

4. The need for a comprehensive human rights commission in Hong Kong is apparent. This submission will only address three compelling concerns evident in the examples addressed in the Legco Report and in human rights practice in the Asian region. The LegCo should bear in mind the following three concerns: 1) With a well-established rule of law, Hong Kong offers the most fertile soil for a successful human rights commission that may best serve the human rights needs of the community in an economically efficient manner; 2) achieving Hong Kong’s objectives for the comprehensive protection of human rights requires great attention to the independence and transparency of the proposed commission; and 3) the establishment of a comprehensive human rights commission in Hong Kong offers the opportunity for Hong Kong to take a leading role in the Asian region in regard to the practice and study of human rights.

A. Prospects for the Successful Establishment of an Independent Human Rights Commission in Hong Kong.

5. The Government’s argument that Hong Kong does not need a comprehensive human rights commission because it already has the rule

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

of law and effective legal and political institutions to protect human rights turns the proper analysis of this issue on its head. First, this misunderstands the role of a human rights commission. Human rights commissions typically aim to provide a comprehensive package of human rights services that are not adequately provided in traditional courts and other public bodies. This typically includes a system of broad oversight of developments relating to human rights in the society, oversight relating to human rights treaty compliance, an advisory service to legislative drafters and administrative officials, promotion of human rights education and investigation and prosecution of individual complaints in an economically efficient manner by officials most knowledgeable of human rights requirements. *The existing Hong Kong system barely provides any of these human rights services except to a limited extent in the area of equal opportunities.* It is interesting to note from the LegCo Report that the Paris Principles provide for services by NHRIs in all of these areas and that the four countries discussed all address these issues in a comprehensive fashion.

6. It is, in fact, the well-established rule of law in Hong Kong that offers the potential for success in this endeavor. The credibility and effectiveness of a human rights commission generally relates to the independence and effectiveness of the judiciary. The four countries studied in the LegCo Report generally share with Hong Kong an established tradition of the rule of law. In fact three of the examples share Hong Kong's common law tradition in this regard. South Korea does not share the common law tradition but, thanks to the establishment of democratic reform and a Constitutional Court, has adopted a comparable tradition of constitutional judicial review. The distinguishing characteristic among the four cases is the adequacy of the rule of law in each and the level of control over corruption. A strong rule of law and less corruption usually translates into success for human rights commissions. One may imagine that the conditions of both the rule of law and corruption pose a much greater challenge in India than in Hong Kong. The level of corruption in Hong Kong is comparable to Australia, the best of the four cases. This would make Hong Kong an even better candidate to achieve the highest ambitions sought to be realized in the establishment of NHRIs. In the other Asian countries where human rights commissions have been established, in Indonesia, Malaysia, the Maldives, Mongolia, Nepal, the Philippines, Sri Lanka and Thailand, it has been the lack of a well established rule of law that has posed the greatest challenge to establishing successful human rights commissions.

B. The Independence and Transparency of the Proposed Commission

7. In his book on *National Human Rights Institutions in the Asia Pacific Region* Brian Burdekin, the first Federal Human Rights Commissioner in Australia (from 1986-94) emphasizes that “the most critical factor in determining the effectiveness of an NHRI is its capacity to act independently in pursuing its mandate.”³ Burdekin was one of the key figures involved in drafting the Paris Principles on the minimum standards for NHRIs. Burdekin emphasizes the importance of the institution having the power to adopt its own internal rules and regulations relating to management, personnel and financial administration and in relation to investigations and complaints. He emphasizes that such independence does not mean it is unaccountable. There needs to be a capacity both to work with and monitor other branches of government. Being governed by normal civil service practices and reporting to the legislative branch on budgets and other matters is essential. In regard to independence, Burdekin most emphasizes the importance of the integrity and commitment of those who lead the institution. In this regard he feels the chairperson of the commission should be equivalent to a senior judicial appointment and other commissioners to mid-level judges or civil servants. The criteria for appointment should emphasize representation and human rights expertise—which should be spelled out in legislation. Appointment should not be made exclusively by the executive branch. He emphasizes civil society nomination, consultation and participation to assure representativeness and fixed-term appointments to assure independence. Grounds and procedures for dismissal should be clearly proscribed. NHRIs should also have the authority to select and appoint their own staff.

8. In various critiques of human rights commissions in Asia the biggest challenge faced is the securing of independence and a lack of official interference in the work of the commissions.⁴ Though the two examples chosen for the LegCo Report are among the best commissions in Asia, both have been criticized for failure to contain official interference. Past controversies over the independence of Hong Kong’s EOC serves to highlight this problem. Both the Indian and the South Korean human rights commissions have been criticized over issues of independence and impartiality. NGOs in India have particularly criticized the appointment of a former Director-General of the Central Bureau of Investigation with

³ Brian Burdekin, *National Human Rights Institutions in the Asia-Pacific Region* (Leidan: Martinus Nijhoff Publishers, 2007)

⁴ See *Performance of National Human Rights Institutions in Asia 2006: Cooperation with NGOs and Relationship with Governments*, (Bangkok: Forum-Asia, 2007) www.forum-asia.org

no human rights work experience to the Indian Human Rights Commission. That this appointment was upheld under challenge by the Supreme Court of India (PUCL v. Union of India & Anr., 29 April 2004) has drawn further criticism. In South Korea the National Human Rights Commission rejects up to 75 percent of the cases submitted. This is generally attributed to the lack of diverse representation on the commission and the tendency of the political officials in charge of appointments (the national assembly, the President, and the Chief Justice) to favor political appointees generally lacking in human rights experience and expertise.

9. The problem of independence is not insurmountable. The Paris Principles favor both human rights expertise and representation of diverse sectors in the society. The best way to achieve this would be to depoliticize the appointment process to the extent possible. This may involve an appointments committee with diverse representation and guidelines favoring expertise in the area. Commissioners with experience in the different sectors of society generally served by the commission's work may be more sensitive to the problems of eg. housing, immigrants, minorities, etc. Human rights expertise and work experience may aid in the creation and development of adequate standards in the commission's advisory and jurisprudential roles. It should not automatically be assumed that lawyers and judges are human rights experts. As revealed in the LegCo Report, the Indian Protection of Human Rights Act specifies that judges effectively take up the three top roles in the National Human Rights Commission. In contrast, the Australian Human Rights Commission takes advantage of special-purpose commissioners from other Australian commissions dealing with race, sex discrimination, aboriginal rights and disability. It is noteworthy that the Indian case includes similar arrangements for several ex-officio members. The biggest source of criticism of other Asian human rights commissions relates to a lack of independence and political interference. This problem will have to be studied more carefully in future deliberations.

C. Domestic Human Rights Commission and Regional Engagement.

10. Part A above highlights the important domestic functions that would be performed by a human rights commission that are not performed adequately at present. An additional attraction to establishing a human rights commission in Hong Kong is the enhanced international role such commission would offer Hong Kong. With wide disparity between Hong Kong and mainland China in respect of human rights practice Hong Kong is often buffeted by regional debates over human rights practices. Suspicion often attaches to Hong Kong policies, producing a generally

confrontational environment over critical human rights issues. This is seemingly unavoidable under the present circumstances of national authoritarian rule and local lack of democracy. With the Hong Kong government largely mute on critical human rights issues, it tends to engage these debates only in a defensive posture. The old adage that if you are not a part of the solution you are part of the problem appears to apply. Hong Kong is badly in need of an independent body, which can produce policy recommendations on international human rights issues that are not tainted by suspicion about government motives. Such institution would allow Hong Kong to adequately respond to human rights issues at home and engage the regional and national human rights debates in a constructive manner.

11. Establishing a human rights commission, which meets the requirements of the Paris Principles, should enable Hong Kong to join the Asia-Pacific Forum (APF) on NHRIs as a full member. This organization, established by an assembly of Asian human rights commissions, is the most effective and credible regional human rights organization. As of August 2005 there were 12 full members and three associate members. The APF includes an Advisory Council of Jurist (ACJ) which provides expert guidance on human rights issues relating to compliance. The APF has put on workshops in Beijing and may be influential in the development of a future human rights commission in China. Participation in such organization may be very constructive in China's development and will enable a leadership role for Hong Kong. Hong Kong's efforts to move forward in this area should include contact with APF.

Recommendations.

12. The various considerations outlined above point to the importance of establishing a human rights commission in Hong Kong. Given the very favorable rule of law environment in Hong Kong, realizations of the highest standards of compliance with the Paris Principles should be achieved. The LegCo Report offers some tentative structural options in this regard. Further study of options concerning the appointment and make-up of the human rights commission is warranted. Hong Kong should consult with the APF concerning guidelines and membership.