

# 立法會 *Legislative Council*

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## **Panel on Home Affairs**

### **Report of the Subcommittee on Human Rights Protection Mechanisms**

#### **Purpose**

This paper reports on the deliberations of the Subcommittee on Human Rights Protection Mechanisms (the Subcommittee).

#### **Background**

##### Human rights treaties applicable to Hong Kong

2. The following six United Nations (UN) human rights treaties which are applicable to Hong Kong entail a reporting requirement -

- (a) International Covenant on Economic, Social and Cultural Rights (ICESCR);
- (b) International Covenant on Civil and Political Rights (ICCPR);
- (c) International Convention on the Elimination of All Forms of Racial Discrimination;
- (d) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- (e) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and
- (f) Convention on the Rights of the Child.

3. The implementation of these six human rights treaties is monitored mainly through the UN reporting process. The Hong Kong Special Administrative Region (HKSAR) Government submits reports under the six human rights treaties to the respective UN Treaty Monitoring Bodies (TMBs) regularly. The Panel on Home Affairs (the Panel) monitors the submission of reports to UN under these treaties by the HKSAR Government and its progress in following up the recommendations made by the TMBs concerned.

Recommendations made by TMBs regarding the establishment of a human rights commission

4. The United Kingdom (UK) submitted its fourth periodic report in respect of Hong Kong under ICCPR to the United Nations Human Rights Committee (UNHRC) in August 1995. In paragraph 10 of the report, it was stated that the Hong Kong Government had carefully considered the proposal of establishing a human rights commission (HRC) in Hong Kong and concluded that it was not the best way forward in the particular circumstances of Hong Kong. In paragraph 22 of its Concluding Observations issued on 3 November 1995 after its consideration of the report, UNHRC recommended the State Party to reconsider its decision on the establishment of a HRC.

5. In paragraph 9 of its Concluding Observations issued on 15 November 1999 in relation to HKSAR's first report under ICCPR, UNHRC reiterated that it "*remains concerned that there is no independent body established by law to investigate and monitor human rights violations in Hong Kong and the implementation of Covenant rights*".

6. In paragraph 8 of its Concluding Observations issued on 30 March 2006 in relation to HKSAR's second report, UNHRC "*regrets that the HKSAR Government has not implemented a number of recommendations contained in its previous concluding observations. It 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 (EOC). According to UNHRC, the HKSAR Government should consider the establishment of an independent human rights institution compliant with the Paris Principles*".

7. In paragraph 33 of its Concluding Observations adopted by the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) on 7 December 1994 after consideration of the UK's second periodic report under ICESCR, the Committee "*enjoins the Government of Hong Kong to establish procedures to allow an appropriate body to adjudicate on complaints of infringement of the rights under the Covenant, and to allow the Hong Kong legislature to consider the desirability of establishing a human rights commission*".

8. In paragraph 14 of its Concluding Observations issued by UNCESCR on 6 December 1996 after consideration of UK's third periodic report, the Committee reiterated its serious concern that "*The Hong Kong Government continues to object to the establishment of a human rights commission*".

9. In paragraph 15 of its Concluding Observations issued on 11 May 2001 in relation to the HKSAR's first report under ICESCR, UNCESCR reiterated its concern on "*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*".

10. In paragraph 78 of its Concluding Observations issued on 13 May 2005 in relation to the HKSAR's second report under ICESCR, UNCESCR reiterated its concern on "the absence of a human rights institution with a broad mandate, while noting HKSAR's position that EOC has comparable functions".

### **The Subcommittee**

11. The issue of the establishment of a HRC in HKSAR has been the subject of discussion of the Panel. When the Panel examined the existing human rights protection mechanisms in Hong Kong at its meeting on 9 February 2007, some members were of the view that the existing mechanisms were far from satisfactory. They expressed disappointment at the Administration's repeated refusal of setting up a HRC in Hong Kong for the promotion and protection of human rights, despite the recommendations made repeatedly by UNHRC and UNCESCR. The Panel decided to set up a subcommittee to study issues relating to the human rights protection mechanisms in Hong Kong. The terms of reference and membership of the Subcommittee are in **Appendices I and II** respectively.

12. Under the chairmanship of Hon Albert HO, the Subcommittee has held five meetings including four with the Administration, the Hong Kong Human Rights Monitor (HKHRM) and academics. The submissions received are in **Appendices III to VII** (*LC Paper Nos CB(2)1731/06-07(01), CB(2)2198/06-07(02) and (03), CB(2)1727/7-08(01) and (02)*). The Subcommittee would like to take the opportunity to thank Mr LAW Yuk-kai, Director of HKHRM, Mr C Raj Kumar, Associate Professor of the City University of Hong Kong, and Professor Michael C Davis of the Chinese University of Hong Kong, for making very comprehensive and insightful submissions to the Subcommittee. The Subcommittee would also like to thank Ms LAU Pui-king, Associate Professor of the Hong Kong Polytechnic University for joining the discussion at a meeting.

### **Deliberations of the Subcommittee**

13. The Subcommittee has held discussions on the deficiencies in the existing human rights protection mechanisms in Hong Kong, feasible options to enhance the existing mechanisms and the need for setting up a HRC. A gist of its deliberations is summarized in the following paragraphs.

#### Deficiencies in the existing human rights protection mechanisms

14. According to the Government, human rights in Hong Kong are fully protected by law. The legislative safeguards are enshrined in the Basic Law, the Hong Kong Bill of Rights Ordinance (Cap. 383) and other relevant ordinances. They are buttressed by the rule of law and an independent judiciary. Hong Kong also has an institutional framework of organizations

which help promote and safeguard different rights which include the legal aid services, EOC, the Office of the Ombudsman (the Ombudsman) and the Office of the Privacy Commissioner for Personal Data (the Privacy Commissioner). To provide further protection for human rights, the Government has established the Complaints Against Police Office (CAPO) for investigating complaints about the conduct and behaviour of members of the police force and the Independent Commission Against Corruption Complaints Committee for monitoring and reviewing the handling by the Independent Commission Against Corruption (ICAC) of non-criminal complaints against ICAC and officers of ICAC.

15. The Subcommittee notes that a comprehensive series of recommendations on the role, composition, status and functions of national institutions for protecting and promoting human rights, known as the Paris Principles, were drawn up at an international workshop convened by the UN Centre for Human Rights in October 1991. These recommendations, which were officially approved by the UN General Assembly in December 1993, have become the common and basic criteria for the establishment of national institutions for the protection and promotion of human rights. According to the Paris Principles, a national institution should -

- (a) be given as broad a mandate as possible;
- (b) have a pluralist representation of the social forces of civilian society in its composition;
- (c) have adequate funding and independent framework of operation in order to be free from any government interference; and
- (d) have an official act to effect the appointment of its members and establish the specific duration of their mandate.

16. The Subcommittee is of the view that a major deficiency of the existing human rights protection mechanisms in Hong Kong is the non-compliance with the Paris Principles. The Subcommittee considers that the composition, mandate and independence of human rights institutions established in Hong Kong such as EOC, the Privacy Commissioner and the Ombudsman do not meet the relevant criteria of the Paris Principles. As a result, these institutions have not protected the various aspects of human rights under their purview in an effective manner.

17. The Administration has, however, pointed out that the Paris Principles are the recommendations of a working group convened in 1991 by the Centre for Human Rights on the role, composition, status and functions of national human rights institutions. While the recommendations of the working group were endorsed subsequently by the Commission on Human Rights, these recommendations are not mandatory, nor do they create any binding obligation on the HKSAR Government at both the international and domestic levels. In addition, the Administration is not aware of any representative studies or

systematic assessment of the experience and effectiveness of the existing national human rights institutions, whether or not such institutions are established in compliance with the Paris Principles.

18. The Subcommittee has taken the view that, apart from the non-compliance with the Paris Principles, the existing human rights institutions in Hong Kong have failed to provide a holistic approach to the protection of human rights because of their limited mandate and narrow scope of powers. The Subcommittee has pointed out that EOC is given the statutory powers to oversee the implementation of three anti-discrimination ordinances, namely, the Sex Discrimination Ordinance (Cap. 480), Disability Discrimination Ordinance (Cap. 487) and the Family Status Discrimination Ordinance (Cap. 527). The Privacy Commissioner is responsible for investigation and enforcement of the Personal Data (Privacy) Ordinance (Cap. 486) which aims particularly to protect the individual's right to privacy in relation to personal data only. The Ombudsman is only empowered under the Ombudsman Ordinance (Cap. 397) to investigate and report on grievances of members of the public arising from administrative actions. As a result, there are a number of human rights issues which are not addressed by any institutions.

19. The Subcommittee has pointed out that there is an increase in judicial reviews in recent years challenging the decisions of public bodies and these have overloaded the judicial system. The Subcommittee considers that the increase in judicial reviews has revealed that there is an absence of a holistic approach to the protection of human rights. As a result, many of the human rights violations which fall outside the purview of these existing institutions have to be dealt with by the courts.

20. The Subcommittee has also expressed concern about the absence of a high-level central body to monitor the implementation of human rights guaranteed under the various international treaties. The Subcommittee has pointed out that, while human rights straddle various policy areas, the Constitutional and Mainland Affairs Bureau is only tasked with a co-ordinating function for the HKSAR Government in reporting under the various international human rights treaties (except CEDAW which is under the purview of the Labour and Welfare Bureau) and in making an overall assessment of the way in which human rights are implemented. As a result, the implementation of the Concluding Observations or Concluding Comments in respect of Hong Kong issued by UN human rights treaty bodies has not been monitored effectively.

#### Enhancement of the existing human rights protection mechanisms

21. The Subcommittee is of the view that the Paris Principles, though not legally binding, embody a whole set of international standards and norms. The Administration should follow the Paris Principles in reviewing the competence, composition, mandate and method of operations of the existing human rights institutions such as EOC, the Privacy Commissioner and the Ombudsman so as to enhance their effectiveness.

22. The Administration has, however, reiterated its position that Hong Kong already has an extensive mechanism for the promotion and protection of human rights in Hong Kong. The Administration also considers that the existing human rights institutions in essence have largely followed the standards of the Paris Principles in terms of their independence and operational and financial autonomy. There is no obvious need for changing the existing institutions.

#### Need for a human rights commission in Hong Kong

23. To facilitate its consideration of the need for a human rights commission in Hong Kong, the Subcommittee has requested the Research and Library Services Division of the Legislative Council Secretariat to conduct a research to study the functions, powers and operation of HRCs in Northern Ireland, Australia, South Korea and India. The Subcommittee notes that all the HRCs in these places have been assessed by the International Co-ordinating Committee of National Human Rights Institutions to be in compliance with the Paris Principles.

24. The Administration's position is that there already exists in Hong Kong an extensive mechanism for the protection of human rights. The rights of individuals are enshrined clearly in the laws. The constitutional and legal provisions are firmly underpinned by the rule of law, an independent judiciary, statutory bodies and institutions, and a comprehensive legal aid system. Moreover, the effectiveness of the existing mechanism and the work of the Government and these bodies are continually and closely monitored by the Legislative Council and the public, including particularly the media. The Administration, therefore, does not see an obvious need for establishing another human rights institution to duplicate or to supersede existing mechanisms, and has no plans or timetable for the establishment of such in the immediate future.

25. The Administration has also advised the Subcommittee that the organization, structure and operation of the mechanism for the protection of human rights should be determined by the circumstances of individual countries or places. In "Fact Sheet No. 19: National Institutions for the Promotion and Protection of Human Rights", the UN High Commission for Human Rights has clearly stated that -

*"In the course of its involvement in the work of national institutions, the United Nations has come to realize that no single model of national institution can, or should, be recommended as the appropriate mechanism for all countries. Although each nation can benefit from the experience of others, national institutions must be developed taking into account local cultural and legal traditions as well as existing political organization."*

26. The Subcommittee finds the Administration's argument not convincing. The Subcommittee has pointed out to the Administration that, while all the places covered in the research have a democratically elected legislature, an independent judiciary and other institutions such as the Ombudsman and NGOs dealing with certain aspects of human rights protection, human rights commissions have been established in these places. The Subcommittee also considers that it is important for the HKSAR Government to review comprehensively each of its policy areas during the reporting process and assess whether the policies and measures are in compliance with its obligations under various international human rights treaties, but no such review mechanism has been put in place at present.

27. The Subcommittee is of the view that the establishment of a HRC in Hong Kong can achieve the following -

- (a) the commission can provide for a holistic mechanism to monitor and review the efforts of the HKSAR Government in carrying out its international and domestic human rights obligations, and to review the compatibility or conformity of Hong Kong laws in respect of the related international treaties; and
- (b) with the power to investigate complaints and resolve complaints by conciliation, etc, the commission is a more cost-effective and accessible method of resolving conflicts relating to human rights.

28. The Subcommittee appreciates that the establishment of a HRC is not a panacea for the prevention of all human rights violations and resolution of conflicts in a society. The Subcommittee has, however, stressed to the Administration that its establishment should not be perceived as creating more confrontations. To the contrary, its establishment would benefit the governance of HKSAR because many conflicts could be resolved by conciliation and members of the public do not have to seek redress through judicial channel or by staging protests on the street.

29. The Subcommittee has considered the following categories of institutional framework of human rights promotion and protection -

- (a) the multiple-commission model which consists of various commissions mandated to deal with specific aspects of human rights;
- (b) the single and integrated commission model by which one single and integrated commission would be mandated broadly to deal with both equality and human rights issues; and
- (c) the dual-commission model by which a general human rights commission and an equal opportunities commission would be responsible for general human rights and equality issues respectively.

30. The Subcommittee is of the view that, while adopting the single and integrated commission model may have the problem of the absence of a specialized body of dealing with specific area of human rights protection, the cost and effectiveness of establishing a new HRC in Hong Kong should be considered. The primary concern is whether the commission will have adequate independence and investigatory powers. If a HRC is to be set up, its remit and responsibilities and those of the existing human rights institutions should be construed carefully taking into account the existing provisions of the respective ordinances, the possible jurisdictional overlap and the resources implications. The Subcommittee stresses that, in order for the commission to function effectively, the institution must have a high degree of operational and financial autonomy with a broad mandate. It is of utmost importance that the appointment of the chairman and members of the human rights commission, as well as other human rights institutions, should be made in a fair and transparent manner. The Subcommittee has suggested that reference should be made to the creation of the office of the Commissioner for Public Appointments in the UK who is given a role, independent of the government, to set the standards for recruiting and to regulate the recruitment process for appointments in public bodies. In addition, the appointment criteria should emphasize diverse representation and human rights expertise.

### **Conclusion and recommendation**

31. The Subcommittee concludes that there is a need to set up a HRC in Hong Kong and is disappointed at the stern position taken by the Administration against its establishment. The Subcommittee recommends that a motion on its report should be moved for debate at a Council meeting (i.e. on 9 July 2008), and the agreement of the Panel and the House Committee be sought for the allocation of a debate slot to Hon Albert HO, who is the Subcommittee Chairman, under Rule 14A(h) of the House Rules for moving the motion. The wording of the proposed motion is in **Appendix VIII**.

### **Advice sought**

32. Members of the Panel are invited to note the deliberations of the Subcommittee as summarized above and support the recommendation stated in paragraph 31 above.



## **Subcommittee on Human Rights Protection Mechanisms**

### **Terms of Reference**

1. To monitor and examine the operation and effectiveness of existing institutional framework for promotion and protection of human rights in Hong Kong;
2. 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
3. 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.

**Panel on Home Affairs**

**Subcommittee on Human Rights Protection Mechanisms**

**Membership list**

<b>Chairman</b>	Hon Albert HO Chun-yan
<b>Members</b>	Hon James TO Kun-sun Dr Hon Philip WONG Yu-hong, GBS Hon Emily LAU Wai-hing, JP Hon CHOY So-yuk, JP Hon LI Kwok-ying, MH, JP Hon Daniel LAM Wai-keung, SBS, JP Dr Hon Fernando CHEUNG Chiu-hung Hon WONG Ting-kwong, BBS  (Total : 9 Members)
<b>Clerk</b>	Miss Flora TAI
<b>Legal Adviser</b>	Miss Kitty CHENG
<b>Date</b>	1 November 2007

II. Views of Professor C. Raj Kumar and Professor Michael C. Davis

附錄 III  
Appendix III

*(a) Views on whether Hong Kong's existing human rights framework is compliant with the Paris Principles*

We believe that Hong Kong's existing human rights framework is not in compliance with the Paris Principles. Although Hong Kong has a few institutions in the form of the Equal Opportunities Commission, the Ombudsman and the Office of the Privacy Commissioner for Personal Data that are engaged in the task of protecting and promoting some aspects of human rights, these institutions are not best suited to provide a holistic approach to the protection and promotion of human rights, as envisaged in the Paris Principles.

The Paris Principles are important basic principles that inform our approach and understanding of the institutionalisation of human rights. They also provide guidelines on how national human rights institutions (NHRIs) can achieve the goals of protecting and promoting human rights. The Paris Principles are the first systematic effort to enumerate the role and functions of NHRIs. They are divided into sections comprising certain headings: competence and responsibilities, composition and guarantees of independence and pluralism,

methods of operation, and additional principles concerning the status of commissions with quasi-jurisdictional competence.

Through the Paris Principles, efforts have been made to ensure that NHRIs have "as broad a mandate as possible" and that such mandate has either constitutional or legislative validity. Unfortunately, in the context of Hong Kong, the mandate that is given to the existing institutions is fairly limited and the powers that are exercised are narrow. The comprehensive section on NHRIs' competence and responsibilities in the Paris Principles suggest that the institutions be given sufficient scope to evolve according to socio-legal and political circumstances, and to include those functions that they deem appropriate. This guidance in the Paris Principles was advanced with the hope that countries would evolve a broader approach to institutional protection of human rights and not a limited approach. The section on the composition and guarantees of independence and pluralism under the Paris Principles aims to underline the need for measures to ensure the NHRIs' independence and institutional autonomy. Unfortunately, our historical experience with the working of existing institutions in Hong Kong demonstrates that functional autonomy and operational independence are neither protected through the legal structure nor

in practice. While establishing some of these institutions in Hong Kong, there was an opportunity to emphasise the basic philosophy underlying the establishment of such institutions worldwide, which is to ensure the protection and promotion of human rights and fundamental freedoms of people through the development of national institutions. However, this was not done and our institutions have been subject to different types of criticism. This is of particular concern when other institutions, including the judiciary and, to a certain extent, the administrative methods of grievance redress within the government departments may not always be able to afford "guarantees of independence and pluralism," as such guarantees are specifically mentioned in the sub-heading of the Paris Principles. The working of the existing institutions in Hong Kong does not demonstrate that these Principles have been duly followed.

As part of the responsibilities of NHRIs, the Paris Principles observe that NHRIs should "promote and ensure the harmonisation of national legislation regulations and practices with the international human rights instruments to which the State is a party, and ensure their effective implementation." This guideline aims at local NHRIs performing a comprehensive function in human rights development and education in the community. This is an important

principle in as much as it refers to the compatibility of international human rights law and national legislation. This Principles aim also to ensure that governments take efforts to ratify international human rights treaties. In the context of Hong Kong, since the existing institutions have limited mandate and have not had the powers to entertain human rights violations, including civil, political, economic, social and cultural rights, they have not been able to usefully perform these responsibilities. NHRIs are not the only institutions that have the task of ensuring compliance with treaty obligations; the Governments' law ministry and, to a certain extent, the judiciary could perform these tasks while NHRIs would then supplement the role of the other governmental departments in ensuring treaty compliance.

Setting standards in the area of human rights, ensuring treaty ratification, and promoting domestic law reform to elevate the status of international human rights treaties within the domestic law are important aspects of improved governance mechanisms in human rights matters that NHRIs ought to be performing. Unfortunately, the institutions in Hong Kong do not comply with the Paris Principles and hence, are not able to perform these responsibilities in an effective manner. This assumes significance in light of expanding notions of

human rights and the continuous and specialised development of international human rights Jurisprudence. The Copenhagen Declaration correctly summarises this aspect when it emphasises the need for NHRIs to ensure that "governments ratify international human rights treaties, remove reservations contrary to the object and purpose of the treaty and ensure consistency between domestic laws, programs and policies and international human rights standards".

***(b) Views on whether a human rights commission should be established in Hong Kong***

We believe that an independent human rights commission should be established in Hong Kong as soon as possible. The institutional approach to handling human rights issues has proven to be one of most commonly developed strategies to facilitate domestic protection and promotion of human rights. Hong Kong needs an independent human rights commission (IHRC) that should specifically be mandated to investigate allegations of human rights violations that come before it or those cases in which it decides to take *suo motu* jurisdiction. The need for creating an IHRC is demonstrated by the fact

that human rights issues have once again come to the forefront of political discourse in Hong Kong in view of controversies surrounding the Article 23 legislation and other matters. Various interest groups had to engage with the government of the HKSAR for several months in vain to convince it of the need for examining the Article 23 legislation due to its negative impact on human rights and civil liberties.

Moreover, Hong Kong courts, by their nature, cannot pass any opinion on the legality or otherwise of a future legislation. Hence, the much needed human rights scrutiny of the Article 23 legislation was not available. However, the human rights consequences of this legislation were publicised through academic writings, independent opinions, consultations, media opinions, NGOs and professional organisations like bar associations. But these opinions tend to fundamentally differ from the kind of opinion that would typically come from an IHRC, if there were such an institution in Hong Kong.

NHRIs perform a variety of functions, including investigating alleged human rights violations, conducting public inquiries, exercising advisory jurisdiction, enforcement of human rights in prisons and other custodial institutions, providing advice and assistance to governments, promoting human rights



education and awareness, promoting interaction, exchange, and better coordination among other NHRIs in the region and worldwide, promoting interaction and exchange with NGOs, and publication of annual reports

To this list may be added a few more specific functions for the IHRC of Hong Kong: the IHRC should engage and collaborate with NGOs in Hong Kong to tackle human rights problems and to promote and develop a vibrant civil society culture in Hong Kong; the IHRC of Hong Kong should also collaborate, share information with other HRCs in the Asia-Pacific region and other parts of the world and be willing to learn from best practices and experiences of HRCs that have been successful in handling human rights issues in other jurisdictions; the IHRC should involve itself in the task of prioritising the promotion of human rights education in Hong Kong that respects human dignity and cherishes human values like equality, non-discrimination, and tolerance.

In this regard, the IHRC can usefully refer to the work of the Independent Commission against Corruption (ICAC) in Hong Kong and how it was successful in developing a culture of integrity and corruption-free governance

in Hong Kong. Hong Kong has successfully developed a system of corruption-free governance and a governmental administrative system that is largely based upon integrity and efficiency. Hong Kong's ICAC is known to be one of the most successful institutional approaches to tackle corruption. The Global Corruption Report of 2006, prepared by Transparency International, ranks Hong Kong to be one of the least corrupt cities in the world. However, efforts to tackle corruption through the ICAC and endeavours to protect and promote human rights through the proposed IHRC are quite different processes. Much will depend on political consensus and the commitment of the government of the HKSAR to provide the institutional autonomy and functional independence for an IHRC. Undoubtedly, it would also involve political bargaining with the Mainland that brings into question the autonomy that HKSAR is supposed to enjoy while being a part of the PRC. The autonomy of an IHRC will in a way mirror the larger question of how politically autonomous Hong Kong itself can be.

Besides the earlier mentioned justifications for the creation of an IHRC in Hong Kong, it is also worth noting that an IHRC in Hong Kong can help provide direction to the human rights discourse in its dialogue with power

structures of the state. There is great governmental apathy relating to human rights and this can, to a large extent, be overcome if the government starts to think seriously about human rights as a development and governance issue, rather than a purely political issue on which they have to disagree with critics of the administration. The presence of an IHRC can ensure that numerous matters in which the government has not acted in accordance with the rights and freedoms guaranteed to the people of Hong Kong can be averted from tedious court cases. The IHRC will be able to engage with the particular victims of human rights violations and can potentially serve as an impartial arbiter between the government and the victims of human rights violations. Unnecessary time, money and resources spent for litigation can thus be better utilised for other development activities. The IHRC can provide greater impetus through its research and development department in understanding the relationship between human rights, democracy and development.

While drafting a suitable legislation for establishing an IHRC in Hong Kong, it is possible to borrow the practice of the Court of Final Appeal (CFA) in Hong Kong: to have some members of the IHRC come from outside Hong Kong and, in particular, from other common law jurisdictions and other HRCs to sit on the IHRC in Hong Kong and thus contribute to the development of best practices

for the protection and promotion of human rights. There are other countries in which HRCs are functioning effectively and they have started to take capacity-building initiative and training programs to promote the establishment of HRCs worldwide. The proposed IHRC of Hong Kong could very well use these experiences and indeed engage and interact with other countries where HRCs have been successfully protecting and promoting human rights. The proposed IHRC should also be empowered to handle violations of economic, social and cultural rights, besides civil and political rights. The experience of HRCs that have been established in other parts of the world also demonstrate that even the successful HRCs have not been effective in the area of economic and social rights and have been subject to criticism on this account. In this context, it is important to recognise that the mandate of the IHRC in Hong Kong should specifically include powers to investigate allegations of violations of ESC rights and provide remedies for the victims. Since the ICCPR and ICESCR are both entrenched in the HKSAR, the proposed IHRC will have a legal and constitutional framework to ensure the proper protection and promotion of all human rights.

The need for establishing an IHRC in Hong Kong can be justified on the basis of human rights advocacy and an independent institutional mechanism designed to protect and promote human rights. This would pave way for the development of democratic institutions in Hong Kong with a view to improve the quality of governance and effectiveness of public administration. However, it is possible that the establishment of an IHRC can be opposed on several grounds. The fact that the present government of the HKSAR and the authorities in Mainland China are deeply concerned about the agitation against the Article 23 legislation and the dynamic movement towards deepening of democracy has made the case of establishing an IHRC difficult. The government of the HKSAR may be of the opinion that creating an IHRC is nothing short of opening a Pandora's Box or a slippery slope that will end up openly challenging its authority. A vibrant civil society, leading political opposition groups, media and other members of the Hong Kong society are already exerting enormous pressure on the government to reform and truly promote greater transparency in its decision-making process, particularly on all matters relating to the Article 23 legislation. This also translates into demands that the government allow genuine public consultation and receive feedback, in addition to being ready and willing to listen to the views of the

people of Hong Kong and if necessary, make amendments to the legislation.

The government of the HKSAR has demonstrated little sincerity in its handling of the Article 23 episode and if at all, it has only widened the distance between the government and the people of Hong Kong.

Under these circumstances, the creation of an IHRC would send the right signals to all concerned people that the government is ready and willing to handle the human rights implications of not only the Article 23 legislation, but also other possible acts in the future. The recent Article 23 debate has engendered some mistrust of the government that needs to be repaired. Moreover, the creation of an IHRC would only underscore the government's pre-existing commitments to international human rights obligations to which Hong Kong is a party. The mandate of the IHRC ought to be wider so as to include both civil and political rights and economic, social and cultural rights. Unlike the courts of Hong Kong, the IHRC need not be restricted by domestic legislation and should be able to handle issues relating to human rights in a much more creative manner. In this regard, it is useful to refer to the objection that there may be a case of functional duplication prevailing in the concept of

a human rights commission in Hong Kong due to the fact that the HKSAR already has an EOC.

It is important to note that that the formation of EOC in Hong Kong was preceded by initial efforts to create a human rights commission. These efforts did not come to fruition and what ultimately came about was not an IHRC but an EOC. Equality and non-discrimination, albeit a very important human rights issue, is only one of the various human rights issues that need an institutional response. EOC has jurisdictional limitations to pursue matters that are violations of the anti-discrimination law. This means that many of the other human rights violations that take place in Hong Kong will have to be dealt with by the courts of the HKSAR or some other administrative tribunal with little relief to the survivors. A recent controversy over the appointment of a new Director of the EOC and his comments on his predecessor has damaged the reputation of the institution, and there is now an investigation in this respect in the Legislative Council. There was some public speculation that the earlier Director was let go because she was fiercely independent and forceful in her mandate. This only underscores the argument that was earlier made about

the need for the proposed IHRC to have its autonomy and independence and should not have any governmental interference in its functioning.

The proposed IHRC will not supplant the EOC. The EOC will function on the same lines in which it is presently functioning. However, there are arguments for its reform, and the need for guarantees of its greater transparency and independence is significant. The IHRC will be an independent stand-alone institution that will be broadly mandated and will have jurisdiction to investigate allegations of human rights violations. The functions of the IHRC will be determined based upon numerous factors, including the needs and human rights aspirations of the people of Hong Kong, the structure of human rights law in the BL and the BORO, the Paris Principles and other international human rights principles that are relevant for the establishment of human rights commissions. The IHRC will also draw upon comparative experiences in terms of the functions of the HRCs that have been established and functioning in other countries in the South East Asian region and other parts of the world.



Further, the enabling legislation that establishes the IHRC will have to ensure that there is no functional duplication in terms of the role of the EOC and hence, those matters that come before the IHRC, which are directly or indirectly related to equality and non-discrimination, need to be handed over to the EOC. This will ensure that both the IHRC and the EOC do not function in opposing directions or enter into a turf war, but rather complement each other's unique roles.

The role of the ICAC in Hong Kong is also very important to understand institutionalisation of transparency in governance. Corruption is a violation of human rights. While in the case of developing countries, there is a stronger case of corruption to be a violation of human rights, in developed countries and advanced economies also there are enough instances to demonstrate that corruption violates human rights and rights-based approaches to corruption can more effectively handle the problem. In this regard, the IHRC will benefit significantly from the work of the ICAC as corruption in administration clearly leads to abuse of power and potential human rights violations. The IHRC can be the sheet-anchor institution on the basis of which other human rights work can be conducted.

The governance discourse in Hong Kong can be significantly transformed if the IHRC remains the focal point for good governance. Close interaction and engagement of the IHRC with the EOC and the ICAC would benefit these institutions in evolving suitable policies and practices that, in totality, ensure good governance. Human rights support good governance, and any system of administration that does not respect human rights cannot promote good governance. Hong Kong has the potential to take the lead in this area, as there are numerous possible linkages between the human rights discourse of the IHRC, which could be supported by the good governance discourse of the ICAC and the anti-discrimination discourse of the EOC. All these aspects are indeed human rights issues and it is in the best interests of the HKSAR's growth and development that the IHRC is established so that rule of law, protection of rights and freedoms, and promotion of good governance and achievement of sustainable social and economic development becomes a true reality.

A survey of Hong Kong's legal institutions and laws has revealed the presence of a theoretical foundation upon which a culture of human rights can

be nurtured. There is indeed a conceptual basis for deepening rule of law, good governance and tolerant society already exists in Hong Kong. Nevertheless, the latent potential for a comprehensive human rights culture can only be realised through human rights education that galvanises and enters the political and social psyche of Hong Kong residents. The incapacity of the Hong Kong courts to deal with all human rights problems and the unwillingness of the HKSAR government to allow participatory democracy means that the community's demand for preservation of liberties has no proper recourse at the moment. This was demonstrated in the weak and non-transparent response of HKSAR administration to the Article 23 agitation.

For meeting the gap in human rights protection that Hong Kong is facing, establishment of an Independent Human Rights Commission (IHRC) is essential. The word "independent" is so important in the political context of Hong Kong that it was considered appropriate to add it to the acronym "IHRC". An autonomous human rights institution in the form of an IHRC will be capable of meeting the expectations of Hong Kong society and promoting a culture of human rights. It is important to recognise that there will be no duplication or clash of jurisdiction of the IHRC with other entities that deal with

particular human rights issues, which are covered by the EOC and the ICAC. The arguments for an IHRC outweigh those against it. A model IHRC that can accommodate various concerns and still be effective has been proposed for consideration of the legal community and political authorities. This framework can go a long way in bringing Hong Kong closer to the liberal rights-respecting paradise that it has always aspired to be.

# 香港人權監察

## HONG KONG HUMAN RIGHTS MONITOR

致立法會人權保障機制小組委員會意見書

### 香港人權保障機制的缺憾

二零零七年六月

1. 在 2007 年 4 月 28 日的會議上，立法會人權保障機制小組委員會要求香港人權監察提供一份文件，講述現存人權保障上的缺憾，尤其有那些人權範疇，得不到人權機制的處理。人權監察經研究後，簡報如下，以便政府和貴小組委員會進一步研究和跟進。

#### 國際人權法和本地法中權利的落實

2. 儘管有眾多國際人權公約（包括國際勞工公約）適用於香港，可是香港卻並無一個獨立的法定機構，可以去確保公約的落實，以及跟進公約監察機構給香港的建議。
3. 香港有《基本法》的人權保障條文，亦已訂立了《香港人權法案條例》，但是並無一個機構去處理各種侵犯人權的投訴，與及去監察和促進《人權法》中各項權利的實施；即使在有限的權利範圍中（例如限於性別、殘疾和家崗位的歧視，特定類別個人資料的侵犯等），有專門的獨立監察機構去處理，然而這些權利範疇內的人權問題，也並非全數地納入有關機構的職權中，令有些權利得不到應有的保障。

#### 法律的制訂和檢討

4. 現時並無一個獨立的人權專責機制，在法律制訂和檢討的不同階段和立法的過程中，能夠從人權角度，專門研究法例草案和現有法律，提出具體的批評和建議，協助行政和立法機關改善香港的法律，令香港法律符合國際人權標準和《基本法》的人權保障，而不必過份依賴法院的違憲審查機制，逼人以身試法，才見改善。
5. 政府在制訂和檢討法律時，雖然有律政司的協助，但是這種完全是政府內部的機制，既不獨立，亦不公開，不能引起公眾討論，不能發揮公眾監察力量，因此不時有消息指律政司和政策局人員就政策的人權影響有不同意見，一些保護人權的意見最終不被接納，立法會或公眾要求索取有關的法律意見時，遭到拒絕。政府內部的法律意見，不能有效取代人權委員會獨立的、以人權角度出發的專業法律意見。

## 政策的制訂、檢討和執行

6. 同樣地，香港並無獨立的人權機制，督促和協助政府制訂和檢討政策時，促進人權。申訴專員公署負責調查行政失當，權力局限在欠缺效率和不妥善的行政決定、行爲、建議或失職，雖然在這個層面上也可從人權的角度，去調查政策執行時的行政措施和行爲，但卻不是處理政策本身的人權問題，除非該政策只關行政；專員如處理一般政策的本身，完全脫離了行政層面，即屬越權。而且，專員的授權法例中，並無明言要求她在職權內調查行政失當時，一定要考慮人權的因素，因此，儘管要考慮人權因素似是理所當然，但現實上可能亦會視乎在位的專員及公署人員的個人取向。因此，在專員需否考慮人權因素的問題上，亦有授權法例指引不足的缺憾。

## 人權機制的缺憾

7. 現時香港的人權保障機制的問題，可以分爲三大類。

### 沒有機制

8. 第一類涵蓋那些沒有人權機制去處理的人權範疇，尤其沒有法定的投訴機制，去處理、調解和獨立調查這些範疇的人權問題，提供補救和促進改革。例如：
- 兒童權利：家庭團聚、學生紀律懲處、中小學派位制度、阻礙某些社群兒童的教育政策（如非法入境者、尋求庇護的人士）、在制訂和執行政策以及在司法上恰當重視兒童意見和權利、以及兒童的其他受保護、發展和參與的權利；
  - 失去人身自由者的保障：被拘留人士的教育、生活和就業訓練；
  - 尋求庇護和無國籍人士：拘留政策、基本生活保障；
  - 入境管制：簽證及出入境政策、外傭管制政策；
  - 行動自由：邊境禁區的管制政策，包括禁區紙，何種情況下記者或示威者可以進入；
  - 政治結社：必須在公司和社團條例中選取，不能有效維護成員的私隱；
  - 工會結社：受制工會條例，令團體可否登記爲工會，跨行業結社，以及工會的一些運作和對外聯繫，受到不當的管制；
  - 大學教職員結社，也受校方的限制，例如在工會命名等安排上，校方竟然要求實質的批核；
  - 和平集會：眾多部門的繁複的要求（如保險、消防、噪音管制計劃）、警方攝錄、禁止進入區域的劃定、請願示威區和採訪區的設置、即場管制措施、抄身份證、跟蹤、通知手續、限制或禁止使用器材、籌款、施加條件、禁止遊行和集會、政府申請禁制令等政策；
  - 受法律平等保護的權利：紀律部隊在防止某些範圍內對求助者和執法對象的直接和間接歧視；
  - 學術自由：來自政府（包括駐外人員）、校方和資助者等各種形式的干預和壓力；
  - 資訊自由：屋村和街道的資訊和傳播政策、政府公開資訊的政策、政府選擇性對待受影響人士和傳媒發放訊息的資訊政策；

- 文學藝術創作和其他文化活動的自由：公共空間的提供和管理等；
- 新聞和言論自由：電台主持受威脅、部份傳媒機構受歧視、傳媒自我檢查、發牌和頻道政策受質疑、版權問題威脅互聯網媒體和網絡社群、公共廣播受壓等；
- 私隱：傳媒採訪和報導權利的保障與不當侵擾間的衝突、選舉資訊傳遞和播放的管制等；
- 參與公共生活的權利：選舉權和被選舉權，選舉程序的權利問題；
- 宗教信仰和政治主張方面的歧視；
- 公共服務方面的歧視問題；
- 法律服務和司法程序的人權問題；
- 護老和弱能人士住宿和照顧服務中的侵權問題；
- 醫療服務中的侵權問題；
- 少數人的權利：少數族裔、少數性傾向社群等；
- 整體或個別範疇的管制體制、守則和運作問題：如出版、影視節目和互聯網上的干預、管制、審裁權力和標準。

### 機制內的缺憾

9. 第二類是有人權機制去處理，但因職權和資源等問題，這些機制不能提供有效的保障。例如
- 警監會沒有調查權力，對警務人員違規懲處的意見，亦無約束力；
  - 申訴專員沒有權力和責任，去處理一般政府政策的人權問題，而在處理行政失當時，亦沒有法律訂明的責任去考慮人權因素；
  - 個人資料私隱專員沒足夠資源去處理日新月異而且眾多的社會私隱問題，亦無檢控和提起民事訴訟的權力；
  - 平等機會委員會無權處理服務商販受購物人士性別歧視的投訴等漏洞；現有的歧視法例亦無訂明政府有責任正面促進平等，沒有政策評估機制，消除歧視和促進平等。

### 政府造成的缺憾

10. 第三類是有人權機制去處理，但因為政府政策和操作上，忽略了巴黎原則的一些組織和運作原則，令人權機制的成員維護人權的傾向、動力、知識、經驗和能力，與及機構的獨立和多元性，有不足之處，或令機制塞責，甚或給政府漠視或干預。例如：
- 平機會有眾多令人爭議的委任決定，甚至有漠視人權、限制婦女權利歷史的人被委；
  - 政府在廉署採用旋轉門政策，令廉署獨立性承受無必要的受損風險；
  - 政府總部改組，政府計劃將法援職權轉移，法定負責向政府提供法律援助服務方面意見的法律援助服務局，在計劃宣告前並無被諮詢，只是事後被知會，而且在立法會聆訊前，竟然未有開會討論，之後的立場，軟弱無力。

**Observations of C. Raj Kumar<sup>♦</sup>**  
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City University of Hong Kong  
Hong Kong, China  
&  
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National Human Rights Commission (NHRC)  
New Delhi, India

In the last meeting, the Chairman suggested that we provide some information relating to the question of establishing an independent human rights commission (IHRC) in Hong Kong. In addition to the documents that were submitted earlier, I would like to state the following:

***a. Deficiencies in the existing human rights protection mechanisms in Hong Kong***

The fundamental deficiency in the existing human rights protection mechanism is that Hong Kong does not have exclusive institutional machinery that is entirely devoted for the protection of the rights and freedoms of the people of Hong Kong. I believe that Hong Kong's existing human rights framework is not in compliance with the Paris Principles. Although Hong Kong has a few institutions in the form of the Equal Opportunities Commission, the Ombudsman and the Office of the Privacy Commissioner for Personal Data that are engaged in the task of protecting and promoting some aspects of human rights, these institutions are not best suited to provide a holistic approach to the protection and promotion of human rights, as envisaged in the Paris Principles. Unfortunately, our historical experience with the working of existing institutions in Hong Kong demonstrates that functional autonomy and operational independence are neither protected through the legal structure nor in practice. While establishing some of these institutions in Hong Kong, there was an opportunity to emphasise the basic philosophy underlying the establishment of such institutions worldwide, which is to ensure the protection and promotion of human rights and fundamental freedoms of people through the development of national institutions. However, this was not done and our institutions have been subject to different types of criticism. This is of particular concern when other institutions, including the judiciary and, to a certain extent, the administrative methods of grievance redress within the government departments may not always be able to afford "guarantees of independence and pluralism," as such guarantees are specifically mentioned in the sub-heading of the Paris Principles. The working of the existing institutions in Hong Kong does not demonstrate that these Principles have been duly followed.

***b. Feasible options to enhance the existing mechanisms***

I believe that an independent human rights commission should be established in Hong Kong as soon as possible. The institutional approach to

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<sup>♦</sup> *This paper is a shorter version of the views that were submitted earlier.*



handling human rights issues has proven to be one of most commonly developed strategies to facilitate domestic protection and promotion of human rights. The experience of many societies worldwide have demonstrated the fact the national human rights institutions have been successful in empowering the people and to ensure a certain degree ensure accountability of the government. Hong Kong needs an independent human rights commission (IHRC) that should specifically be mandated to investigate allegations of human rights violations that come before it or those cases in which it decides to take *suo motu* jurisdiction.

The judiciary in Hong Kong, by their nature, cannot pass any opinion on the legality or otherwise of a future legislation. The proposed independent human rights commission of Hong Kong can perform a variety of functions, including investigating alleged human rights violations, conducting public inquiries, exercising advisory jurisdiction, enforcement of human rights in prisons and other custodial institutions, providing advice and assistance to governments, promoting human rights education and awareness, promoting interaction, exchange, and better coordination among other human rights commissions in the region and worldwide, promoting interaction and exchange with NGOs, and publication of annual reports.

To this list may be added a few more specific functions for the IHRC of Hong Kong: the IHRC should engage and collaborate with NGOs in Hong Kong to tackle human rights problems and to promote and develop a vibrant civil society culture in Hong Kong; the IHRC of Hong Kong should also collaborate, share information with other HRCs in the Asia-Pacific region and other parts of the world and be willing to learn from best practices and experiences of HRCs that have been successful in handling human rights issues in other jurisdictions; the IHRC should involve itself in the task of prioritising the promotion of human rights education in Hong Kong that respects human dignity and cherishes human values like equality, non-discrimination, and tolerance.

There are other societies in which HRCs are functioning effectively and they have started to take capacity-building initiative and training programs to promote the establishment of HRCs worldwide. The proposed IHRC of Hong Kong could very well use these experiences and indeed engage and interact with other countries where HRCs have been successfully protecting and promoting human rights. The proposed IHRC should also be empowered to handle violations of economic, social and cultural rights, besides civil and political rights. The experience of HRCs that have been established in other parts of the world also demonstrate that even the successful HRCs have not been effective in the area of economic and social rights and have been subject to criticism on this account. In this context, it is important to recognise that the mandate of the IHRC in Hong Kong should specifically include powers to investigate allegations of violations of ESC rights and provide remedies for the victims. Since the ICCPR and ICESCR are both entrenched in the HKSAR, the proposed IHRC will have a legal and constitutional framework to ensure the proper protection and promotion of all human rights.

Under these circumstances, the creation of an IHRC would send the right signals to all concerned people that the government is ready and willing to handle the human rights implications of all legislation. Moreover, the creation of an IHRC would only underscore the government's pre-existing commitments to international human rights obligations to which Hong Kong is a party. The mandate of the IHRC ought to be wider so as to include both civil and political rights and economic, social and cultural rights. Unlike the courts of Hong Kong, the IHRC need not be restricted by domestic legislation and should be able to handle issues relating to human rights in a much more creative manner. In this regard, it is useful to refer to the objection that there may be a case of functional duplication prevailing in the concept of a human rights commission in Hong Kong due to the fact that the HKSAR already has an EOC.

***c. Review of the options before deciding on the way forward***

It is important to note that that the formation of EOC in Hong Kong was preceded by initial efforts to create a human rights commission. These efforts did not come to fruition and what ultimately came about was not an IHRC but an EOC. Equality and non-discrimination, albeit a very important human rights issue, is only one of the various human rights issues that need an institutional response. EOC has jurisdictional limitations to pursue matters that are violations of the anti-discrimination law. This means that many of the other human rights violations that take place in Hong Kong will have to be dealt with by the courts of the HKSAR or some other administrative tribunal with little relief to the survivors.

The proposed IHRC will not supplant the EOC. The EOC will function on the same lines in which it is presently functioning. However, there are arguments for its reform, and the need for guarantees of its greater transparency and independence is significant. The IHRC will be an independent stand-alone institution that will be broadly mandated and will have jurisdiction to investigate allegations of human rights violations. The functions of the IHRC will be determined based upon numerous factors, including the needs and human rights aspirations of the people of Hong Kong, the structure of human rights law in the BL and the BORO, the Paris Principles and other international human rights principles that are relevant for the establishment of human rights commissions. The IHRC will also draw upon comparative experiences in terms of the functions of the HRCs that have been established and functioning in other countries in the South East Asian region and other parts of the world.

Further, the enabling legislation that establishes the IHRC will have to ensure that there is no functional duplication in terms of the role of the EOC and hence, those matters that come before the IHRC, which are directly or indirectly related to equality and non-discrimination, need to be handed over to the EOC. This will ensure that both the IHRC and the EOC do not function in opposing directions or enter into a turf war, but rather complement each other's unique roles.

The governance discourse in Hong Kong can be significantly transformed if the IHRC remains the focal point for good governance. Close interaction and engagement of the IHRC with the EOC and the ICAC would benefit these institutions in evolving suitable policies and practices that, in totality, ensure good governance. Human rights support good governance, and any system of administration that does not respect human rights cannot promote good governance. Hong Kong has the potential to take the lead in this area, as there are numerous possible linkages between the human rights discourse of the IHRC, which could be supported by the good governance discourse of the ICAC and the anti-discrimination discourse of the EOC. All these aspects are indeed human rights issues and it is in the best interests of the HKSAR's growth and development that the IHRC is established so that rule of law, protection of rights and freedoms, and promotion of good governance and achievement of sustainable social and economic development becomes a true reality.

For meeting the gap in human rights protection that Hong Kong is facing, establishment of an Independent Human Rights Commission (IHRC) is essential. The word "independent" is so important in the political context of Hong Kong that it was considered appropriate to add it to the acronym "IHRC". An autonomous human rights institution in the form of an IHRC will be capable of meeting the expectations of Hong Kong society and promoting a culture of human rights. It is important to recognise that there will be no duplication or clash of jurisdiction of the IHRC with other entities that deal with particular human rights issues, which are covered by the EOC and the ICAC. The arguments for an IHRC outweigh those against it. A model IHRC that can accommodate various concerns and still be effective has been proposed for consideration of the legal community and political authorities. This framework can go a long way in bringing Hong Kong closer to the liberal rights-respecting paradise that it has always aspired to be.

### **Concluding Remarks**

I recognise that there may be a need for further examination of these issues, particularly the need for the establishment of an independent human rights commission in Hong Kong. My humble submission is that the Subcommittee on Human Rights Protection Mechanisms of the Panel on Home Affairs should consider commissioning an independent study with a view to understanding the law, institutional practice and effectiveness of the human rights commissions in the Asia Pacific region. This study and the resultant report may be a useful document on the basis of which future discussions relating to the establishment of the IHRC can be conducted. Of course, the study should be commissioned in all earnestness and not with a view to delay the process of creating an institutional machinery for protecting human rights in Hong Kong. But before the study is commissioner, there is an urgent need for the recognition that the existing machinery to protect human rights in Hong Kong is not adequate. There is no doubt that the absence of an independent human rights commission in Hong Kong continues to create serious obstacles for protecting and promoting human rights in Hong Kong.

# 香 港 人 權 監 察

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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

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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).

from The Ombudsman and Equal Opportunities Commission (EOC) and the 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

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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).

official capacity”. In an earlier submission to the Subcommittee on Human 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

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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/>

autonomy as the judiciary. Among the four selected areas, the National Human 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

<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

### ACKNOWLEDGEMENT

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-

立法會 CB(2)1727/07-08(01)號文件附錄 II  
Appendix II to LC Paper No. CB(2)1727/07-08(01)

	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 - NHRCT'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	<ul style="list-style-type: none"> <li>- The Office of the Ombudsman</li> <li>- The Office of the Privacy Commissioner for Personal Data (PCO)</li> <li>- The Independent Police Complaints Council</li> <li>- The Commissioner for Covert Surveillance</li> </ul>	<ul style="list-style-type: none"> <li>- National Commission for Minorities</li> <li>- National Commission for Women</li> <li>- National Commission for Right to Information</li> <li>- National Commission for Child Right - 18 States*</li> <li>- Human rights Commissions</li> </ul>	National Commission on Women	Parliamentarian Standing Committees on Ethnic and privileges, on Human Rights and on Women		<ul style="list-style-type: none"> <li>- Parliamentarian Sub Committee on Human Rights</li> <li>- National Authority for Children</li> </ul>	<ul style="list-style-type: none"> <li>- National Dalit Commission</li> <li>- National Women Commission</li> <li>- HRs and Social Justice Committee of Parliament</li> </ul>	<ul style="list-style-type: none"> <li>- Barangay Human Rights Action Court</li> <li>- Commission on the Role of Filipino Women</li> <li>- Office of the Ombudsman</li> </ul>	<ul style="list-style-type: none"> <li>- Ministry of Gender Equality &amp; Family</li> <li>- Korea Immigration Service</li> </ul>			



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## **Submission to Legco Sub-Committee on Human Rights Protection Mechanisms**

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**April 2008**

### **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.<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup>

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

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<sup>2</sup> 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.”<sup>3</sup> 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.<sup>4</sup> 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

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<sup>3</sup> Brian Burdekin, *National Human Rights Institutions in the Asia-Pacific Region* (Leiden: Martinus Nijhoff Publishers, 2007)

<sup>4</sup> 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](http://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.

2008年7月9日(星期三)  
立法會會議席上  
何俊仁議員就  
"人權保障機制小組委員會的報告"  
提出的議案

議案措辭

"本會察悉人權保障機制小組委員會的報告。"

(Translation)

**Motion on "Report of the Subcommittee on Human Rights  
Protection Mechanisms" to be moved by Hon Albert HO  
at the Council meeting of Wednesday, 9 July 2008**

**Wording of the Motion**

"That this Council notes the Report of the Subcommittee on  
Human Rights Protection Mechanisms."