

Hong Kong Human Rights Commission

Submission to

LegCo Panel on Home Affairs

about

**Monitoring mechanism for the Implementation of
International Human Rights Treaties in the Hong Kong
Special Administrative Region**

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Please note that this English version is not a direct translation of the Chinese submission.

(I) Introduction

1. This paper submitted by Hong Kong Human Rights Commission (HKHRC) represents the written submission to the Panel on Home Affairs' meeting on 9 May 2003 regarding a monitoring mechanism for the implementation of international human rights treaties in the Hong Kong Special Administrative Region (HKSAR). The purpose of the paper is to argue for the establishment of a National Human Rights Commission (NHRC)¹ to protect human rights.
2. National Human Rights Institutions (NHRI) have long been a concern of the United Nations. The original concern of the United Nations dates back to 1946 when the issue was first addressed by the Economic and Social Council. The Council asked Member States to consider "the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission on Human Rights"².
3. NHRI are still an important concern to the Office of the High Commissioner of Human Rights (OHCHR). The OHCHR has stressed the particular importance and responsibility of national Governments in the realization of human rights. The best protection of rights at the national level, according to OHCHR is, among other things, adequate legislation and the enactment and enforcement of individual safeguards and remedies³.
4. Around the world many countries in different regions have therefore followed the recommendations of the OHCHR. At the moment 48 countries already have statutory national human rights institutions to monitor human rights. In Asia Pacific alone there are already 9 countries having such institutions, counting Australia, Fiji, India, Indonesia, Mongolia, Nepal, New Zealand, Republic of Korea and Thailand. In Europe 21 countries have such institutions, Africa 5, and the Americas 13.
5. It is the view of the HKHRC that the Hong Kong Government must be up to international standards and establish a NHRC. This will constitute an important statement by and to the people of Hong Kong. It will demonstrate that Hong Kong recognizes and seeks to achieve the values of fairness, equal opportunity and tolerance. Public affirmation of these values can help to change the expectations and attitudes that create discrimination in the first place. Also the presence of an effective enforcement mechanism will tend to deter many discriminatory actions and policies.

¹ Internationally these national institutions are usually referred to as National Human Rights Institutions. However, HKHRC will refer to such an institution as being called a National Human Rights Commission in the context of Hong Kong SAR.

² <http://www.unhchr.ch/html/menu6/2/fs19.htm>

³ <http://www.unhchr.ch/html/menu6/2/fs19.htm>

6. HKHRC therefore urges the Panel on Home Affairs to ask the Government to establish an independent statutory NHRC to monitor human rights in Hong Kong.

(II) International and domestic obligations to establish a NHRC

7. Hong Kong both has domestic and international obligations to establish a NHRC. Domestically, article 39 of the Basic Law says: “The provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region”.
8. Just like other international covenants and declarations, both ICCPR and ICESCR oblige governments to provide adequate remedies for victims of human rights violations.⁴ Governments must take all necessary steps to give effect to human rights. As NHRC is an effective human rights monitoring mechanism, there is urgency for establishing a NHRC.
9. In addition, ICCPR article 2 (3)(b) oblige State Parties: “[to] ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;”. However, due to the inadequacy of the legislative and monitoring system, the establishment of the NHRC becomes more essential.⁵
10. In fact, in the course of submitting the reports for Hong Kong, the United Nations committees have in their concluding observations repeatedly condemned the government of Hong Kong 5 times for not establishing a NHRC.⁶

⁴ ICCPR article 2, para. 2 states that: “each State Party ... undertakes to take the necessary steps ... to adopt ... legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

ICESCR article 2(1) says that: “[each] State Party undertakes to take steps ... by all appropriate means, including particularly the adoption of legislative measures.”

⁵ ICCPR article 2 (3)(b)

⁶ The Committee on Economic, Social and Cultural Rights’ concluding observations of 1994 (E/C.12/1994/19) were already highly critical of the lack of a NHRC. Thus paragraph 25 says: “The Committee is concerned at the Government’s clear objection to the establishment of a human rights commission”. The same concern was reiterated in the concluding observations of 1996 (E/C.12/1/Add.10) and 2001 (E/C.12/1/add.58). In 2001 the CESCR reiterated its concern of: “[the] failure of the HKSAR to establish a national human rights institution with a broad mandate.”(paragraph 15). Furthermore the UNHRC has also criticized Hong Kong for the lack of such a mechanism. Both the 1995 (CCPR/C/79/Add. 57) and the 1999 (CCPR/C/79/Add.117) concluding observations are critical of the position of the Hong Kong government. Thus in 1999 paragraph 9 says: “The 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.”

11. There is a general consensus for establishing a NHRC among international communities. The Paris Principles, endorsed by the Commission on Human Rights in March 1992, emphasizes the significant role that institutions at the national level can play in promoting and protecting human rights and fundamental freedoms and in developing and enhancing public awareness of those rights and freedoms.⁷ In addition, The Vienna Declaration and Programme of Action (VDPA) (A/CONF.157/23) was adopted on the World Conference on Human Rights in Vienna, 14-25 June 1993⁸. In General comment 10 of 3 December 1998 (E/C.12/1998/25), the Committee on Economic, Social and Cultural Rights (CESCR) notes that one such means, through which important steps can be taken, is the work of national institutions⁹.

(III) The problems of the existing mechanisms to protect human rights

12. At present, Hong Kong has already established many human rights' related mechanisms, such as Equal Opportunities Commission, the Ombudsman, Privacy (Personal Data) Commissioner etc. However they have specific problems reflecting the need for a NHRC.

A. Equal Opportunities Commission (EOC)

13. **The Equal Opportunities Commission (EOC)** enforces only three non-discrimination ordinances. These are the Sex Discrimination Ordinance (SDO) (Cap 480) (enacted 1995), the Disability Discrimination Ordinance (DDO) (Cap 487) (enacted 1995), and the Family Status Discrimination Ordinance (FSDO) (Cap 527) (enacted 1997). However, EOC has no jurisdiction over other ordinances than those relating to sex, disability and family status.
14. Furthermore, the primary enforcement power of the EOC is the power to investigate and conciliate complaints. It exercises its other powers, such as conducting formal investigation, assisting complainants who wish to litigate, and litigate in its own name, far less often. It has no power to issue an enforcement notice in a general investigation of a government department. It is only in belief investigations where the EOC believes that an unlawful act has been committed by a named respondent that an enforcement notice may be issued¹⁰.
15. EOC is further limited by the fact that there is no guarantee that an application for legal assistance will be granted, given its limited budget. Thus it is forced to make strategic decisions as to which cases are important enough to support. In 2002, for example, less than 10 out of 2000 complaints were granted legal aid. The uncertainty for clients about whether they will be granted legal

⁷ United Nations Human Rights Committee (A/RES/48/134) of 20 December 1993.

⁸ Paris Principle (resolution 1992/54) and by the General Assembly and Vienna Declaration and Programme of Action: 12/07/93 (A/CONF.157/23).

⁹ General comment 10 of 3 December 1998 (E/C.12/1998/25), the Committee on Economic, Social and Cultural Rights (CESCR).

¹⁰ Carole J. Petersen 2002: "The Right to Equality in the Public Sector: An Assessment of Post-colonial Hong Kong" in: *Hong Kong Law Journal*, volume 32, part 1.

assistance has the consequence that a substantial percentage of respondents either refuse to conciliate or offer very small remedies¹¹.

16. With respect to the cases which are impossible to conciliate or litigate, the Government should establish an Equal Opportunities Tribunal. Moreover, more resources should be allocated to the EOC for legal advice and legal aid. Furthermore, the Legal Aid Ordinance should be amended so that the waiving scheme, which can waive the upper limit of financial eligibility in meritorious cases involving a possible breach of the Hong Kong Bill of Rights Ordinance or an inconsistency with the ICCPR, can be extended to any litigation related to existing and future anti-discrimination ordinances.

B. The Ombudsman

17. The Ombudsman is limited in its jurisdiction because it has no powers to provide legal advice, legal aid, bring legal proceedings or issue orders. Nor does it have the power to modify policies that represent a breach of human rights covenants.

C. The Privacy Commissioner's Office

18. The Privacy Commissioner's Office is limited by the fact that it does not have any conciliation measures, does not provide legal advice or legal aid. Nor does it have powers to bring legal proceedings.

D. Others

19. According to article 17 of the Public Order Ordinance, appeals can be addressed to the **Appeal Board on Public Meetings and Processions**, if one is denied to organize a public assembly. However there is no mechanism to monitor the decisions of the Appeal Board from a human rights perspective.
20. Furthermore, it is a problem that existing mechanisms lack independence or authority. For instance the **Complaints against Police Office** (CAPO) is not independent, and the **Women's Commission** lacks authority to review policies. Also as for the accountability system for principal officials it has not been followed up by an independent body which can evaluate the system from a human rights perspective.
21. Rejection of applications for registration of a society may be appealed to the Chief Executive. However, the lack of independence and obligation to view the appeal from a human rights perspective, gives less credibility to such an appeal mechanism.

¹¹Ibid.

(IV) Inadequacy of the existing ordinances

A. The scope of application of the Bill of Rights is too narrow

22. Section 7 of the Bill of Rights Ordinance states that the Hong Kong Bill of Rights Ordinance binds only the Government and public authorities (and persons acting on their behalf). Thus the Bill of Rights cannot be used to remedy discrimination by private parties, such as private employers.

B. Absence of comprehensive and all-round legislation against discrimination

23. As mentioned before, only three non-discrimination ordinances exist at the moment. As the ICCPR and ICESCR cover a wide range of human rights and advocate for equal opportunities, it is urged that a comprehensive anti-discrimination legislation should be introduced as soon as possible including the area of age, sexual orientation, race, etc.

C. Absence of the domestic legislation on ICESCR

24. At present, there is still no domestic legislation on the International Covenant on Economic, Social and Cultural Rights. In its concluding observations, the Economic, Social and Cultural Council of the United Nations has shown its deepest concern of the Covenant status in Hong Kong's domestic legal order. Thus, the authorities should have domestic legislation of the ICESCR and amend those respective ordinances which violated the ICESCR.

25. Besides, the Legal Aid Ordinance should be amended so that the waiving scheme, which can waive the upper limit of financial eligibility in meritorious case involving a possible breach of the Hong Kong Bill of Rights Ordinance or an inconsistency with the ICCPR, can be extended to any litigation related to ICESCR.

(V) Establishment of the Human Rights Commission

A. The structure of a National Human Rights Commission

26. A NHRC should be formed through a thorough ongoing consultation process on the basis of inclusion of NGOs and community groups. Furthermore advisory bodies and statutory bodies should be invited as well.

27. The NHRC should generally be composed of a variety of members from diverse backgrounds, with particular interests, expertise or experience in the field of human rights.

28. The NHRC shall develop relations with NGOs devoted to promoting and protecting human rights.

29. The NHRC should have adequate funding and not be subject to financial control which might affect its independence.
30. The appointment of members of the NHRC should be effected by an official act, to ensure a stable mandate.

B. The Roles and Functions of the NHRC

31. National Human Rights Commission should have the following mandate in the area of legislation:

Make binding recommendations, review policies, review policy proposals with the view of proposing amendments or reforms of the laws, regulations and administrative practices and measures. Thus it should have the mandate to systematically review the government's human rights policy in order to detect shortcomings in human rights observance and to suggest ways of improving it. It should monitor the government's compliance with its own and with international human rights laws and if necessary, recommend changes.

32. The NHRC should also ensure the implementation of all other international conventions such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
33. The NHRC should have the mandate to hear and consider complaints from affected parties. Cases may be brought before the NHRC by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations.
34. A NHRC should seek settlement through conciliation or transmitting cases to any other competent authority.
35. A NHRC should have the power to initiate proceedings and intervene in proceedings in which important human rights issues are being considered.
36. A NHRC should have the power to raise human rights issues with Mainland authorities and a future NHRI in Mainland China.
 - Inform the public about the commission's own functions and purposes;
 - Provoke discussion about various important questions in the field of human rights; produce and disseminate human rights publications.
 - Assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;
 - Publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness,

especially through information and education and by making use of all press organs. (Paris principles 3 (f) (g))

- Prepare reports on the national situation with regard to human rights in general, and on more specific matters;
- Monitor human rights education to ensure that all government departments have a strategy to promote human rights awareness.

(VI) Recommendations

37. A National Human Rights Commission should be established to monitor all human rights. It should have the powers to receive complaints, investigate proactively, conciliate, adjudicate, provide legal advice, legal aid, bring legal proceedings and issue enforcement notices, court orders, and monitor both the public and the private sphere. It should furthermore have the power to review all government policies and make binding recommendations. Lastly, a NHRC should engage in public education on human rights.

38. Meanwhile:

- ◆ The Government should take active steps towards the establishment of a NHRC. This should be done in three stages:
 - 1) The Government should strengthen the existing enforcement mechanisms in the area of human rights. For instance the EOC should be able to issue an enforcement notice in a general investigation. Furthermore the HKHRC recommends that the consultation paper “Review of the Role and Functions of Public Sector Advisory and Statutory Bodies”¹² should be further reviewed from a human rights perspective.
 - 2) A statutory body should be set up to handle all cases related to Bill of Rights violations. Such a body should have the powers to receive complaints, investigate proactively, conciliate, adjudicate, provide legal advice, legal aid, bring legal proceedings and issue enforcement notices, court orders and have the power to review all government policies and make binding recommendations. The Bill of Rights should be amended so it includes private parties as well.
 - 3) A National Human Rights Commission should be established to monitor and implement the ICESCR, ICCPR, CEDAW, ICERD and the labour conventions. The existing statutory bodies should in the long run be part of the NHRC, while other areas not covered by the bodies should be monitored in the NHRC.

¹² Home Affairs Bureau 2003: “Review of the Role and Functions of Public Sector Advisory and Statutory Bodies. Consultation Paper”, Home Affairs Bureau, Hong Kong Special Administrative Region.

- ◆ The Government should set a time schedule for the establishment of a NHRC.
- ◆ The Government should introduce legislation to ensure the implementation of ICESCR, ICCPR, ICERD, CEDAW and Basic Law article 39. It might also set the priority for the implementation of the relevant provisions.
- ◆ The relevant LegCo Panels should discuss and monitor the implementation of the human rights at least once a year and assess the Government budget and relevant policies in the light of the relevant provisions.
- ◆ The Government should review legislation on the provision of legal aid to safeguard human rights. The Legal Aid Ordinance should be amended so that the waiving scheme can be extended to any litigation related to existing and future anti-discrimination ordinances and violations of the ICESCR.
- ◆ The Government should study and draw reference to the experience of other countries which had introduced legislation to safeguard human rights.
- ◆ The Government should promote education on ICESCR, ICCPR, ICERD, CEDAW among members of the public and the advisory and statutory boards and committees. Reference might be made to the experience of UN in this respect.
- ◆ The Government should ensure that sufficient Government resources would be allocated towards the implementation of the human rights covenants.
- ◆ The Government should review the powers and functions of the existing advisory and statutory bodies and bodies for appeal to assess whether protect all human rights.
- ◆ It is urged that a comprehensive anti-discrimination legislation should be introduced as soon as possible including the areas of age, sexual orientation, race.
- ◆ More resources should be allocated to the EOC for legal advice and legal aid.