

A Proposal to the Establishment of the Human Rights Commission in Hong Kong

A NGO Consultative Version

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

1. INTRODUCTION

1. National Human Rights Institutions (NHRIs) are independent bodies that promote and monitor the states' implementation of and compliance with their international obligations of human rights protection. They are normally responsible for dealing with human rights complaints lodged by the public, making recommendations to government, promoting conformity of national laws and practices with international standards, conducting inquiries, and publicizing human rights in the community.
2. The principles governing the establishment and operation of NHRIs are the "Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights" [hereinafter the Paris Principles],¹ which was 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.² The Paris Principles set forth the basic standard of competence, responsibility, composition, and method of operation for NHRIs.
3. With the recent fast growing global trend of the establishment of NHRIs, should Hong Kong, where our Equal Opportunity Commission has been accredited a "C" by the International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights,³ follow the human rights wave by setting up a Human Rights Commission? If yes, what functions and respective powers shall be entrusted to such a commission? How should such a Commission be structured so as to provide the most efficient and effective human rights promotion and protection? How should it be posited among the Governmental departments, the judiciary and the NGOs to avoid duplicated efforts if any?
4. This report aims to explore the above questions in the following order. Chapter I justifies the imminent need for the establishment of a Human Rights Commission in Hong Kong [hereinafter the HKHRC]. Chapter II discusses the appropriate functions and correspondence powers that should be accorded to the HKHRC or other relevant bodies in the institutional framework for human rights promotion and protection in Hong Kong

¹ "The Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights" (1991), General Assembly resolution 48/134, Annex, available at <http://www.ohchr.org/english/law/parisprinciples.htm> [hereinafter the Paris Principles].

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

³ *National Human Rights Institutions Forum*, "National: List of Institutions," available at <http://www.nhri.net/NationalDataList.asp?MODE=1&ID=2>

[the institutional framework]. Chapter III concerns the strategies to maximize the effectiveness and efficiency of such a commission. Chapter IV discusses the best institutional framework for human rights promotion and protection in the context of Hong Kong [hereinafter the institutional framework], in other words, the best way as to how the functions and powers aforesaid in Part II should be allocated to the NHRI(s). Chapter V concerns internal structure and various operational matter and of the HKHRC. Chapter IV suggests the alternatives to the establishment of the HKHRC.

5. This part submits a compelling case for the establishment of the Hong Kong Human Rights Commission [the HKHRC] in compliance with the Paris Principles in Hong Kong. The report first outlines the emergence and the recent development of NHRIs and the call for the establishment of a NHRI in Hong Kong. Then, it explores the inadequacies of the current institutional framework for human rights protection and promotion in Hong Kong, and the benefits and impacts which the HKHRC can bring about.

2. THE EMERGENCE AND THE DEVELOPMENT OF NHRIS

2.1. THE EMERGENCY AND SIGNIFICANCE OF NHRIS

6. The international community has recognized the importance of NHRIs in human rights protection for over a decade. NHRIs were first endorsed by the UN Economic and Social Council in 1946 as important mechanisms for bridging government and civil society efforts in the promotion of human rights.⁴
7. Since then, the UN has, in the General Assembly every year, called upon States to establish and strengthen their NHRIs.⁵ In 1993, the Vienna Declaration affirms the constructive and important role of NHRIs *for the promotion and protection of human rights* and recognizes that each state's has the right "to choose the framework that is best suited to its particular needs at the national level."⁶
8. According to the Paris Principles No.3, NHRIs serve an important functions in enforcing and promoting human rights protection by:-

- (a) Advising the Government, Parliament and any other competent body on the compatibility of any (i) legislative or administrative provision and (ii) any public

⁴ Office of the High Commissioner for Human Rights, "Fact Sheet No. 19, National Institution for the Protection and Promotion of Human Rights," (April 1993), available at <http://www.unhchr.ch/html/menu6/2/fs19.htm>

⁵ See for example, Commission on Human Rights, "Report of the Secretary-General 59th session: Effective Functioning of Human Rights Mechanisms: National Institutions and Regional Arrangements," (31 December 2002), (E/CN.4/2003/110).

⁶ Vienna Declaration, paragraph 36.

policy with international human rights treaties; and (iii) the preparation of reports on human rights issues;

- (b) Ensuring effective implementation of international human rights instrument signed by the party-state;
- (c) Encouraging ratification of international human rights treaties and their implementation;
- (d) Contributing to States reports to UN bodies;
- (e) Cooperating with the UN, the regional and the national human rights institutions of other countries;
- (f) Assist in the formulation of human rights education and research programmes and increase public awareness of human rights and efforts to combat all discrimination; and
- (g) Publicizing human rights.

9. The important role of NHRIs in promoting and protecting economic, social and cultural rights can be illustrated by the General Comment No. 10⁷ of the UN Committee on Economic, Social and Cultural Rights:-

“National institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. Unfortunately, this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions.”

10. At a Commonwealth conference on the “Role of National Institutions” held in Cambridge, in July 2000, participants from 41 Commonwealth countries recognized that NHRIs:-

“play a critical role in the entrenchment of the universality, interdependence and indivisibility of human rights and the maintenance of good government and ... that the common legal and governance traditions and values of the Commonwealth provided an opportunity to build on the Paris Principles to reflect more clearly the Commonwealth’s fundamental values.”⁸

⁷ United Nations Committee on Economic, Social and Cultural Rights, “General Comment No. 10,” (December 1998, E/C.12/1998/25).

⁸ *Commonwealth Secretariat*, “Protecting Human Rights: The Role of National Institutions,” (2000) at 6.

2.2. THE RECENT DEVELOPMENT OF NHRIs

11. Under the leadership of Mary Robinson, the Office of the High Commissioner for Human Rights [OHCHR] has demonstrated a strong commitment to the development of NHRIs. Since the Vienna Conference in 1993, it is observed that each year stronger endorsements from the Commission and from the General Assembly for national institutions were adopted.⁹
12. With a steady increase in the numbers of NHRIs, the UN has attempted to regulate and set universal standards for these bodies. After the launch of the Vienna Declaration and Programme of Action in 1993, the Office of High Commissioner issued a handbook in 1995 which listed out detailed guidelines to strengthen NHRIs.¹⁰ In 2000, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) was set up to coordinate the functions of NHRIs at the international level, to strengthen conformity of NHRIs with the Paris Principles, to ensure their regular contact with the OHCHR and other international bodies and to encourage cooperation amongst national institutions. The ICC awards an accreditation regularly to its member states on the compliance of their NHRIs with the Paris Principles.¹¹
13. By 2001, more than 50 NHRIs have been established under the Paris Principles.¹²
14. Further, regional international organizations have also recognized the important role of NHRIs. In 1997, the Committee of Ministers of the Council of Europe called on member states to set up NHRIs such as human rights commissions, ombudsmen¹³ and advocated the co-operation between such institutions and the Council of Europe.¹⁴
15. In the Asia Pacific region, the Asia Pacific Forum of National Human Rights Institutions was established in July 1996 by the Larrakia Declaration.¹⁵ The Forum supports the

⁹ *Human Rights Features' website*, 'NHRIs will always need to criticise governments,' (18 March - 26 April 2002), available at <http://www.hrdc.net/sahrdc/hrfchr58/Issue6.htm#Dark.%20dark>

¹⁰ *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) [Hereinafter the Handbook].

¹¹ "UN System: Info-pack", (1st semester 2005), available at http://www.mandint.org/english/info_pack.pdf at 63.

¹² Millennium Declaration (Report of the Secretary-General at the 56th Session of UNGA) at 36, paragraph 198.

¹³ Committee of Ministers of the Council of Europe, Resolution No. R (97) 14 of 30 September 1997. See also Strasbourg, "In Our Hands: The effectiveness of human rights protection, 50 years after the Universal Declaration, Proceedings of the European regional colloquy organised by the Council of Europe as a contribution to the commemoration of the fiftieth anniversary of the Universal Declaration of Human Rights and the 1998 review of the implementation of the Vienna Declaration and Programme of Action," (2-4 September 1998), available at http://www.coe.int/t/e/human_rights/cddh/4._other_activities/03._colloquy_on_protection_of_hr/Proceedings%20colloquy%20In%20our%20hands%20E.asp

¹⁴ Committee of Ministers of the Council of Europe, accompanying resolution (Resolution No. (97) 11).

¹⁵ To be a member of the Forum, the NHRI have to show that they adhere to the Paris Principles. So far NHRIs from 14 countries have become full members. <http://forumasia.org/downloads/Viennaplus10/vienna10-DrPark-Final.doc>

establishment and development of NHRIs and promotes cooperation and joint activities among NHRIs, the UN, governments, and human rights NGOs in the region.

16. The EOC in Hong Kong is not qualified as member of the Forum while not fully complying with the Paris Principles. Yet, the Forum has welcomed the EOC to participate as an observer at its meetings.¹⁶ The EOC has attended every annual meeting of the Forum since 1997.¹⁷ The Forum and the EOC also jointly organized regional workshop.¹⁸

3. THE CALL FOR THE ESTABLISHMENT OF A HUMAN RIGHTS COMMISSION IN HONG KONG

17. The debate on the establishment of a human rights commission first appeared during the legislation of the Bills of Rights Ordinance (BORO) in early 1990s. In the following decade, some legislators and various NGOs have attempted to urge for the establishment of a human rights commission for several times but with no avail. Instead, the Government proposed the creation of the Equal Opportunities Commission (EOC) to mediate discrimination on the grounds of sex and disability inclusively. The establishment of a general human rights commission has been rejected, which in turn reflected the implementalistic approach of Government in making public policy.
18. Significant events related to the debate on the establishment of a human rights commission and its substitute body, the EOC, are summarized as follows.

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. ¹⁹
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

¹⁶ *Asia Pacific Forum of National Human Rights Institutions*, "A Partnership For Human Rights In Our Region: Report on APF Activities (July 2000 to September 2001)," (24-27 September 2001), available at www.asiapacificforum.net/annual_meetings/sixth/report_forum_activities.doc

¹⁷ *The Asia Pacific Forum of National Human Rights Institutions*, "A Partnership for Human Rights in Our Region: Regional Workshop on the Role of National Human Rights Institutions and other Mechanisms in Promoting and Protecting Economic, Social and Cultural Rights," (11-13 July 2001), available at www.asiapacificforum.net/training/workshops/economic_social/background.doc at 5.

¹⁸ The Forum and the EOC jointly organized "Regional Workshop on the Role of Human Rights Institutions and Other Mechanisms in Promoting and Protecting Economic, Social and Cultural Rights in the Asia Pacific region" from 11 to 13 July 2001 in Hong Kong. *The Asia Pacific Forum of National Human Rights Institutions*, "9th Annual Meeting Concluding Statement," (September 13, 2004), available at http://www.asiapacificforum.net/annual_meetings/ninth/concluding.htm

¹⁹ LegCo's meeting, "Official Record of Proceedings," (5 June 1991) at 52.

	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. ²⁰
July 1993	Ms. Anna Wu initiated a Legislative Council motion debate on the enactment of antidiscrimination legislation and the establishment of a Human Rights and Equal Opportunities Commission. ²¹ The motion gained the support from the Legislative Council at that time. ²²
March 1994	Former legislator Ms. Anna Wu introduced two private member bills, namely the Equal Opportunities Bill, which would have prohibited discrimination in private sector on several different grounds including race, sex, disability, age, and sexuality ²³ , 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. ²⁴
October 1994	Instead of supporting the Equal Opportunities Bill drafted by Anna Wu, the government opposed it by introducing the Sex Discrimination Bill and the Disability Discrimination Bill.
1995	The Sex Discrimination Ordinance (Cap 480) and the Disability Discrimination Ordinance (Cap 487) were enacted.
1996	The Equal Opportunities Commission was established to enforce the Sex Discrimination Ordinance and the Disability Discrimination Ordinance.
1997	The Family Status Discrimination Ordinance (Cap 527) was enacted and the jurisdiction of the EOC is enlarged to include family status discrimination.
1997-2005	The HK Government rejected the need to establish a general human rights institution by continuously pointing to the independent judiciary, the legal aid system, the vigilant media,

²⁰ Id at 29.

²¹ LegCo’s meeting, “Official Record of Proceedings,” (14 July 1993) at 4591-5.

²² Id at 4633.

²³ 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.

²⁴ Legislative Council, “Official Record of Proceedings,” (21 April 1994) at 3299.

	and various specialist institutions, including the Ombudsman, the Privacy Commission, and the Equal Opportunities Commission. ²⁵
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. ²⁶
September 2004	"Legislating Against Racial Discrimination: a Consultation Paper" was released. ²⁷ This provided an opportunity for a review on the implementation mechanism of the antidiscrimination laws.
April 2005	In response to a question posed by the UN Committee on Economic, Social and Cultural Rights during the consideration of the initial report of China, the delegation of the HKSAR Government, Mr. Stephen Fisher, noted that the Government was "currently considering the establishment of a human rights commission." ²⁸
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> " ²⁹
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

²⁵ *Legislative Council, Panel on Home Affairs*, "Background brief prepared by Legislative Council Secretariat Monitoring mechanism for the implementation of United Nations human rights treaties in the Hong Kong Special Administrative Region," (7 May 2003), LC Paper No. CB(2)1999/02-03(02) Ref: CB2/PL/HA, at 3-5.

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

²⁶ *Legislative Council, Panel on Home Affairs*, "Minutes of meeting," (14 May 2004), LC Paper No. CB(2)2663/03-04 Ref: CB2/PL/HA.

²⁷ *Home Affairs Bureau*, the Hong Kong Special Administrative Region Government, "Legislating Against Racial Discrimination: A Consultation Paper," (September 2004).

²⁸ *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>

²⁹ 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).

	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. ³⁰

19. Since 2000, the Bar Association, the Hong Kong Human Rights Monitor, the Hong Kong Human Rights Commission and various NGOs have been repeatedly urging the HKSAR Government to establish an independent human rights commission.³¹
20. Indeed, the Government has not been able to provide a satisfactory explanation of its reluctance to establish a human rights commission.
21. In May 2003, the HKSAR Government rejected the need to establish a human rights commission during the hearing before the Committee on Economic, Social and Cultural Rights by claiming the existing bodies essentially performed the functions of a human rights commission would have. If a human rights commission were to be established, all of those bodies would have to be restructured and it would take a very long time. Therefore, it was unable to provide a definite time frame for setting up a human rights commission, but the authorities would take steps to that end.³²
22. In the reply to the list of issues presented to UNHRC in 2005, the Government made a submission as follows:³³

³⁰ Legislative Council, *Panel on Home Affairs*, (May 2006) LC Paper No. CB(2)2219/05-06(01) at 2.

³¹ Hong Kong Bar Association, "Submission to the Home Affairs Panel of the Legislative Council on the Establishment of a Human Rights Commission in Hong Kong," (9 May 2003).

Civil Human Rights Front, Democratic Party of Hong Kong, The Frontier, Hong Kong Human Rights Commission, Hong Kong Human Rights Monitor, Hong Kong Journalists Association, International Federation for Human Rights, Office of Emily Lau, Power of Democracy, Radio Television Hong Kong Programme Staff Union, "Joint NGO Submissions to the United Nations Committee on International Covenant on Civil & Political Rights: Regarding the Report of the Hong Kong Special Administrative Region of the People's Republic of China," (March 2006), available at www.hkhrm.org.hk/ICCPR/ICCPRJoint2006.doc

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," (May 2003), available at <http://www.legco.gov.hk/yr02-03/english/panels/ha/papers/ha0509cb2-1957-2e.pdf>

Democratic Party, "Policy Recommendation on the Policy Address (05/06)," (2005), available at www.dphk.org/2003/outspoken/address0510/05policy_address_eng.pdf at 29.

³² *Committee on Economic, Social and Cultural Rights*, Press Release on the Meeting of 34th Session," (April 25-May 13 2005), available at www.ishr.ch/About%20UN/Reports%20and%20Analysis/CESCR/CESCR-34thSession.pdf

³³ HKSAR Government, "Second periodic report of the Hong Kong Special Administrative Region of the People's Republic of China in the light of the International Covenant on Civil and Political Rights: Response to the List of issues presented by the Human Rights Committee on 7 November 2005," (CCPR/C/HKG/Q/2), available at

“2.1 (a) a ‘national’ human rights institution: (i) ...In principle, it might be feasible to extend that mandate to include additional forms of discrimination and even the oversight of universal human rights standards in Hong Kong. Having examined the issues in detail ... and having carefully considered the implications, we do not envisage significantly extending the EOC’s mandate in the near future, nor are we ready to take the steps necessary for the establishment of an institution that fully meets the requirements of the Paris Principles.”

23. In the subsequent paragraphs, the Government stated that “a high level of public participation” has been achieved in the formulation of human rights policies through policies including an extension of the NGO/civil society membership of the Committee on the Promotion of Racial Harmony, effective publicity strategies, and the introduction of the Ethnic Minorities Forum, the Children’s Rights Forum and the Human Rights Forum.³⁴
24. In 2006, in response to UNCRC’s concluding observations in the Children’s Rights Forum, the HKSAR Government pointed to the sufficiency of the current institutional framework:-

“The impact of legislation and the execution of policies are monitored by the Legislative Council, the Ombudsman and the press, and are reviewed by the bureaux concerned... Where a particular area overlaps the responsibilities of more than one bureau, there are established arrangements for co-ordination...*These arrangements are conducive to flexibility and a swift response to changing circumstances and to the concerns of the public. We remain unconvinced that there would be any advantage in replacing them with some unified administrative system, a single children’s ordinance, or a single monitoring system, such as a Children’s Commission as some have proposed.*”³⁵
[emphasis added]

4. THE “COMPELLING” CASE FOR A HUMAN RIGHTS COMMISSION IN HONG KONG

http://www.hab.gov.hk/file_manager/en/documents/policy_responsibilities/the_rights_of_the_individuals/ICCPRResponseListIssues_e.doc at 8-10.

³⁴ Id.

³⁵ Home Affairs Bureau, Children’s Rights Forum, “Initial Report of the Hong Kong Special Administrative Region under the Convention on the Rights of the Child: Response to the Concluding Observations of the Committee on the Rights of the Child,” (March 2006), Paper No. CRF 1/2006, available at http://www.hab.gov.hk/file_manager/en/documents/policy_responsibilities/the_rights_of_the_individuals/human/child_forum_20060329Paper1_e.doc at Annex A, paragraph 4.

4.1. THE INADEQUACIES CURRENT ENFORCEMENT MECHANISM OF INTERNATIONAL HUMAN RIGHTS TREATIES

25. According to the HKSAR Government, the implementation of international human rights treaties currently in Hong Kong are monitored through the UN reporting process, legislative actions, judicial reviews, various specialized bodies including the Equal Opportunities Commission (EOC), the Office of the Privacy Commissioner for Personal Data (PCO), the Ombudsman, and the Complaints Against Police Office (CAPO).³⁶
26. The argument of the Government is flawed. Indeed, there is a compelling case for the establishment of a human rights commission in Hong Kong.

4.1.1. United Nations reporting process

27. The UN subcommittee hearings, which take place every 5 years with part-time commissioners, are inadequate to fully implement the international human treaties. Not all human rights violations are of a magnitude that can attract international attention. As Dr. Ramcharan, the UN Deputy High Commissioner for Human Rights, puts, “the UN and the international community are there to bring the states of the world and the international human rights movement together, but they will never replace protection within countries”.³⁷

1.1.1. The Legislative Actions

28. The Legislative Council conducts an examination to the compatibility of a bill on table with the BORO during the first and the second debates of the bill. But such examination is merely a formality rather than a fruitful discussion.
29. 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

³⁶ Legislative Council, “Implementation of International Human Rights Treaties: Monitoring Mechanisms,” LegCo paper No. CB(2)1957/02-03(03).

³⁷ Dr. Bertrand Ramcharan, “For effective national protection systems, Statement on the International Launch of Article 2,” *Asian Legal Resource Centre (ed.)*, (April 2002) Vol. 1, No. 2 at 9.

recommendations of the UN committees should be set up. This suggestion was rejected in the Panel's meeting in May 2003.³⁸

4.1.2. The Independence of Judiciary

30. *Ng Ka Ling v. Director of Immigration*³⁹ is the first case referred to the NPCSC for re-interpretation of the Basic Law after the CFA had handed down its judgment. It concerned the interpretation of Article 24 of the Basic Law which governs the right of abode. Professor Michael C. Davis of the Faculty of Law at the Chinese University of Hong Kong observed that:-

“When it comes to the rule of law in Hong Kong.... The most blatant damage [of *Ng Ka Ling* case] is reflected in the simple reality that final judgments in Hong Kong, at least where constitutional rights are concerned, are simply not final. They are subject to being overturned by a combination of local government and Mainland interference. . .”⁴⁰

31. The HKSAR Government's assertion that the Standing Committee has the power to interpret the Basic Law without, before, during or after a court case severely threatens the rule of law in Hong Kong. There were another two occasions where the NPCSC interpreted the Basic Law regarding the timeline of a universal suffrage and the term of office of the Chief Executive.
32. Facing these constitutional challenges, Mr. C. Raj Kumar, the lecturer of the School of Law, the City University of Hong Kong, argued that an independent NHRI and the promotion of a human right culture are of great importance under the notion of “one country, two systems”:-

“The legal and judicial framework of human rights protection in Hong Kong clearly demonstrates that it is insufficient to rely on the human rights structure guaranteed under the Basic Law and the Bill of Rights Ordinance, or, for that matter, the role of the courts in ensuring the protection and promotion of human rights. For true human rights culture to be promoted in Hong Kong, *a number of factors including the development of independent institutions engaged in the process of promoting human rights education are imperative*. Human rights ought to become the focal point of governance in the HKSAR. This approach is intended to develop a good governance framework for human rights

³⁸ Background brief prepared by Legislative Council Secretariat” at 5.

³⁹ *Ng Ka Ling v. Director of Immigration* [1999] 1 HKLRD 577.

⁴⁰ Michael C. Davis, “Constitutionalism under Chinese Rule: Hong Kong after the Handover,” (1999) 27 *Denv. J. Int'l L. & Pol'y* 275 at 294-5.

protection ...”⁴¹

*“The challenges of governance posed in Hong Kong due to the unique and distinctive development of constitutionalism and political culture under “one country, two systems” can be confronted only through the development of a sustainable human rights culture ... In the Hong Kong context, the colonial history and the disinterest of the colonial power in developing a deeply entrenched system of human rights have created a unique situation after the handover in 1997. The international community’s apprehensions about post-handover civil liberties and social expectations generated by the Basic Law and the Bill of Rights Ordinance have further deepened the need for developing a human rights culture in Hong Kong.”*⁴² [emphasis added]

4.1.3. The Array of Specialized Bodies

33. According to the Paris Principles, NHRIs shall be given “as broad a mandate as possible”⁴³ and independent.⁴⁴ It is submitted that the specialized bodies currently in force in Hong Kong cannot provide full-fledge protection of human rights enshrined under the Basic Law, the ICCPR and the ICESCR. Moreover, the independence of these government watchdogs has been called into question. Hence, the existing institutional framework cannot suffice the requirements of the Paris Principles.

4.1.3.1. Equal Opportunities Commission (EOC)

34. The Equal Opportunities Commission (EOC) can only enforce the Sex Discrimination Ordinance (Cap 480), the Disability Discrimination Ordinance (Cap 487), and the Family Status Discrimination Ordinance (Cap 527) [hereinafter the three antidiscrimination ordinances]. Mr. Raymond Tang, the Chairperson of the EOC, regarded the EOC as “a statutory regulator” and the EOC is obliged to “act within the remit set by the legislature

⁴¹ C. Raj Kumar, “Developing a Human Rights Culture in Hong Kong: Creating a Framework for Establishing an Independent Human Rights Commission,” (2004) 11 *Tulsa Journal of Comparative and International Law* 407 at 414.

⁴² Id at 414- 5.

⁴³ The Paris Principles, Article A(2).

⁴⁴ Id, Article C.

that created our organization.”⁴⁵

35. However, some grounds of discriminations are not covered in the domestic legislation but are protected under the ICCPR and the BORO. Under Article 4 and Article 26 of the ICCPR (similarly under Article 1 and Article 22 of the BORO), every person is entitled to equality before and equal protection of law “without distinction of any kind, such *as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*”.
36. Therefore, discrimination cases on those unprotected grounds in Hong Kong have to be dealt with by the courts or other administrative tribunals. Nevertheless, the BORO only binds “(a) *the Government and all public authorities; and (b) any person acting on behalf of the Government or a public authority*.”⁴⁶
37. This means that there is *no* remedy against human rights violators in the private sector for discrimination on grounds not covered by the three antidiscrimination ordinances.
38. Even if the EOC is independent and well-established with genuine support from the Government, the EOC, with its mandate limited to equality rights only, is unlikely to fulfill the Paris Principles. As the JCHR commented:-

“[H]uman rights dimension is an unavoidable element of the debate on the single equality body. There is wide agreement that the equality commission should at least be able to address the human rights dimension of individual discrimination cases ... [A]ny attempt to determine the future of the structure in the UK for the promotion and protection of equality which does not also address how to promote and protect human rights would be “incomplete, incoherent and ineffective”.”⁴⁷
[emphasis added]

39. Whether the degree of independence of existing specialized commissions in Hong Kong complies with the Paris Principles is questionable. In the case of the EOC, the government’s refusal to reappoint Ms. Anna Wu, who was perceived as an assertive figure in promoting equality, for a second three-year term in 2003 has been widely regarded as an attempt to play down the activism of the EOC at that time.⁴⁸ It was

⁴⁵ A Reply from Mr. Raymond Tang to Mr. Law Yuk Kai (14 June 2006), on the enquiry whether the EOC would file their own submission before the United Nations Committee on the Elimination of All Forms of Discrimination Against Women at 3.

⁴⁶ Bills of Rights Ordinance, Section 7.

⁴⁷ *Joint Committee on Human Rights*, Sixth Report, “The Case for a Human Rights Commission,” (2002-03 HL 67; HC 489), paragraph 188 [hereinafter JCHR’s 6th Report].

⁴⁸ 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.

- suspected that the relationship between the Government and Anna Wu turned bad since the EOC's remarkable success in the litigation against the Education Department on the issue whether the allocation system of secondary school was discriminatory to girls.⁴⁹
40. Subsequently, the Government appointed Mr. Michael Wong, a retired judge from the Court of Appeal as the Commissioner albeit his lack of experience in the related areas. Mr. Michael Wong was also criticized for receiving a pension and four air tickets, and residing in a flat given to his daughter by a local businessman.⁵⁰
41. The controversy didn't stop here. Mr. Michael Wong dismissed Mr. Patrick Yu, who had been appointed by Ms. Anna Wu during her term of office, immediately after his appointment. The event turned into a widespread accusation that Mr. Wong had abused his administrative powers.⁵¹
42. Moreover, the operation of the EOC is not without criticism. Firstly, once a complainant enters the conciliation phase a complainant is "forced" to accept the meagre remedy that is offered to her. The complainant knows that if she rejects the offer, her complaint will be classified as "unsuccessfully conciliated" and the EOC will probably close the case.⁵²
43. Secondly, the EOC has been taking a reserved and passive role in granting victims legal assistance. According to a survey conducted by Ms. Carole Petersen, the former Professor of the Faculty of Law of the University of Hong Kong, legal assistance was granted only in 17 out of the 451 complaints (less than 4% of the total).⁵³
44. Thirdly, the EOC officers are too "neutral" towards the complaint during the conciliation process. The complainants often look to them for assistance and are disappointed when the officers explain their duty of neutrality. As the officers are afraid of being accused by respondents as biased, the processes of investigation and conciliation often turns out to be

⁴⁹ *Equal Opportunities Commission v Director of Education* [2001] 3 HKLRD 690.

⁵⁰ Alliance for Civic Education, Amnesty International H.K., Civil Human Rights Front, Concerning CSSA Review Alliance, Hong Kong Confederation of Trade Unions, Hong Kong Council of Social Service, Hong Kong Human Rights Monitor, Hong Kong Social Workers Association, Justice and Peace Commission of the Hong Kong Catholic Diocese, Office of Emily Lau Legislative Councilor, Office of Fernando Cheung Legislative Councilor, Oxfam Hong Kong, Power for Democracy, Sham Shui Po Community Association, Society for Community Organization, The Frontier, Unison H.K., Zi Teng, 落實子女居港權家長會(香港), "International Covenant on Economic, Social and Cultural Rights-- Situation in Hong Kong & Recommendations," *Office of Emily Lau* (2005), available at www.emilylau.org.hk/doc/CompilationofNGOContributions.doc

⁵¹ Ravina Shamdasani, "Watchdog faces pressure to resign: Firing breached human rights treaties, says academic", *South China Morning Post* (24 Oct 2003), C3.

⁵² Carole J. Petersen, "Racial Equality and the Law: Creating an Effective Statute and Enforcement Model for Hong Kong," (2004) 34 *Hong Kong Law Journal* 459 at 474-5.

⁵³ *Id.*

more adversarial than consensual.⁵⁴ A more adversarial process tends to favour the respondents which are usually more resourceful and are represented by legal practitioners.

45. Given the jurisdictional limitation, the appointment scandal and various operational defeats, the EOC has been awarded a “C” grade in the accreditation by the ICC.⁵⁵

4.1.3.2. The Office of the Ombudsman

46. The restrictions on the jurisdiction of the Ombudsman are unlikely to satisfy the Paris Principles.
47. First, the Ombudsman in Hong Kong is mandated mainly to handle cases of poor or improper administration in the bureaux, department, and non-departmental public bodies specified in Schedule 1 of the Ombudsman Ordinance (Cap 397).⁵⁶ 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 flow are considered to be outdated or inequitable.⁵⁷ There lacks institutional guarantee that the Ombudsman will pursue the promotion and protection in pure human rights cases in the absence of explicit human rights mandate.
48. Second, under Section 8 and Schedule 2 of the Ombudsman Ordinance, actions in relation to security, defence or international relations, legal proceedings or prosecution decisions, exercise of power to pardon criminals, grant of honours, awards or privileges by the Government, actions by the Chief Executive personally, imposition or variation of conditions of land grant are not subject to the Ombudsman’s investigation.
49. Forth, the Ombudsman cannot investigate into crime prevention and investigation actions by Hong Kong Police Force or Independent Commission Against Corruption (ICAC) except those in relation to the Code on Access to Information.⁵⁸ The Government has expressed that it had no plan to extend the remit of the Ombudsman in this regard.⁵⁹

⁵⁴ Id, at 478.

⁵⁵ *National Human Rights Institutions Forum*, “National: List of Institutions,” available at <http://www.nhri.net/NationalDataList.asp?MODE=1&ID=2>

⁵⁶ Ombudsman Ordinance, Section 7(1)(a).

⁵⁷ Alice Tai Yuen Ying, “Letter to Hong Kong Human Rights Monitor” (OMB/CR/31_V, 9 January 2007), at 1.

⁵⁸ Id, Section 7(1)(b).

⁵⁹ HKSAR Government, “Second periodic report of the Hong Kong Special Administrative Region of the People’s Republic of China in the light of the International Covenant on Civil and Political Rights: Response to the List of issues presented by the Human Rights Committee on 7 November 2005 (CCPR/C/HKG/Q/2),” available at http://www.hab.gov.hk/file_manager/en/documents/policy_responsibilities/the_rights_of_the_individuals/ICCPRResponseListIssues_e.doc, paragraph 2.1(b).

50. In July 2006, the Ombudsman, Ms. Alice Tai, has been empowered to handle complaints against the Student Financial Assistance Agency.⁶⁰ She also announced that she would submit a proposal in the autumn of 2006 to the Legislative Council to expand the Ombudsmen's role to encompass complaints against the police and the ICAC.⁶¹ By January 2007, her proposal was still under progress and Ms. Tai concluded that "it would not be appropriate for the Ombudsman ex officio to continue to be represented on IPCC and the ICAC Complaints Committee."⁶²
51. The independence of Ombudsmen has called into question after non-reappointment of Mr. Andrew So in 1998. Mr. Andrew So, who had actively pursued a human rights perspective and had publicly expressed his wish to remain in office, was not renewed as the Ombudsman despite considerable public support to his renewal. It was widely reported that the Government was unhappy about Mr. So's vigorous investigation into government maladministration and his attempts to expand the Ombudsman into a broad-based human rights body.⁶³

4.1.3.3. The Office of Privacy Commissioner (PCO)

52. The mandate of the Privacy Commissioner for Personal Data is severely limited by the Personal Data (Privacy) Ordinance (Cap 486).⁶⁴ It does not provide any conciliation measures, legal advice or legal aid. Nor does it have powers to bring legal proceedings.
53. Again, the HKSAR Government undermines the independence of the Commission through appointment of the Privacy Commissioner. In 2001, Mr. Stephen Lau Ka-men was not reappointed as the Privacy Commissioner. It was speculated that Mr. Lau had annoyed the Government as he submitted a report on Xinhau's breach of the Personal Data (Privacy) Ordinance, whereby the Xinhau had failed to disclose to legislator Emily Lau within 40 days her personal file kept by the agency.⁶⁵
54. The Privacy Commissioner has been working against a backdrop of budgetary cut since 2003. Net cash flow for operating activities of the PCO has been reduced from HKD

⁶⁰ *Singtao*, "Ombudsmen will be able to investigate into the Student Financial Assistance Agency (申訴專員將可查「學資處」)," (7 July 2006) A16.

⁶¹ Id. See also Ombudsmen, Annual Report 2006.

⁶² Alice Tai Yuen Ying, at 2.

⁶³ Gren Manuel, "A new watchdog in the jungle," *South China Morning Post* (27 December 1998).

⁶⁴ The PDPO has a limited remit cannot effectively protect the right to privacy enshrined under the Basic Law and ICCPR.

⁶⁵ Michelle Chak, "Shock as privacy chief says he will step down; announcement sparks calls for an official explanation", *South China Morning Post* (31 July 2001).

Letter to the Editor of Lai Wing-Yiu, "Concern Over Privacy Chief's Departure," *South China Morning Post* (5 August 2001).

\$3,231,478 in 2003, HKD \$3,170,642 in 2004 to HKD \$2,602,341 in 2005.⁶⁶ 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.

55. Due to the budgetary constraint, the PCO has remained small and unpowerful. The PCO currently has thirty nine executive members of staff.⁶⁷ In the Overview of Annual Report 2004-2005, the current Privacy Commissioner, Mr. Roderick Woo stated that the Operations Division had not replaced staff whose positions fell vacant and the remaining staff in the division had had to shoulder an increased caseload. The problem of understaffing intensified by a 4% increase of the number of complaint cases in 2004-2005 as compared with 2003-2004.⁶⁸
56. The Privacy Commissioner Mr. Roderick Woo has been complaining to the media about recent budget cut and the inadequate staffing level of the Commission. He said that his work had cut to mere promotion of personal data privacy protection.⁶⁹ To make matters worse, the Home Affairs Bureau has rejected Mr. Woo's latest request for more funds and staff to embark on new projects.⁷⁰

4.1.3.4. The Hong Kong Press Council

57. The Press Council was established in July 2000. The objective of the Council is to promote the professional and ethical standards of the newspaper industry, defend press freedom, and deal with public complaints against local newspapers.⁷¹ In August 1999, the Law Reform Commission published two consultation papers to address public concern over serious invasion of privacy in news reporting. In response to the two reports, in November 1999, the Hong Kong Federation of Journalists, announced the intention of setting up an independent body called the Hong Kong Press Council to deal with complaints arising intrusion of privacy.
58. Initially the Council handled only public complaints against intrusion of privacy by member newspapers. But the Council expanded its terms of reference with effect from

⁶⁶*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.

⁶⁷ Id at 12.

⁶⁸ Id, Annual Report 2004-2005 at 3.

⁶⁹ Michael Ng, "Privacy watchdog bemoans funding," *The Standard* (24 October 2005), available at http://www.thestandard.com.hk/news_print.asp?art_id=4077&sid=5117570

⁷⁰ Id.

⁷¹ *Hong Kong Press Council's* website, "Objectives," available at <http://www.presscouncil.org.hk/e/defaultc.htm>

July 2001 to cover public complaints against intrusion of privacy, prurience, indecency, and sensationalism by newspapers.⁷²

59. The Press Council is ineffective in curing media intrusion of privacy.⁷³ First, the membership of the Press Council lacks representativeness. The Council currently consists of ten Hong Kong newspapers and two representative bodies of the media. However, the three most popular newspapers, the Apple Daily, Oriental Daily and the Sun, which get hold of more than 70% of total circulation, refused to participate in the Press Council.⁷⁴ The Hong Kong Journalist Association, the largest journalists' union in Hong Kong, and the Hong Kong Press Photographers Association are unwilling to join the Council too.
60. Second, the Press Council is a self-regulatory body. It has no enforcement power and "its authority rests on the willingness of members to respect the Council's views, to adhere voluntarily to ethical standards and to admit mistakes publicly."⁷⁵ The Council can only issue public condemnation against the media which are found to have violated the Journalists' Code of Professional Ethics. Without the power to enforce its directives, it is highly doubtful as to the effectiveness of those public condemnations in transforming the misbehaviours of the press.
61. Third, the popularity of the Press Council has remained low. Given the severity of media intrusion in Hong Kong, the Council has received a surprisingly little number of complaints: a total number of 22 in 2005, 19 in 2004, 15 in 2003, 25 in 2002, 18 in 2001 and 21 in 2000.⁷⁶
62. Fourth, the Press Council is an independent organization funded by the newspapers and public donations. Till now, the Council has never made public its financial situation and management. As such, there has been speculation that the Council has been suffering from financial difficulty as well as a severe shortage of staff.⁷⁷
63. In view of the pitfalls of the current Press Council, the Law Reform Commission in 2004 reinstated its recommendation to establish a statutory press council. Such statutory council, if established, would have no power to award compensation, no power to impose a fine or power to order apology against a newspaper or magazine publisher who is found

⁷² HKSAR Government, "Press Freedom," (May 2006), available at http://www.info.gov.hk/info/hkin/press_freedom.pdf at 3-4.

⁷³ See *Law Reform Commission of Hong Kong*, "Privacy and Media Intrusion" (December 2004), available at <http://www.hkreform.gov.hk/reports/rmedia-e.pdf> at 98-103.

⁷⁴ Yan Mei Ning, "The Press Council Five Year Performance (報業評議會五年來的表現)," *Media Digest*, RTHK, available at http://www.rthk.org.hk/mediadigest/20050815_76_120575.html

⁷⁵ *Hong Kong Press Council's* website, "About the Council," available at <http://www.presscouncil.org.hk/e/defaultc.htm>

⁷⁶ *Hong Kong Press Council's* website, "2000-2004 No of Cases Statistics," available at <http://www.presscouncil.org.hk/e/defaultc.htm>

⁷⁷ Yan Mei Ning,

to have breached the Press Privacy Code.⁷⁸ In the case of non-compliance, the only power that the proposed statutory press council can exercised in the absence of the court is “to advise, warn or reprimand the publisher of the newspaper or magazine”; “to require the newspaper or magazine publisher to publish a correction, and to approve or decide on its content”; and “to require the newspaper or magazine publisher to publish the Commission’s findings and decision.”⁷⁹

64. Even if such a statutory press council is established, whether it can effectively and efficiently monitor and reduce media intrusion remains doubtful given the little power it enjoys.

4.1.3.5. Commissioner for Covert Surveillance

65. Under the Interception of Communication and Surveillance Ordinance (Cap 589), the Chief Executive will, on the recommendation of the Chief Justice, appoint a panel of judges to authorize covert surveillance. An independent commissioner, who will be a serving or retired judge, will audit operations of covert surveillance and handle complaints against these operations.⁸⁰
66. The Commissioner for covert surveillance has inadequate 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.”⁸¹
67. According to Ms. Ross Wu, the spokesperson of the Civil Human Rights Front, “the law does not provide adequate safeguards to protect the privacy of individuals. Moreover, the new commissioner for covert surveillance lacks the power to ensure that abuses are not only identified but that offenders are punished and victims compensated.”⁸²
68. There has been criticism that the first covert surveillance commissioner, Justice Woo Kwok-hing, is not as independent as he appears to be, given his long term appointment as the head of the Electoral Affairs Commission.⁸³ At this stage, whether Justice Woo will protect the right to privacy in a just and proactive manner remains to be seen.

⁷⁸ Law Reform Commission’s Report on “Privacy and Media Intrusion”, Recommendations 33, 34 and 36.

⁷⁹ Id, Recommendation 35.

⁸⁰ Interception of Communication and Surveillance Ordinance, Section 39.

⁸¹ Id, Section 40(b)(iv).

⁸² Rose Wu, “The Covert Surveillance Law and the Protection of Privacy,” *Hong Kong Christine Institute*, (September 2006), available at http://www.hkci.org.hk/index_e.htm

⁸³ Stephen Vines, “Watching the Watchers,” *The Standard* (11 August 2006), available at [http://hk-
imail.singtao.com/news_detail.asp?we_cat=5&art_id=24805&sid=9264402&con_type=1&d_str=20060811](http://hk-
imail.singtao.com/news_detail.asp?we_cat=5&art_id=24805&sid=9264402&con_type=1&d_str=20060811)

4.1.3.6. Police Complaints Mechanism

69. The HKSAR Police have been frequently accused of beating, slapping, and torturing criminal suspects. In April 1998, four police officers were convicted of assaulting and causing bodily harm to a drug suspect by pouring water into his ears and nose, stuffing a sports shoe in his mouth, and threatening to throw him from a 16th floor balcony, then beating him unconscious. In March 1999, an 18-year-old youth was found dead in police custody without any satisfactory explanation from the Police.⁸⁴
70. Moreover, the Police have long been criticized for using excessive force in regulating assemblies and demonstrations, resulting unwarranted oppression to lawful assemblies and demonstration. In 2000, the Hong Kong Human Rights Monitor received complaints against the Police for the use of pepper spray in the course of demonstration organized by university students.⁸⁵
71. As far as investigations of police misconduct are concerned, The Complaints Against Police Office (CAPO) is not an independent body.
72. The Independent Police Complaints Council (IPCC) is not a statutory body up till now. It has no power to investigate complaints against the police or to impose penalty.
73. The UNHRC has correctly pointed out in its concluding observations of March 2006 that investigations are still carried out *by the police themselves* through CAPO, while the IPCC does not have the power to ensure proper and effective investigation of complaints or for the effective implementation of its recommendations.”⁸⁶
74. By and large, there is no public body entrusted with overall responsibility for the strategic enforcement of human rights laws in Hong Kong, in which its policy agenda is focus on

⁸⁴ *Hong Kong NGO Summary of Issues*, United Nations Human Rights Committee Hearing on the Hong Kong SAR (1 November 1999).

⁸⁵ *Hong Kong Human Rights Monitor*, “Protestors Pepper-sprayed Contrary to a Deal with Police?” (26 June 2000), available at <http://www.hkhrm.org.hk/english/reports/press/pr260600.html>

For more information about the mischief of law enforcement agencies, please visit *Hong Kong Human Rights Monitor*’s website, at <http://www.hkhrm.org.hk>, in particular “Statement: Distress Over Police’s Selective Oppression of Student Organisations” (16 August 2000); Open court closed by the police (26 July 2000) ; and “HKHRM Observation report on April 2 dispersal” (Chinese only) (8 April 2004).

⁸⁶ Hong Kong (CCPR/C/HKG/CO/2, 30 March 2006), paragraph 9.

protection and promotion of human rights and is capable of bringing “test cases” in order to clarify or reform the law.

75. Ms. Anna Wu, former Legislative Council member, has been advocating for the establishment of a Human Rights Commission in Hong Kong for more than ten years, as the current fragmented approach in protection and promotion of human rights has been far from satisfactory. She said:-

“There have also been concerns that a human rights and equal opportunity commission could duplicate the functions of several channels of redress and thus create institutional redundancy. Various complaint channels, such as the Commission Against Maladministration and the complaints division of the Legislative Council may occasionally touch on human rights concerns. Similarly, the government has added human rights to the agenda of the Committee on the Promotion of Civic Education, and placed human rights under the portfolio of the Secretary of Home Affairs.

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.”⁸⁷

76. Ian Bynoe and Sarah Spencer, the Director and the Research Fellow of Human Rights Programme of the Institute for Public Policy Research, observed that-

“The United Kingdom [before the passage of Equality Act 2006] *thus lacks any focus for the systematic promotion, monitoring or enforcement of human rights.* [First], There is no body which monitors the extent to which United Kingdom law, policy and the way it is administered conform to the country's international legal obligations; nor one able to assess the impact of proposed legislative and policy changes. Government legal advisers currently fulfill this role to a limited extent but have neither the resources nor mandate to scrutinize the policies of each and every Whitehall department, local authority or other public body... Secondly, there is no organization to advise public and private bodies how to ensure that they find the right balance between protecting human rights and other policy objectives... Thirdly, there is no body to promote human rights education and public awareness... Lastly, in relation to many human rights enjoyed by United Kingdom citizens, no means are available within the United Kingdom for complaints of their breach to be independently investigated, nor for these rights to

⁸⁷ Anna Wu, “Why Hong Kong Should Have an Equal Opportunities Legislation and a Human Rights Commission,” *Human Rights and Chinese Values-- Legal, Philosophical and Political Perspectives*, Michael C. Davis (ed.) at 198.

be fully enforced.”⁸⁸ [emphasis added]

77. Before the Equality Act 2006, there already existed specialized public bodies in the UK which protects certain human rights. They are the Commission for Racial Equality, the two Equal Opportunities Commissions, the Fair Employment Commission and the Data Protection Registrar.
78. This pre-2006 institutional framework for human rights promotion and protection in the UK is very similar to the current scattered and piecemeal approach in Hong Kong. Hence, the above critique to the pre-2006 institutional framework in the UK is equally applicable to that of Hong Kong at present.

4.2. A HUMAN RIGHTS COMMISSION AS AN EFFECTIVE SUPPLEMENT OF THE JUDICIARY

79. NHRIs with a specific focus on human rights sometimes overlap and dilute the role of judicial review in the protection and promotion of human rights.⁸⁹
80. Undoubtedly, the availability of judicial remedies is essential to make rights meaningful. However, the roles and the functions of the judiciary are essentially different from that of NHRIs, albeit with some overlapping of jurisdiction. The judiciary determines the scope of the legal obligation of the Government under the international human rights treaties and the Basic Law.⁹⁰ The judiciary can provide NHRIs and the society the legal frameworks for protection and of human rights.⁹¹ On the other hand, NHRIs’ policy agenda and resources focus exclusively on human rights issues.
81. An independent judiciary and NHRIs in fact supplement and strengthen the roles of each other without unwarranted duplication. As compared with those of NHRIs, judicial remedies are inadequate in the following ways.
82. First, the majority of victims of human rights violations are not persons of means. The cost and delay of litigation can effectively deter the victims of human rights violations from filing a case to the court. Litigation is also time-consuming. Victims may not be willing to take the time and trouble to bring a legal action even if they can afford the legal cost. On the other hand, NHRIs can provide victims easy, friendly and inexpensive access to justice.

⁸⁸ Ian Bynoe and Sarah Spencer, “A Human Rights Commission for the United Kingdom – Some Options,” (1997) 2 *European Human Rights Law Review* 152 at 154-5.

⁸⁹ Jeffrey Goldsworthy, “Judicial Review, Legislative Override, And Democracy,” (2003) 38 *Wake Forest Law Review* 451 at 470.

⁹⁰ See Michael J. Perry, “Protecting Human Rights in a Democracy: What Role for the Courts?” (2003) 38 *Wake Forest Law Review* 635 at 639-45.

⁹¹ *Id* at 644.

83. Second, the judiciary can only take ex ante remedial compensation when a victim files an application before the court. As such, protection through judicial review is scattered and limited in scope. On the other hand, NHRIs have a much broader mandate on and can play a preventative role actively at the domestic level. Mary Robinson, the United Nations High Commissioner for Human Rights, has articulated the potential of national human rights institutions positively:-

“I have become increasingly convinced of the necessity to focus on preventive strategies. This has convinced me of the importance of creating strong, independent national human rights institutions to provide accessible remedies, particularly for those who are most vulnerable and disadvantaged.”⁹²

84. Third, while NHRIs need not be restricted by legislation and common law in the same way as the judiciary, it should handle human rights issues in a much more flexible and creative manner. For example, the court can decide on a case only if the plaintiff has the *locus standi*.⁹³ However, NHRIs can take actions as long as there is human rights violation.
85. Hence, it is submitted that an independent judiciary on its own does not suffice the requirement of “*taking the necessary steps*” and “*taking steps...by all appropriate means*” stipulated respectively in Article 2 of the ICCPR and Article 2 of the ICESCR. [emphasis added] Instead, NHRIs should work hand in hand with a competent judiciary to enhance the promotion and protection of human rights.

4.3. THE ENHANCEMENT OF A HUMAN RIGHTS CULTURE

86. Although NHRIs cannot make final judicial decision as the courts do, NHRIs can still contribute to the development of good governance⁹⁴ and a culture of respect for human rights.
87. Firstly, NHRIs can promote the values of transparency and government accountability. Publicizing human rights abuses can generate public pressure on the government and the private individuals to comply with international human rights norms. As Linda Reif

⁹² Mary Robinson, “Human Rights: Challenges for the 21st Century,” *The Dag Hammarskjöld Lecture 1998* (5 November 1998), available at <http://www.dhf.uu.se/pdfiler/Robinson.pdf>

⁹³ Some courts have overcome the limitation of locus standi. See Gordon A. Christenson, “Federal Courts and World Civil Society,” (1997) 6 *J. Transnat’l L. & Pol’y* 405 at 453-61.

⁹⁴ 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.

argues:-

“These institutions act as mechanisms by which members of the public can participate in the regulation of the conduct of public administration by initiating complaints that lead to investigations of human rights abuses or faulty administration. Accountability of the administration is improved—lines of accountability are drawn between the public, the national institution and the executive/administrative branch, and the latter has to comply with the investigation, have its behaviour scrutinized according to standards of law and equity, and respond to recommendations or other stronger remedial action. Transparency of government conduct is heightened through formal, objective scrutiny and public reporting by the national human rights institution.”⁹⁵

88. Secondly, NHRIs can take an active part in lobbying government over legislation, policy, and participation in international human rights treaties. For example, the Australian Human Rights and Equal Opportunity Commission [hereinafter HREOC] has criticized mandatory detention of asylum seekers⁹⁶. The Indian Human Rights Commission successfully lobbied for the repeal of the Terrorist and Disruptive Activities (Prevention) Act 1987⁹⁷. The Indonesian Human Rights Commission criticized the ban of a popular publication by the Government⁹⁸. The Malaysian Human Rights Commission mounted a strong attack on the Internal Security Act.⁹⁹
89. Had there been a human rights commission in Hong Kong, such a commission might be involved in the drafting of the National Security Bill and ensure the Bill would be compatible with fundamental rights enshrined under the Basic Law and the ICCPR.
90. Thirdly, NHRIs have “the advantage of being able to respond *more flexibly* and *over a longer time period* to a range of challenges thrown up by human rights problems.”¹⁰⁰ The Commission need not wait and award post-event remedies. Instead, they can actively pursue preventive measures.

⁹⁵ Linda C. Reif, Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection, (2000) 13 *Harvard Human Rights Journal* 1 at 18.

⁹⁶ S Ozdowski, “A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner,” (2001), available at http://www.hreoc.gov.au/human_rights/idc/index.html

⁹⁷ *National Human Rights Commission of India*, “Annual Report 1998- 1999,” available at <http://www.nhrc.nic.in> at 21. The Commission lobbied for the repeal of the Terrorist and Disruptive Activities (Prevention) Act 1987 on the basis that its implementation had lead to serious human rights abuses. The Commission undertook 'extensive hearings and analysis' before coming to this conclusion in a climate in which there was a real threat from terrorism.

⁹⁸ Li-ann Thio, “Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go Before 1 Sleep,” (1999) 2 *Yale Human Rights and Development Law Journal* 1 at 78.

⁹⁹ *National Human Rights Commission of Malaysia*, “Annual Report 2000,” Chapter 3, available at http://www.suhakam.org.my/annual_report/annual2000.pdf

¹⁰⁰ B Burdekin, “Human Rights Commissions,” *Human Rights Commissions and Ombudsman Offices: National Experiences Throughout the World*, K Hossain et al (ed.) (London: Kluwer, 2001) at 801-31.

“NHRC ... can look to the causes of the dispute and the need for long-term solutions. NHRC may, for example, be able to act as a forum for communities that are in dispute with one another to work through the multiple causes of grievances between them as part of an ongoing confidence-building exercise. They can also work with non-governmental organizations or other government agencies to develop a range of methods for curbing abuses. *This power is particularly important where abuses are deep-rooted and widespread, or rooted in long-standing inter-communal antagonism.*”¹⁰¹ [emphasis added]

91. Fourthly, human rights educational programmes can play an important role in NHRIs and pose a far-reaching impact on human right protection in long run. This function is particularly important as many types of human rights violations are deeply rooted as a norm and culture. NHRIs can create a sense of awareness of rights and enhance the social expectations of human rights protection among the society through human rights education¹⁰². Even in the most repressive regimes, the establishment of NHRIs can “create an official space for a human rights discourse and may foster greater, even if limited, activism and awareness.”¹⁰³
92. Fifth, poised between the state and the civil society, NHRIs bring together the state’s representatives on one side and representatives of NGOs and trade unions on the other. By virtue of their pluralist membership, NHRIs provide opportunities to promote political participation of the civil society and hence promote public awareness on the respect for human rights.
93. Italian NGOs commented that:-
- “The lack of such a National Institution further highlights the difficulties in order to promote and protect in Italy all fundamental human rights in a coherent and integrated approach.”¹⁰⁴
94. Professor Huang, the Director of the Chong Fo-chuan Center for the Study of Human Rights comments that for Taiwan in which lacks a human rights culture and tradition, “bit-by-bit accretion” is unable to achieve greater advancement of human rights.¹⁰⁵ As

¹⁰¹ Carolyn Evans, “Human Rights Commissions and Religious Conflict in the Asia-Pacific Region,” (2004) 53 *International & Comparative Law Quarterly* 713 at 721.

¹⁰² Human Rights Watch, “Government Human Rights Commissions in Africa, Protectors or Pretenders? Government Human Rights Commissions in Africa,” (2001), available at <http://www.hrw.org/reports/2001/africa/overview/summary.html>

¹⁰³ Id.

¹⁰⁴ Comitato per la promozione e protezione dei diritti umani (a network of 48 Italian NGOs), “NGO Supplementary Report to the Fourth Italian Government Periodic Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights submitted by Italy under articles 16 and 17 of the Covenant,” (14 October 2004), available at www.comitatodirittiumani.org/le%20iniziativa/supplementaryreportitaliy.pdf at 26.

¹⁰⁵ Peter Huang, “The Paradox of Taiwan’s Human Rights Conditions,” *Taiwan Association for Human Rights’ website*, (2 January 2000), available at www.tahr.org.tw/site/committee/2001.01Commissions/peter.htm

Dr. Li-ann Thio, Professor of the Law Faculty, National University of Singapore said, “A concern for human rights has to be born from within before it can be enforced from without.”¹⁰⁶ The same applies to Hong Kong.

95. In the UK, the Commission for Equality and Human Rights (CEHR) will be established by 2007 upon the passage of the Equality Act 2006. The existing British equality commissions, namely the Equal Opportunities Commission, the Disability Rights Commission, and the Commission for Racial Equality will subsequently be dissolved.¹⁰⁷
96. The Joint Committee on Human Rights (JCHR) in the UK published a report in March 2003 to construct a “compelling” case for a Human Rights Commission.¹⁰⁸ After conducting a research on the development of a human rights culture after the passage of the Human Rights Act, the JCHR concluded that “public authorities do not consider mainstreaming respect for human rights in their policies and practices a priority”¹⁰⁹ and no administrative framework and scant guidance reaching public authorities to foster a culture of respect for human rights are in place.¹¹⁰ Both the Audit Commission in 2003¹¹¹ and the Institute of Public Policy Research for the Department for Constitutional Affairs in 2005¹¹² verified the absence of a culture of human right.
97. According to the JCHR, the establishment of a human rights commission could reduce unnecessary litigation against public authorities¹¹³; act as a partner of the Government in achieving “fundamental goals”¹¹⁴, and achieve a constructive and cooperative relationship between the citizen and the state¹¹⁵. Most importantly, a human rights commission could both effectively and efficiently develop public awareness and the culture of respect for human rights.¹¹⁶

¹⁰⁶ Li-ann Thio at 78.

¹⁰⁷ The Commission for Racial Equality will be dissolved in 2009, two years after the other equality commissions.

¹⁰⁸ JCHR’s 6th Report at 5.

¹⁰⁹ Id, paragraph 62.

¹¹⁰ Id, paragraph 61.

¹¹¹ The Audit Commission reported that 58% of public bodies in the UK had not adopted a strategy for human rights in 2002. *Audit Commission*, “Human rights: Improving Public Service Delivery,” (London, 2003), paragraph 12.

¹¹² “The HRA has not yet been of sufficiently demonstrable value in improving standards in public services as the Government has intended when the Act was passed”. In particular there is “insufficient awareness of the legal principle of ‘positive obligations’ to protect human rights which requires public authorities to adopt a pro-active approach to human rights”. See *Institute for Public Policy Research*, “Improving Public Services: Using a Human Rights Approach,” (London, 2005) at 37.

¹¹³ JCHR’s 6th Report, paragraph 78.

¹¹⁴ Id, paragraph 79.

¹¹⁵ Id, paragraph 80.

¹¹⁶ Id, paragraph 94.

“A commission would give human rights a focus, resources and a degree of institutional stability not found recently in central government ...”¹¹⁷

“A commission could undertake much of the dissemination and monitoring of human rights with respect to public authorities which is not happening, and shows no likelihood of happening, under the existing arrangements within Government.” We believe this work needs to be done. We conclude that in the absence of a human rights commission it will not be done well, or possibly it will not be done at all.”¹¹⁸

“We are persuaded that sufficient unmet needs have been identified for there to be work for a commission to do. The development of a culture of respect for human rights in Great Britain is in danger of stalling, and there is an urgent need for the momentum to be revived and the project driven forward. A culture of respect for human rights cannot be developed through the courts alone and it cannot be developed solely by an agency within Government. We believe an independent commission would be the most effective way of achieving the shared aim of bringing about a culture of respect for human rights. Our advice is that such a commission should be established.”¹¹⁹ [emphasis added]

98. The passage of the Human Rights Act 1998 generated the positive obligation on the UK Government to enforce the ECHR and to nurture a culture of respect for human rights. It is the aim of the Human Rights Act to develop a culture of respect for human rights throughout society.¹²⁰
99. Although the Human Rights Act 1998 has not been incorporated into Hong Kong’s domestic laws, the ICCPR and the ICESCR, having acquired the same status of the Basic Law through Article 39, have generated similar positive obligations for the protection and promotion of human rights on the HKSAR Government.

4.4. THE INTERNATIONAL AND DOMESTIC OBLIGATIONS ON THE HKSAR GOVERNMENT TO FULLY IMPLEMENT THE UN HUMAN RIGHTS TREATIES

100. To date, six major UN human rights treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial

¹¹⁷ Id, paragraph 96.

¹¹⁸ Id, paragraph 98.

¹¹⁹ Id, paragraph 99.

¹²⁰ Lord Chancellor, Lord Irvine of Lairg, “Hansard,” HL col.1228 (3 November 1997).

Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child, has been extended to Hong Kong.

101. The Basic Law, the ICCPR and the ICESCR set out the domestic human rights framework in Hong Kong. The Basic Law, the constitution of Hong Kong, guarantees that the HKSAR shall safeguard the rights and freedoms of its residents and of other persons in the Region.¹²¹ Various human rights are expressly protected, including the right to life,¹²² equality before the law,¹²³ freedom from torture,¹²⁴ personal liberty,¹²⁵ liberty of movement,¹²⁶ privacy of communication,¹²⁷ freedom of expression,¹²⁸ freedom of religion,¹²⁹ freedom of association,¹³⁰ and the right to peaceful assembly.¹³¹

102. Article 39 of the Basic Law provides that:-

“[t]he provisions of the International Covenant on Civil and Political rights, the International Covenant on Economic, social and Cultural Rights 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.*”
[emphasis added]

Hence, the ICCPR and the ICESCR acquire the same status as the provisions in the Basic Law through Article 39 upon the transfer of sovereignty in 1997.

103. Implementation of the international treaties and constitutional guarantees of human rights protection is always the core concern. Under the Charter of the UN, member states are *obliged* to promote and to realize human rights and freedoms for every individual.¹³²
104. Article 2 of the ICCPR provides duties for governments to apply and guarantee all the rights set out in the Covenants: –

¹²¹ The Basic Law, Article 4.

¹²² Id, Article 28.

¹²³ Id, Article 25.

¹²⁴ Id, Article 28.

¹²⁵ Id.

¹²⁶ Id, Article 31.

¹²⁷ Id, Article 30.

¹²⁸ Id, Article 27.

¹²⁹ Id, Articles 32 & 141.

¹³⁰ Id, Article 27.

¹³¹ Id, Article 28.

¹³² Preamble to the ICCPR.

“...to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” (ICCPR, Article 2(2)) [emphasis added]

“...[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.” (ICCPR, article 2(3)(b)) [emphasis added]

105. So do the ICESCR:-

“...to take steps...with a view to achieving progressively the full realization of the [Covenant] rights...by *all appropriate means*.” (ICESCR Article 2(1)) [emphasis added]

106. The Committee on Economic, Social and Cultural Rights has recognized the “potentially crucial role” of national institutions “in promoting and ensuring the indivisibility and interdependence of *all human rights*.”¹³³ [emphasis added]

107. The effectiveness of NHRIs in integrating the international human rights norms into the domestic legal framework and executive policy agenda is best illustrated by Linda C. Rief’s passage:-

“A national human rights institution may be able to use international and domestic human rights laws directly or indirectly in the investigation of a complaint. The direct use of human rights norms occurs when international law has been incorporated into domestic law, alongside other supporting human rights laws and jurisprudence...[I]ndirect use of international human rights norms can occur in two ways. First, depending on the legal system, it may be possible to use international human rights obligations of the state to interpret how the national constitutional or statutory guarantees of rights comply with international obligations in a specific situation. Second, for national human rights institutions... that have the power to use wider notions of fairness and equity in the identification of poor government conduct— the international human rights law obligations of the state can be used as guiding principles or examples of “good practices” even if the international law has not been implemented into domestic law.”¹³⁴

108. To date, the ICC counts 100 member institutions worldwide. In Asia Pacific Region, Human Rights Commissions have been established in New Zealand (created in 1977),

¹³³ General Comment 10, Article 1, paragraph 1.

¹³⁴ Linda C. Rief.

Australia (1986), the Philippines (1987), India (1993), Indonesia (1993), Palestine (1993), Iran (1995), Sri Lanka (1997), Fiji (1999), Malaysia (2000), Nepal (2000), Thailand (2000), Mongolia (2001), South Korea (2001), Afghanistan (2002). In Taiwan, the Government has been planning to establish a National Human Rights Commission in accordance with the Paris Principles since 2000.¹³⁵

109. The UN has expressly urged the Hong Kong Colonial Government and then the HKSAR Government to set up a human rights commission seven times since 1995. The concluding observations show that UN's demand on the HKSAR Government to establish a NHRI according to the Paris Principles has escalated.
110. In its 1995 Concluding Observations, the Human Rights Committee *recommended* that the State party to reconsider its decision on the establishment and competence of a Human Rights Commission."¹³⁶
111. In 1999, the same Committee in its concluding observations of November 1999 *expressed concern at the lack of an independent body* established by law to investigate and monitor human rights violations in HKSAR and the implementation of Covenant rights.¹³⁷
112. In its 1997 Concluding Observations, the Economic, Social and Cultural Rights Committee expressed *concern* that "Hong Kong government continues to object to the establishment of a human rights commission"¹³⁸.
113. In 2001, the Economic, Social and Cultural Rights Committee *urged* the HKSAR Government to establish a NHRI consistent with the Paris Principles and the Committee's General Comment No. 10. Until such an institution is established, the Committee urged the HKSAR to enhance its measures promoting of economic, social and cultural rights.¹³⁹

¹³⁵ In Taiwan, the plan for the establishment of a human rights commission appeared in both 2004 and 2005 Yearbook. Taiwan's Government Information Office, available at <http://www.gio.gov.tw/taiwan-website/5-gp/yearbook/p238.html>

¹³⁶ United Kingdom of Great Britain and Northern Ireland, including Hong Kong, (CCPR/C/79/Add.57, 9 November 1995), paragraph 22.

¹³⁷ United Kingdom of Great Britain and Northern Ireland, including Hong Kong, (CCPR/C/79/Add.117, 12 November 1999), paragraph 9.

¹³⁸ United Kingdom of Great Britain and Northern Ireland, including Hong Kong, (E/C.12/1/Add.10, 28 November 1996), paragraph 14(c).

¹³⁹ Hong Kong, China (E/C.12/1/Add.58, 21 May 2001), paragraph 32.

114. Though the Committee against Torture¹⁴⁰ and the Committee on the Elimination of Discrimination Against Women¹⁴¹ did not expressly mention a NHRI, both recommended the establishment of an independent body to oversee the relevant human rights policies in 2000 and 1999 respectively.
115. Since 2005, the UN has taken a much stronger position regarding the absence of a NHRI compatible with the Paris Principles in Hong Kong.
116. The Economic, Social and Cultural Rights Committee in its concluding observations of May 2005 reiterated its concern regarding *the absence of a human rights institution with a broad mandate*, while noting that the Equal Opportunities Commission has comparable functions.¹⁴²
117. The Committee on the Rights of the Child in its concluding observations of September 2005 recommended that the State party establish, in the mainland, Hong Kong and Macau SARs respectively, *a NHRI 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 Paris Principles*. Such institutions should have a mandate to receive, investigate and address complaints from the public, including individual children, and should be provided with adequate financial, human and material resources. In the case of the HKSAR, *such an institution could be a specialized branch of the existing Ombudsman's office*.¹⁴³
118. The Human Rights Committee in its concluding observations of March 2006 *regretted* the non-implementation of a number of recommendations contained in its previous concluding observations. The committee concerned the limited mandate and powers of the Ombudsman and the Equal Opportunities Commission. The committee further states that, *"The HKSAR should consider the establishment of an independent human rights institution compliant with the Paris Principles."*¹⁴⁴ [emphasis added]
119. Regarding to the international and domestic obligations on the HKSAR Government to ensure the enforcement of the two Covenants and the escalation of the demand to establish NHRIs, the creation of a human rights commission would demonstrate the Government's commitments to international treaties to which Hong Kong is a party.

¹⁴⁰ Hong Kong, China (A/55/44, 1 February 2000), paragraph 143. The Committee against Torture in its concluding observations of May 2000 recommended that *continued efforts be made to ensure that the Independent Police Complaints Council become a statutory body, with increased competence*.

¹⁴¹ Hong Kong, China (A/54/38, 4 May 1999), paragraph 280. The Committee on the Elimination of Discrimination Against Women in its concluding observations of February 1999 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.

¹⁴² Hong Kong (E/C.12/1/Add.107, 13 May 2005), paragraph 41.

¹⁴³ Hong Kong (unedited version – CRC/C/15/Add.271, 30 September 2005), paragraph 17.

¹⁴⁴ Hong Kong (CCPR/C/HKG/CO/2, 30 March 2006), paragraph 8.

120. It is submitted that there is a compelling case for the establishment for the Hong Kong Human Rights Commission (HKHRC) in compliance with the Paris Principles for implementing the international treaties to which Hong Kong is a party.

121. The reasons for the establishment of the HKHRC are:

(1) the defect of existing institutional framework for promotion and protection of human rights, where a public body with overall responsibility for the strategic enforcement of human rights law in Hong Kong is absent;

(2) the supplementary effect of NHRIs to the judiciary;

(3) the effect of NHRIs to foster a culture of respect for human rights; and

(4) the domestic and international obligations on the HKSAR Government to establish a NHRI according to the Paris Principles and the escalation of the international demand on the establishment of a NHRI since 2000.

Chapter II. The Functions and Powers of the Institutional Framework for Human Rights Promotion and Protection in Hong Kong

122. The following sections will explore, in an ideal scenario, what the jurisdictions, the precise functions and accordingly the scope of power that the institutional framework for human rights protection and promotion in Hong Kong [the institutional framework] should be entrusted with.
123. Undoubtedly, the HKHRC shall be the core of the institutional framework. However, in terms of effective and efficient administration, it may be unnecessary and inappropriate for the HKHRC to take up direct responsibility to monitor all aspects of human rights concern. The HKHRC can discharge some of its functions to other NHRIs if appropriate.
124. There are three options for the institutional framework, namely (1) a single commission model, (2) a dual-commission model consisting of a human rights commission and an equal opportunities commission, and (3) a multiple-commission model consisting of various specialized institutions. Later, Chapter III discusses which model best suits Hong Kong.

1. JURISDICTION

125. According to the Paris Principles, the NHRIs should be given “as broad a mandate as possible.”¹⁴⁵
126. The Danish Centre for Human Rights suggests that, “the mandates of the institution should remain broad enough in order for serious human rights violations, unless clearly dealt with by another institution ... [to] be addressed by the NHRI.”¹⁴⁶ Even if the extent to which such complaints can be handled in NHRIs is limited, the institution should not be barred to deal with them in an appropriate manner.

¹⁴⁵ The Paris Principles, Article 2.

¹⁴⁶ Birgit Lindsnaes, Lone Lindholt and Kristine Yigen, “National Human Rights Institutions, Articles and working papers, *Input to the discussions on the establishment and development of the functions of national human rights institutions*,” (Denmark: The Danish Centre for Human Rights, 2001) ISBN: 87-90744-18-7, Chapter 4 at 87 [hereinafter Power and Functions].

127. The jurisdiction of the NHRIs should be precisely defined to allow NHRIs to pursue work efficiently and to avoid conflicts with other state institutions.
128. The mandate of NHRIs should be accorded in parallel to its functions,¹⁴⁷ which fall broadly into categories of (1) promotion and education of human rights issues; (2) advice and assistance to the government, (3) casework.¹⁴⁸ In other words, a NHRI can be granted a different scope of mandate according to its different functions.
129. There are mainly five questions for considerations:
- (a) What is the definition of human rights and thereby the general mandate of the HKHRC and other relevant bodies? Should “human rights” be defined by the international human rights treaties, whether or not to which Hong Kong is a party, or the international human rights treaties to which the state party is a party, or the international human rights treaties incorporated into the domestic law?
 - (b) Should the ICESCR be included in NHRIs’ jurisdiction?
 - (c) Should the object of the complaints be the public sector, or private sector, or both?
 - (d) How should the HKHRC and other relevant bodies interpret its mandate?
 - (e) Should the HKHRC and other relevant bodies handle complaints and conduct investigation against the Police or the ICAC?

1.1. THE DEFINITION OF HUMAN RIGHTS

130. The Commonwealth Secretariat in the Best Practice states that human rights should be defined “not only by reference to domestic law, but also by reference to all international human rights instruments, whether or not acceded to by the State”.¹⁴⁹
131. According to Professor John Hatchard, the Visiting Professor of Law Programme in Open University in the UK, basing the jurisdiction of a human rights commission on international instruments has several advantages. The international instrument provides

¹⁴⁷ Id, Chapter 4 at 85.

¹⁴⁸ Handbook, see generally Chapter 3.

¹⁴⁹ Commonwealth Secretariat, “National Human Rights Institutions: Best Practice,” (London: 2001) at 18.

“a convenient point of reference by which the degree of domestic implementation of human rights may be assessed”.¹⁵⁰

132. Some NHRIs have freestanding human rights remit. The South Africa Human Rights Commission deals with issues involving “human rights” and “fundamental rights”¹⁵¹. The Uganda Human Rights Commission handles complaints against violations of “any human right” except for cases that are before a competent court of law, or those that are time barred.¹⁵²
133. The jurisdiction of NHRIs can be based on the mix of the international human right instruments and the constitution. The jurisdiction of the Indian Human Rights Commission covers human rights under both the Constitution “or embodied in the International Covenants and enforceable by courts in India”, which are in turn the ICCPR and the ICESCR).¹⁵³
134. In Australia, the Human Rights and Equal Opportunities Commission [hereinafter Australian HREOC] was established by the 1986 Human Rights and Equal Opportunities Act. The Act defines “human rights” by the international instruments scheduled to, or declared under the Act, including:-
- (a) The International Covenant on Civil and Political Rights
 - (b) The Convention on the Rights of the Child
 - (c) Declaration on the Rights of the Child
 - (d) Declaration of the Rights of Disabled Persons
 - (e) Declaration on the Rights of Mentally Retarded Persons
 - (f) Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief
 - (g) The ILO Convention Concerning Discrimination in Respect of Employment and Occupation

¹⁵⁰ John Hatchard, “The Inter-relationship between Commonwealth Human Rights Commissions and other National Human Rights Institutions,” *British Council’s* website (July 2003), available at <http://www.britishcouncil.org/governance-report061003.doc> at 15.

¹⁵¹ Constitution of South Africa, Section 184 and of the South Africa Human Rights Commission Act, Section 7.

¹⁵² Constitution of Uganda, Article 52(1). See also Uganda human rights commission’s website, “Complaints Information” (2001), available at <http://www.uhrc.org/complaints.php>

¹⁵³ Indian Human Rights Commission Act, Section 12.

Three domestic legislations, the Racial Discrimination Act 1975, the Sex Discrimination Act 1986 and the Disability Discrimination Act 1992, are scheduled in the 1986 Human Rights and Equal Opportunities Act.

135. While the Constitution of Argentina 1994 incorporates nine human rights treaties and two declarations on human rights¹⁵⁴, the jurisdiction of the national *Defensor del Pueblo* of Argentina covers civil and political rights, economic, social and cultural rights, and “third-generation” rights such as environmental rights and consumer rights.¹⁵⁵ The *Defensor* has jurisdiction over the public administration, non-governmental public entities exercising public privileges, governmental agents and privatized public utility companies, but not the judiciary, the legislature and the defense and security entities.¹⁵⁶
136. The Danish Institute for Human Rights has based its activities on the human rights recognized by the international community, including the human rights laid down in the Universal Declaration, the conventions of the United Nations and the Council of Europe, and the Danish Constitution.¹⁵⁷
137. In Korea, the National Human Rights Commission Act defines “human rights” as any of liberties and rights guaranteed by the Constitution, Acts of the Republic of Korea, international human rights treaties ratified by the Republic of Korea, and international customary law.¹⁵⁸
138. In the UK, the mandate of the Commission for Equality and Human Rights (CEHR), created by the Equality Act 2006, will not be restricted to her domestic laws. Section 9 of the Equality Act defines human rights to include “other human rights”, meaning that the CEHR can consider human rights guaranteed by other international human rights treaties to which the UK is a signatory.

¹⁵⁴ Constitution of Argentina 1994, Article 75(22). The treaties are the American Convention on Human Rights; ICESCR, ICCPR, Optional Protocol to the ICCPR; Convention on the Prevention and Punishment of the Crime of Genocide; ICERD; CERD, CEDAW, Convention Against Cruel, Inhuman, Degrading Treatment or Punishment; and the CRC. The declarations are the American Declaration of the Rights and Duties of Man; and the Universal Declaration of Human Rights. Also, all the treaties ratified by Argentina are given a status superior to that of domestic law. See *id.* See also Janet Koven Levit, “The Constitutionalization of Human Rights in Argentina: Problem or Promise?,” (1999) 37 *Colum. J. Transnational Law* 281.

¹⁵⁵ *Id.*, Article 41 (granting all inhabitants the right to a healthy and balanced environment fit for human development and for productive activities to satisfy present needs without compromising those of future generations) and Article 42 (giving consumers and users of goods and services the right, in relation to consumption, to the protection of health, security, and economic interests, to adequate and truthful information, to freedom of choice and conditions of equitable treatment and dignity).

¹⁵⁶ Law 24.284 (1 December 1993), Sections 14-15.

¹⁵⁷ *Danish Institute for Human Rights*, “Act No. 411 of 6 June 2002 on the Establishment of the Danish Institute for International Studies and Human Rights,” Annual Report 2003, available at <http://www.humanrights.dk/publikationer/alle/aar/gbberetn.pdf> at 34.

¹⁵⁸ National Human Rights Commission Act (Korea), Article 2(1).

139. However, the Equality Bill stated that the CEHR should take all appropriate actions to satisfy the ECHR rights before acting on non-Convention rights. This meant that almost any action taken by the CEHR on non-Convention rights would be subject to challenge.¹⁵⁹ That clause was subsequently amended to “*particular regard*” must be given to the Convention rights. The amendment recognized that the ECHR was at the core of the Commission’s work without establishing a rigid hierarchy between Convention and non-Convention rights.¹⁶⁰
140. On the other hand, restricting the jurisdiction of NHRIs to human rights guaranteed under the Constitution or domestic laws is undesirable. In cases of Canada and Malaysia, the state limits the jurisdiction of their NHRIs by granting them a mandate with express reference to civil and political rights as opposed to a general mandate including social, economic and cultural rights.
141. The Canadian Human Rights Commission, established in 1977, administers the Canadian Human Rights Act. The Act aims to promote equal opportunity and to prohibit discrimination based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, or conviction for an offence. The Commission also administers the Employment Equity Act, which seeks to achieve equality in the workplace experienced by women, aboriginal peoples, and persons with disabilities. Both the Canadian Human Rights Act and the Employment Equity Act apply to public authorities and federally regulated private-sector organizations.¹⁶¹
142. The Canadian Human Rights Commission has been criticized for demonstrating “as narrow a mandate as possible”.¹⁶² To tackle poverty, a deeply rooted problem in Canada, the Committee on Economic Social and Cultural Rights has twice recommended expanding the remit of the Canadian Human Rights Commission to include social, economic and cultural rights.¹⁶³ The Commission as well as major equality-seeking groups have been fully supported this recommendation.¹⁶⁴ Yet, the Canadian Government has not taken any action.

¹⁵⁹ “Rights Brought Home: The Human Rights Bill,” Cm. 3782 (1997), paragraph 14.

¹⁶⁰ Id, paragraph 10.

¹⁶¹ *Canadian Human Rights Commission’s* website, “Our Mandate” (January 2006), available at <http://www.chrc-ccdp.ca/about/mandate-en.asp>

¹⁶² Bruce Porter, “Twenty Years of Equality Rights: Reclaiming Expectations,” (17 April 2005), available at <http://www.20years.ca/Porter-revised.pdf> at 30.

¹⁶³ Canada (E/C.12/1/Add.31, 10 December 1998), paragraph 51.

¹⁶⁴ Among the organizations supporting the inclusion of social and economic rights were the Charter Committee on Poverty Issues, the National Anti-Poverty Organization, Equality for Gays and Lesbians Everywhere, The African Canadian Legal Clinic, Action travail des femmes, La table féministe de concertation provinciale de L’Ontario, the National Association of Women and the Law, the Council of Canadians with Disabilities, Coalition of Persons with Disabilities (Newfoundland and Labrador) and Independent Living Resource Centre (St. John’s, Newfoundland),

143. In a recent complaint, a number of social assistance recipients alleged that the Government refused to adjust to the rising costs of housing and forced growing numbers of recipients into homelessness. The right to equality in housing enshrined under the Ontario's Code, and the positive obligations on the government under the international law to accommodate the needs of homeless people are relied on. The Ontario Human Rights Commission dismissed the complaints as "frivolous", thereby denying the complainants access to a hearing before the Human Rights Tribunal.¹⁶⁵
 144. To expand the jurisdiction of the Canadian Human Rights Commission, the Canadian Human Rights Act Review Panel recommended introducing a 'preamble referring to the various international agreements that Canada has entered into that refer to equality and discrimination' to the CHRA.¹⁶⁶
 145. In Malaysia, the Human Rights Commission of Malaysia Act 1999 defines "human rights" as those fundamental civil and political liberties listed in Part II of the Constitution.¹⁶⁷ However, the Suhakam has occasionally ignored the statutory restriction and investigate into issues involving social, economic and cultural rights.¹⁶⁸ For instance, Musa Hitam, the first chairman of the Suhakam, told the press before his appointment that the Commission should protect social, economic, cultural, environmental, women's and children's rights.¹⁶⁹ Such a view was subsequently endorsed in Suhakam's first Annual Report.¹⁷⁰ The Suhakam regarded water issues as human rights issues. In 2002, Suhakam investigated into water shortages in response to public complaints.¹⁷¹ Moreover, the Suhakam has affirmed its power to investigate human rights concerns even if a court has initiated proceedings on other aspects of the same issue.¹⁷²
 146. Yet, in some occasions, like mother-tongue education campaign of the SOS Damansara Committee and the Kampung Medan riots, the Suhakam has avoided dealing with racial and cultural issues which many Malaysians identify as pressing human rights concerns.¹⁷³
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Metro Toronto Chinese & Southeast Asian Legal Clinic, Affiliation of Multicultural Societies & Service Agencies of B.C. and the Canadian Council for Refugees. See *Canadian Human Rights Commission*, "Annual Report 1997," (Ottawa: Canadian Human Rights Commission, 1998) at 2.

¹⁶⁵ *Candace. Beale. v. Ontario (Minister of Community Family and Children's Social Services)* (17 March 2004) File No JWIS-5JUR3L (OHRC).

¹⁶⁶ Canadian Human Rights Act Review Panel, "Promoting Equality: A New Vision," (Ottawa: Department of Justice, 2000) at 2, Recommendation 1 [hereinafter the CHRA Review].

¹⁶⁷ Human Rights Commission of Malaysia Act 1999, Section 2.

¹⁶⁸ A Whiting, "Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission," (2002) 39 *Stanford Journal of International Law* 1 at 97.

¹⁶⁹ *Id.*

¹⁷⁰ *Human Rights Commission of Malaysia*, "Annual Report 2000," at 7.

¹⁷¹ Yap Mun Ching, "Suhakam to Take Up Water Issue," *Malaysiakini* (14 February 2002), at <http://www.malaysiakini.com>

¹⁷² A Whiting at 80-2.

¹⁷³ *Id.*, at 97.

147. It is submitted that, at least, “human rights” should be defined with reference to the six UN human rights treaties which currently apply to the HKSAR, including: -

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

and other domestic legislations, including:-

- (g) The Hong Kong Bills of Rights Ordinance;
- (h) The anti-discrimination ordinances¹⁷⁴ and
- (i) Any other legislation incorporated any of the above human rights treaties.

The HKHRC and other relevant bodies in the institutional framework shall advocate and implement other international human rights norms or customary international practices, which are not yet signed by the HKSAR Government, irrespective of the definition of human rights and the jurisdictions of the HKHRC.

1.2. SHOULD THE ICESCR BE INCLUDED IN NHRIS’ JURISDICTION?

148. Although UN and many jurisdictions have affirmed the justiciability of economic, social and cultural rights since the last decade, few NHRIs enjoy a full spectrum of economic,

¹⁷⁴ Including the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, and the Family Status Discrimination Ordinance and potentially the Race Discrimination Ordinance.

- social and cultural rights in their mandates.¹⁷⁵ A non-exhaustive survey carried out by the Danish Centre for Human Rights in 2001 identified that NHRIs in South Africa, India, Australia, Ghana, Zambia, France and Mexico are entrusted to monitor the implementation of the ICESCR.¹⁷⁶
149. The South African Human Rights Commission is explicitly mandated to monitor economic, social and cultural rights. The Commission requires public bodies to provide information annually on measures taken realize the rights concerning housing, health care, food, water, social security, education and the environment in the Bill of Rights.¹⁷⁷
150. In India, the National Human Rights Commission protects and promotes human rights guaranteed by the Constitution or embodied in the ICCPR and the ICESCR. The Commission has undertaken many inquiries into issues involving economic, social and cultural rights, like degrading labour, education and mental health facilities. It has entertained complaints about death and disability arising from water supplies poisoned by arsenic or fluoride¹⁷⁸; and held a Regional Consultation on Public Health and Human Rights in New Delhi.¹⁷⁹
151. The Danish Institute for Human Rights has taken up several issues related to economic, social and cultural rights, including the education of asylum seekers, housing of prisoners and housing of elderly people in Denmark.
152. As stated above, there has been strong call in Canada to expand the mandate of the Canadian Human Rights Commission to social and economic rights. Professor Martha Jackman, Faculty of Law in the University of Ottawa, proposed that the right to adequate food, clothing, housing, health care, social security, education, work which is freely chosen, childcare, support services and security and dignity of the person should be protected under the Canadian Human Rights Act. Discrimination on the grounds of social and economic conditions of a person should be prohibited.¹⁸⁰

¹⁷⁵ *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 17-8 [herein after *Assessing the Effectiveness of NHRIs*].

¹⁷⁶ Morten Kjærsum, "The Role of National Human Rights Institutions in implementing Economic, Social and Cultural Rights," *EU-China Dialogue on Human Rights* (30-31 May 2002), available at <http://www.humanrights.dk/departments/international/partnercountries/china/EUchina/1cpdf.pdf> at 2-3.

¹⁷⁷ The Constitution of the Republic of South Africa 1996, No. 108 of 1996, s. 7(2) and s. 184(2).

¹⁷⁸ *National Human Rights Commission of India*, "Annual Report 5 (1995-96)."

¹⁷⁹ *Id* at 35.

¹⁸⁰ Martha Jackman and Bruce Porter, "Women's Substantive Equality and the Protection of Social and Economic Rights Under the Canadian Human Rights Act," *Status of Women Canada's* website (September 1999), available at http://www.swc-cfc.gc.ca/pubs/pubspr/factsheets/200211_020510_7_e.pdf at 45-6.

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| 153. The enabling legislation of the HKHRC should authorize the HKHRC to monitor the implementation of economic, social and cultural rights. The reasons are as follows. |
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1.2.1. The indivisibility and interdependence of all human rights

154. All rights are indivisible and interdependent.¹⁸¹ Economic, social and cultural rights and civil and political rights are not fundamentally different from one another, either in law or in practice. According to the UN Professional Training Series No. 12:-

*“Economic, social and cultural rights may also come within the mandate of a national human rights institution through the principle of the indivisibility and interdependence of all rights. Human rights law is integrated and holistic. Rights relate to each other. The right to life, for example, has implications for the right to health and the right to education, and the right to freedom of movement has implications for the right to livelihood. Even though a national human rights institution’s mandate may refer only to civil and political rights, it will have jurisdiction to deal with many issues of economic, social and cultural rights through the rights to life, equality and non-discrimination.”*¹⁸² [emphasis added]

155. In its General Comment No. 10, the Committee on Economic, Social and Cultural Rights regrets that the role of NHRIs in promoting economic, social and cultural rights “has been neglected or given a low priority.”¹⁸³ The Committee called on state parties to give full attention to economic, social and cultural rights in all of the relevant activities of NHRIs and recommended state parties to grant NHRIs appropriate powers to protect economic, social and cultural rights.¹⁸⁴

¹⁸¹ The indivisibility and interdependence of all human rights, such as civil, cultural, economic, political and social, are fundamental concepts of international human rights law, first reaffirmed in United Nations General Assembly resolution 32/130 of 16 December 1977, such that:- (a) all human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights; (b) the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; (c) the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.

¹⁸² *United Nations*, “Professional Training Series No. 12: Economic, Social and Cultural Rights, Handbook for National Human Rights Institutions,” (New York and Geneva: 2005) ISBN 92-1-154163-8 at 35.

¹⁸³ General Comment 10, Article 1, paragraph 1.

¹⁸⁴ The same Committee encourages Senegal and Nepal to ensure that NHRIs “accord equal weight and attention” to economic, social and cultural rights rather than solely on civil and political rights; recommends that the Human Rights Commission of New Zealand to “take up economic, social and cultural rights as a comprehensive topic and ensure that those rights are duly reflected in the National Plan of Action for Human Rights” and requests Guatemala to provide information, on specific measures adopted by the NHRI “Procuraduría de los Derechos Humanos” to promote and protect economic, social and cultural rights in its third periodic report.

156. In 2001, *Best Practice* issued by the Commonwealth Secretariat stresses that, -

“regardless of a country’s formal recognition of economic, social and cultural rights, NHRIs should employ all available means to respond to inquiries related to the advancement of those rights.”

NHRIs should advise the government on the development and implementation of economic policies and conduct educational programmes to promote awareness of economic, social and cultural rights.¹⁸⁵

157. In September 1995 in the Fourth World Conference on Women of the United Nations, the Beijing Declaration and the Platform for Action was adopted with the consensus of 189 countries, including the pre-1997 Hong Kong Government. The Beijing Platform for Action, which sets out the strategic objectives under twelve critical areas of concern, aims to empower women to participate in economic, social, cultural and political decision-making.¹⁸⁶

158. At regional level, the Asia Pacific Forum of NHRIs in July 2001 hosted the regional Workshop on the Role of National Human Rights Institutions and Other Mechanisms in Promoting and Protecting Economic, Social and Cultural Rights. Bringing together members of NHRIs, Government delegates, international experts, UN representatives, representatives from NGOs, civil society and the judiciary, the Workshop affirmed Governments’ and NHRIs’ responsibilities to ensure that no peoples are discriminated against in their enjoyment of economic, social and cultural rights.¹⁸⁷

159. The Seoul Declaration, adopted by consensus in 2004 in the Seventh International Conference of National Institutions, in which the HKSAR Government participated, announces that:-¹⁸⁸

See Senegal (26th E/C.12/1/Add.62, 24 September 2001), paragraph 37; Nepal (26th E/C.12/1/Add.66, 24 September 2001), paragraph 40; New Zealand (E/C.12/1/Add.88, 23 May 2003), paragraph 23; Canada (E/C.12/1/Add.31, 10 December 1998), paragraph 51, *supra* note 151; Guatemala (E/C.12/1/Add.93, 12 December 2003), paragraph 47.

¹⁸⁵ *Best Practice* at 20 and 33.

¹⁸⁶ *Beijing Declaration and Platform for Action*, Fourth World Conference on Women (15 September 1995), A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

¹⁸⁷ “Copenhagen Declaration: The role of National Institutions in combating discrimination was the main theme at the 6th International Workshop of National Human Rights Institutions,” (Copenhagen, 10- 13 April 2002) available at <http://www.un.org/documents/ga/conf166/aconf166-9.htm>

¹⁸⁸ The Seoul Declaration was adopted by consensus in the Seventh International Conference of NIs, which was held 14 – 17 September 2004 in Seoul, Republic of Korea. *HKSAR of China* participated in this Conference. The other participants came from Africa, the Americas, the Asia-Pacific and the European regions: Afghanistan, Albania, Argentina, Australia, Benin, Bolivia, Bosnia and Herzegovina, Burkina Faso, Chad, Denmark, Egypt, Fiji, France, Georgia, Germany, Ghana, Greece, Guatemala, Guyana, India, Kenya, Kazakhstan, Kyrgyz Republic, Luxembourg, Maldives, Malawi, Mauritius, Mexico, Mongolia, Morocco, Nepal, New Zealand, Niger, Northern Ireland (UK), Norway, Palestine, Peru, Philippines, Republic of Korea, Russia, Rwanda, Senegal, South Africa, Spain, Sweden,

“NHRIs should promote and protect economic, social and cultural rights, as an indivisible part of the full spectrum of universal human rights, including a reinforced capacity to better guarantee the State’s respect for its obligations under the Covenant on Economic, Cultural and Social Rights... NHRIs should encourage States to ensure basic needs, including food and shelter, thereby preventing the development of conditions which give rise to terrorism and conflicts.” [emphasis added]

1.2.2. Justiciability of Economic, Social and Cultural Rights

160. The assumption that economic, social or cultural rights are unenforceable is false.¹⁸⁹
161. The Committee on Economic, Social and Cultural Rights states that the ICESCR “possess at least some significant justiciable dimensions” and any of Economic, Social and Cultural Rights are self-executing in a number of its General Comments:-
- “The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”¹⁹⁰
162. The Committee indicates that many articles of the ICESCR, including non-discrimination (Article 2(2)), gender equality (Article 3), pay equity (Article 7(a)(i)), trade unions (Article 8), economic and social exploitation of children and young people (Article 10.3), free and compulsory primary education (Article 13(2)(a)), religious and private schools (Articles 13(3) and 13(4)), and freedom of scientific research and creative activity (Article 15(3)), are enforceable.¹⁹¹
163. Many national courts have given effect to economic, social and cultural rights over the years. In *Grootboom and others*, the Constitutional Court of South Africa declared that the right to housing is justiciable. It ordered the State to provide relief to those occupants who were forcibly evicted by devising and funding them immediately. The Court has

Tanzania, Thailand, The former Yugoslav Republic of Macedonia, Togo, Tunisia, Uganda, Ukraine, Venezuela and Zambia. “Seventh International Conference for National Institutions for the The Seoul Declaration, Promotion and Protection of Human Rights,” (14 -17 September 2004) available at http://www.nhri.net/pdf/Program_ICNI_7_final_draft.pdf

¹⁸⁹ *The Asia Pacific Forum of National Human Rights Institutions*, “The Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities” (May 2004), available at <http://www.un.org/esa/socdev/enable/rights/ahc3apf.pdf>, paragraph 214.

¹⁹⁰ UNCESCR, General comment No. 11.

¹⁹¹ Professional Training Series No. 12 at 25.

placed a constitutional duty on the South African Human Rights Commission to “monitor and assess the observance of human rights”, and to monitor and report on the State’s compliance with the Court’s judgment.¹⁹²

164. In India, economic, social and cultural rights are held justiciable. The Supreme Court held that the right to food flows from the right to life guaranteed in Article 21 of the Constitution.¹⁹³

1.2.3. Monitoring Economic, Social and cultural rights

165. The South African Human Rights Commission has found monitoring the implementation of economic, social and cultural rights far from straightforward. Many departments of the South African Government have not submitted the report on time, or provided comprehensive information, or both.¹⁹⁴
166. *A programmatic approach* to socio-economic rights protections, which embraces not only individual and judicial based models of rights enforcement, but also open-minded approach about the integration of governmental and UN responses, may be effective in promoting socio-economic rights in practice. A programmatic approach is a method of dealing with human rights concerns through launching specific programmes, requires a pre-planning element both to assess the impact of the policy in question.¹⁹⁵

1.3. SHOULD THE OBJECT OF THE COMPLAINTS BE THE PUBLIC SECTOR, OR PRIVATE SECTOR, OR BOTH?

167. The HKHRC or other relevant bodies should monitor both the complaints against the public authorities and private individuals.¹⁹⁶

¹⁹² *Government of the Republic of South Africa and others v Grootboom and others* 2000 (11) BCLR 1169 (CC).

¹⁹³ UN Standing Committee on Nutrition, “Closing the Gap on the Rights to Nutrition: the Voluntary Guidelines,” ISSN 1654-3743 (United Kingdom: 2005) at 50.

¹⁹⁴ John Hucker, “Some Thoughts on Designing a Human Rights Commission,” *Research, Development, and Evaluation Commission, Executive Yuan* (October 2002), available at <http://www.rdec.gov.tw/res01/human%20rights/website/PDF/JohnHuckerAbstract.pdf> at 14.

¹⁹⁵ Fionnuala Ni Aoláin, “Symposium on the United Nations High Commissioner for Human Rights: The First Ten Years of the Office, and the Next, Looking Ahead: Strategic Priorities and Challenges for the United Nations High Commissioners for Human Rights,” (2004) 35 *Columbia Human Rights Law Review* 469 at 480.

¹⁹⁶ Assessing the Effectiveness of NHRI at 19, supra note 162; Best Practice at 18.

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| 168. | The reasons are: (1) the ICCPR recognizes the inter-citizen rights; (2) the UN encourages NHRIs to handle human rights violations undertaken by private sector, which is increasingly a provider of essential public services.” ¹⁹⁷ |
| 169. | If its jurisdiction is limited to public sector, the HKHRC or other relevant bodies should investigate complaints against the State as including any acts by organizations that are substantially funded, subsidized or regulated by the State. ¹⁹⁸ |

170. In the UK, the government agrees with the JCHR that the CEHR should not be “disbarred from promoting and assisting the development of human rights awareness beyond the public sector”.¹⁹⁹
171. In operation, a distinction should be made between situations involving a case against a private person in his individual capacity, and those where the individual has acted in some official capacity. In the latter case, the complaint and a demand for the payment of compensation may still be directed against that person directly and not exclusively against their government institution. A policeman who has tortured someone may find himself personally liable because he has exceeded his authority. However, the state may also be liable, because it has allowed its servant to perpetrate the act in question.²⁰⁰

1.3.1. Law enforcement agencies

172. Whether the HKHRC can handle complaints and conduct investigation against law enforcement agencies, for example the Police Force, the ICAC, the Correctional Services Department, and the Customs and Excise Department, are controversial.²⁰¹ A more challenging question is whether the PRC Central Government’s agencies, like the Xinhua News Agency and the People’s Liberation Army, should be monitored by the HKHRC or other relevant bodies.
173. *Assessing the Effectiveness of NHRIs* says, “[n]o public entity should be excluded from the monitoring function of national institutions,” particularly those law enforcement agencies such as the police, army, intelligence services and other security services.²⁰²

¹⁹⁷ Professional Training Series No. 12 at 35.

¹⁹⁸ *Id.*

¹⁹⁹ *Department for Constitutional Affairs, the UK Government*, “Government Response to Joint Committee on Human Rights, Eleventh Report of Session 2003-2004: ‘Commission for Equality and Human Rights: Structure, Functions and Powers’,” (July 2004), available at http://www.dca.gov.uk/publications/reports_reviews/2004fr.htm at 5, paragraph 33 [hereinafter UK Government Response].

²⁰⁰ Power and Functions at Chapter 5 at 98-9.

²⁰¹ Handbook, paragraph 232.

²⁰² *Assessing the Effectiveness of NHRI* at 19, *supra* note 162.

174. Amnesty International recommends NHRIs to investigate the conduct of the police and the security forces throughout the national territory.²⁰³
 175. For the Poland's Commissioner for Civil Rights Protection established in 1987, its jurisdiction covers all areas of administration. The Commissioner investigates the armed forces, the police, the prison system, and security forces.²⁰⁴
 176. In Ghana, Section 7 of the Act of the Commission on Human Rights and Administrative Justice allows the Ghanaian Commission to receive complaints against the armed forces and the police with respect to equal access to recruitment and fair administration. As such, the commission investigates into bribery and corruption.
 177. In Sri Lanka, the human rights commission is charged with monitoring detentions and national security laws. It does not recommend release, but monitors detention and informs one's relatives when he is taken into custody.
 178. Article 53(4) of the Constitution of Uganda restricts the Human Rights Commission from taking up matters concerning the relationship between the government and another government or an international organization, or matter concerning prerogatives of mercy.
 179. According to the Section 43(2) of Canadian Human Rights Act, the jurisdiction of Canadian Human Rights Commission is subject to limitations concerning national defence or national security.
 180. On the other hand, if human rights commission in a country do not receive complaints against the law enforcement agencies, other NHRIs specialized for investigating police-related complaints should be established. Examples are the Independent Police Complaints Commission in the UK, Independent Complaints Directorate in South Africa, and Police Ombudsmen offices in Brazil.
 181. In India, complaints against police misbehaviours has taken up most of the time and resources of the National Human Rights Commission. Therefore, the Commonwealth Human Rights Initiative recommended India to set up a separate agency solely for investigating police-related complaints.²⁰⁵
182. In the context of Hong Kong, the institutional framework should be empowered to handle complaints and conduct investigations against all the law enforcement agencies in the absence of an independent commission monitoring those agencies. The establishment of

²⁰³ Amnesty International, "National Human Rights Institutions: Amnesty International's recommendations for effective protection and promotion of human rights," (1 October 2001), available at <http://www.nhri.net/pdf/IOA4000701.pdf> at 4.A.5.

²⁰⁴ See Law of 15 July 1987 Article 14 (Poland).

²⁰⁵ *Commonwealth Human Rights Initiative*, "Newsletter," Volume 11 Number 2, (Summer 2004), available at http://www.humanrightsinitiative.org/publications/nl/newsletter_summer_2004/newsletter_summer_2004.pdf at 5.

an independent institution to handle complaints against law enforcement agencies can be equally desirable.²⁰⁶

1.4. INTERPRETATION OF MANDATE

183. Creativity in interpreting the mandate is vital for NHRIs to effectively advance human rights. The Professional Training Series No. 12 states that:-

“A national human rights institution’s interpretation of its mandate and jurisdiction is generally subject to judicial review. This should encourage the institution to interpret its mandate as broadly as possible. It need not and should not be cautious. It can be confident that, if it exceeds its legal authority, a court can review its decision and give a definitive ruling on the scope of its establishing law.”²⁰⁷

184. In Sri Lanka, a broader role for the Human Rights Commission was envisaged after the Commission for the first time employed woman commissioners in 2000. Recognizing internal displacement as a severe human rights violation, the Commission with three NGOs initiated a study into the status of the internally displaced persons.²⁰⁸ The Commission subsequently adopted some recommendations of the study and built the capacity to address the needs of internally displaced persons.²⁰⁹ As such, Sri Lanka’s Commission has “innovatively extended its work to encompass internally displaced persons.”²¹⁰
185. In the Maldives, the National Human Rights Commission, established in December 2003, has continuously confronted the local Government. It has investigated the conditions of detention cells and released a report, which found the cells unfit for human habitation, evidence of physical and sexual abuse, and that prisoners were transferred in the middle

²⁰⁶ For the current inadequacies of monitoring mechanism against the law enforcement agencies, see Hong Kong Human Rights Monitor, “Open Court Closed by the Police” (26 July 2000) and “Statement on the Decision of the Court of First Instance in the Case of Ng Siu Tung” (30 June 2000), available at <http://www.hkhrm.org.hk>

²⁰⁷ Professional Training Series No. 12 at 35.

²⁰⁸ The Commission was given the power to undertake research with regard to human rights, to disseminate and distribute the results of such research under Section 11(f) of the Human Rights Commission Act, No. 21 of 1996 and to advise and assist the government in formulating legislation and administrative directives and procedures with a view to promote and protect fundamental rights under Section 10(c) of the same Act.

²⁰⁹ Mario Gomez, “National Human Rights Commissions and Internally Displaced Persons Illustrated by the Sri Lankan Experience, An Occasional Paper, The Brookings – SAIS Project on Internal Displacement,” (July 2002), available at <http://www.reliefweb.int/library/documents/2002/brookings-sri-27jul.pdf> at 22.

²¹⁰ Id, at 26.

of the night blindfolded and in chains in September 2004.²¹¹ It also criticized the parliamentary election which was held in January 2005 as “not free or unbiased or removed from unwarranted influence.”²¹²

186. The National Human Rights Commission in Nepal was praised for being “engaged in a brave effort to investigate human rights violations and inject human rights as a core component of civil life.”²¹³

187. The JCHR in the UK considers that:-

*“a power to invoke the human rights dimension should be considered to be implicit in the [CEHR's] litigation and enforcement powers relating to its equality functions— if this is in doubt, then the legislation should be so framed as to ensure that the CEHR can rely confidently upon the Human Rights Act in relation to the Convention rights related to those functions.”*²¹⁴ [emphasis added]

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| 188. The HKHRC should be proactive and creative in interpreting its mandate. It should not focus on softer human rights issues such as spreading awareness of human rights, but focus on important human rights agenda. |
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2. POWER AND FUNCTIONS

189. Again, it is emphasised that the powers and functions mentioned in this Chapter concerns the whole institutional framework. Although the HKHRC would certainly be the core of the framework, the HKHRC should not necessarily be entrusted with all the powers and functions. Later, Chapter III discusses the division of work and co-ordination among relevant bodies in the institutional framework.

²¹¹ Harvey M. Weinstein, “Maldives, After the Tsunami, Human Rights of Vulnerable Populations,” *Human Rights Center of the University of California, Berkeley* (October 2005), available at http://www.hrcberkeley.org/afterthetsunami/pdfs/tsunami_full.pdf at 58.

²¹² *Id.*, at 45.

²¹³ M.R. Josse, “Human Rights Reports,” *Nepal Human Rights News.com* (9 February 2006), available at <http://www.nepalhumanrightsnews.com/page.asp?id=2>

²¹⁴ *Joint Committee on Human Rights*, “Eleventh Report, Commission for Equality and Human Rights: Structure, Functions and Powers” (2003-04 HL 78; HC 536), paragraph 76 [hereinafter JCHR 11th Report].

2.1. PROMOTING AWARENESS AND EDUCATING ABOUT HUMAN RIGHTS

190. The Paris Principles suggests NHRIs to support the elaboration of teaching programmes and research on human rights, take part in their implementation in schools, universities and professional circles, and disseminate human rights to increase the collective awareness through information and education.²¹⁵
191. According to the Best Practice, power conferred for the purpose of human rights promotion and education should be “extensive” and cover a “broad range of activities”.
192. Promotion and education must be the “central” and “indispensable” roles of the HKHRC or other relevant bodies.²¹⁶ NHRIs should consider it their duty to educate the public about human rights and the human rights protection mechanism in force.
193. Training of Government employees, especially those in the judiciary, legal profession and security forces, can nurture a culture of respect for human rights effectively.²¹⁷
194. The HKHRC or other relevant bodies should also set an example in promoting public participation in important policy decisions, such as the appointment of senior executives and the selection of programme priorities. Particular effort to consult vulnerable groups should be encouraged.²¹⁸

2.1.1. Promotional Strategy

2.1.1.1. Collecting, producing and disseminating information

195. First, the institutional framework should build up and carefully maintain record systems for storing and retrieving information.²¹⁹ The HKHRC or other relevant bodies should establish a centre for documentation²²⁰, develop “a databank of good practice case studies” and “sector-specific toolkits” to tackle particular challenge for equality and human rights, and describe raised practice standards in relevant fields.²²¹ Libraries and digital archive systems are the most common mechanisms for information collection and organization, whereby significantly improve the accessibility of those human rights

²¹⁵ The Paris Principles, 3(f) and (g).

²¹⁶ Anna Wu, “Human Rights and Equal Opportunities Commission Bill 1994, Summary of the Structure and Functions of the Commission and Tribunal” at 3.

²¹⁷ Best Practice at 23.

²¹⁸ *International Council on Human Rights Policy*, “Performance and legitimacy: National Human Rights Institutions,” (March 2000), available at http://www.ichrp.org/paper_files/102_p_02.pdf, Recommendation 3 [hereinafter Performance and Legitimacy].

²¹⁹ Id at 80.

²²⁰ Handbook paragraph 148.

²²¹ Handbook, paragraph 150.

related information.²²²

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| 196. | The HKHRC or other relevant bodies should make available the domestic mechanism for human rights protection and promotion ²²³ , its research projects ²²⁴ , the reports of the proceedings and findings of treaty-monitoring bodies ²²⁵ , the conciliation results or decisions of complainants ²²⁶ , training materials, information leaflets and newsletters, press releases, findings and recommendations, annual reports ²²⁷ , and the other results of its own work. ²²⁸ |
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2.1.1.2. Dissemination strategy

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| 197. | The HKHRC or other relevant bodies should identify the target group and then develop a dissemination strategy that best suits the target group. They should ensure the largest possible public outreach and rising of awareness. |
| 198. | The publications and website of the HKHRC or other relevant bodies should be bilingual and accessible via the internet or public libraries free. ²²⁹ As a developed city, toll-free phone systems and websites should be used as promotional tools. ²³⁰ |
| 199. | The HKHRC or other relevant bodies should also work with the media and identify areas of concern that would benefit from media involvement. ²³¹ They can contribute to public debate, and explain the role and position of the institution, the findings and recommendations on particular areas. ²³² |
200. Regular meetings with the press, general information meetings open to the public, invitations to specific target groups such as schools, universities, churches and community groups, and presentations at meetings of other organizations are other useful dissemination strategies.²³³

²²² Best Practice at 80.

²²³ Handbook, paragraph 149.

²²⁴ Id, paragraph 150.

²²⁵ Assessing the Effectiveness of NHRIs at 20.

²²⁶ Handbook paragraphs 280-1.

²²⁷ Louise Krabbe Boserup, "An Introduction to Openness and Access to Information," *Danish Institute for Human Rights* (April 2005), available at <http://www.humanrights.dk/upload/application/a99e42a1/accesstoinformation.pdf> at 83.

²²⁸ Handbook paragraph 161.

²²⁹ Id, paragraphs 152-3.

²³⁰ Best Practice at 23.

²³¹ Handbook, paragraph 158; Best Practice at 23.

²³² An Introduction to Openness and Access to Information at 83.

²³³ Id.

2.1.1.3. Organizing promotional events and encouraging community initiatives²³⁴

201. The Northern Ireland, US, and Canadian Commissions have entered into binding anti-discrimination schemes with employers and service providers to approve positive action schemes, which encourage co-operation and partnership, and remedy previous gaps in human rights and equality practices between employers.²³⁵ For example, the EEOC in the US has developed a successful special small business scheme.²³⁶ This schemes combine enforcement and promotion, and encourage employers to interact positively with the NHRIs.
 202. The New Zealand Equal Employment Opportunities Trust, a joint business-civil society initiative to highlight best practice in gender equal opportunities, has attracted considerable praise for its outreach and educational activities despite its tight budget. This indicates that joint initiatives operating at arms' length from a single commission can be very valuable and effective.²³⁷
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| 203. The HKHRC or other relevant bodies should actively organize promotional events and encourage community initiatives. |
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2.1.2. Education and training

2.1.2.1. Education

204. The UN General Assembly defined human rights education as “a life-long process by which people at all levels of development and in all strata of society learn respect for the dignity of others and the means and methods of ensuring that respect in all societies.”²³⁸ The significance of human rights education can be illustrated by the creation the United Nations Decade for Human Rights Education (1995-2004) in December 1994.
205. According to C. Raj Kumar of the School of Law in the City University:-

“[h]uman rights education in Hong Kong is extremely important, given the fact that general awareness of the Basic Law and the Bill of Rights Ordinance in the community is marginal. Awareness relating to rights is very important for empowering the people of Hong Kong to seek good governance policies from the

²³⁴ Handbook, paragraph 154.

²³⁵ Colm O'Connell, “Working Paper Series No. 4: A Single Equality Body, Lessons from abroad,” (London: University College London, 2002) ISBN 1 84206 037 6 at 24 [hereinafter UCL Survey].

²³⁶ The EEOC “Information for Small Employers”, available at <http://www.eeoc.gov/small/index.html>

²³⁷ UCL Survey at 25.

²³⁸ Office of the High Commissioner for Human Rights, “Human Rights Education: Lessons for Life,” (November 1998), available at <http://www.unhcr.ch/html/50th/50kit4.htm#Human%20rights%20education>

government... *Human rights education in Hong Kong needs to go beyond the frontiers of academic learning or, for that matter, professional pursuit. Human rights education should aim to forge social transformation and promote a worldview based upon respect for the rights and freedoms of humanity.*²³⁹

*“Hong Kong needs to overcome such hurdles [persistent habits, and bureaucratic attitudes] ... to develop a system of human rights education that ensures the development of a human rights culture in all its forms and manifestations. The starting point can be to develop knowledge and capacity-building in imparting greater awareness of the Basic Law, the Bill of Rights Ordinance, the UDHR, ICCPR, and the ICESCR. These efforts can be further developed to identify particular groups from different strata of the society to develop skills and expertise in pursuing training programs in human rights education.”*²⁴⁰ [emphasis added]

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| 206. | The HKHRC or other relevant bodies should be involved prioritizing human rights education in Hong Kong, including respect for human dignity and human values like equality, non-discrimination, and tolerance. Education programmes at primary, secondary and tertiary levels should be encouraged. ²⁴¹ For example, the HKHRC can commence a study of the education syllabus and school rules to recommend ways to entrench human rights values into the entire educational system. |
| 207. | As part of a unified strategy for human rights education, prizes and awards to individuals and organizations appreciating their active efforts to the promote and protect human rights, would be “an inexpensive and positive way to raise awareness and to promote a culture of human rights.” ²⁴² |

2.1.2.2. Training

208. Professional training transforms knowledge about human rights into practical communication and negotiation skills that can help NGOs and civil society to negotiate with the Government and bring about public policies improvements.²⁴³
209. The Australia HREOC agrees with the importance of comprehensive human rights training to public sector employees. In conjunction with the Public Service and Merit

²³⁹ See C. Raj Kumar at 417-8.

²⁴⁰ Id at 419.

²⁴¹ Handbook paragraphs 178-9.

²⁴² Jackie Reilly and Ulrike Niens, “bhu8 : A Report to the Northern Ireland Human Rights Commission (Northern Ireland: Northern Ireland Human Rights Commission, 2005) ISBN 1 903681 56 1, Recommendation 12.

²⁴³ Handbook paragraph 164.

Protection Commission, the Australian HREOC delivers training to public sector employees whose jobs involve conducting investigations.²⁴⁴

210. Jackie Reilly and Ulrike Niens, both Research Fellows at the UN Educational, Scientific and Cultural Organization Centre, recommended the NIHRC to “take a leading role in building up Northern Ireland’s teaching expertise” in human rights education and training, including training for trainers and quality assurance of practitioners. The NIHRC can, for example develop a register of trainers, which could be made available to the public via the Internet.”²⁴⁵
211. Cooperation between with NHRIs and standard-setting agencies and the public authorities can sharpen the awareness of human rights of the public authorities.

212. The HKHRC or other relevant bodies should press the Government to provide human rights training to the civil service and other officials on contractual terms.²⁴⁶ To increase cost-effectiveness, priorities should be given to “officials who have the greatest impact on human rights protection or who are most likely to abuse rights, such as law enforcement officials.”²⁴⁷

2.2. ADVISING AND ASSISTING THE GOVERNMENT

213. NHRIs are at the “best position” to advise and assist the government in respect of legislation.²⁴⁸ The HKHRC or other relevant bodies should take into account the particular legal and political traditions of Hong Kong, and advise the Government on compliance of legislation and public policies with international human rights instruments.²⁴⁹

214. The UN has emphasized NHRIs’ role to mediate between the international and the local, to urge the state to fall in step with international standards, and to translate those international norms into a local idiom.²⁵⁰ Since 1990, the UN has served as a “‘forum’ for the exchange of information, an ‘actor’ promoting the concept, advancing the

²⁴⁴ *Joint Standing Committee on Foreign Affairs*, “Defence and Trade Human Rights Sub-Committee Inquiry into Human Rights and Good Governance Education in the Asia Pacific,” (25 June 2003) at 3-4.

²⁴⁵ Review of Human Rights Education and Training, Recommendation 10.

²⁴⁶ Assessing the Effectiveness of NHRIs at 20.

²⁴⁷ *Id.*

²⁴⁸ Handbook paragraph 191; Best Practice at 30.

²⁴⁹ Handbook paragraph 208.

²⁵⁰ See Office of the U.N. High Commissioner for Human Rights, “Fact Sheet No. 19, National Institutions for the Promotion and Protection of Human Rights” (1993), available at <http://www.unhchr.ch/html/menu6/2/fs19.htm>

international role of national institutions and implementing on-site activities for the support of national institutions.”²⁵¹

215. While the OHCHR has continued to accord priority to the establishment and strengthening of NHRIs, the OHCHR has been providing tailored advice and information to a growing number of countries on the legislative framework for new NHRIs and the nature, functions, powers and responsibilities of such institutions. “In addition to the organization of international and regional seminars and workshops, the UN began to focus on various on-site activities, such as the provision of expert advice and technical and material assistance. In other words, the activities were directed increasingly towards assisting individual governments to build their own national human rights structures.”²⁵²
216. Similar to the Best Practice,²⁵³ the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination and the Committee on the Rights of the Child has adopted general comments on the role of NHRIs in their work, suggesting that NHRIs’ active role in the preparation of reports and the reporting process.
217. Relations between the UN Human Rights System and NHRIs many positive developments have been strengthened since last decade. For example, the ECOSOC’s resolution established a “NHRIs Committee” within the ECOSOC, and affirmed the *duty* of States to cooperate with NHRI(s) in preparing reports to the treaty-bodies.²⁵⁴
218. The EU Fundamental Rights Agency opins that the first step to the implementation of Community law is to facilitate all Member States to set up effective mechanisms that follow up the implementation of concluding observations and recommendations of the human rights treaty bodies.”²⁵⁵
219. As such, NHRIs provides the UN treaty bodies and regional forum with a reference point for monitoring State action. The power to conduct in-depth investigation and to handle complaints enhance NHRIs’ advisory role.²⁵⁶

2.2.1. *Jurisdiction*

²⁵¹ Anna-Elina Pohjolainen, “The Evolution of National Human Rights Institutions - The Role of the United Nations (Denmark: The Danish Institute for Human Rights, 2006) ISBN 87-90744-97-7 at 126.

²⁵² Id at 125.

²⁵³ Best Practice at 30.

²⁵⁴ Mu’taz QAFisheh, “Defining the Role of National Human Rights Institutions: With Regard to the United Nations,” Geneva: Graduate Institute of International Studies, *Legal Report Series* (36) at 64-5.

²⁵⁵ *EU Network of Independent Experts on Fundamental Rights*, “Report on the Situation of Fundamental Rights in the European Union and Its Member States in 2005: Conclusions and Recommendations” (2005), available at http://ec.europa.eu/justice_home/cfr_cdf/doc/report_eu_2005_en.pdf at 22.

²⁵⁶ Handbook paragraphs 192.

220. As far as the promotion and education role and the advisory role are concerned, a mandate vested in the institutional framework shall be as broad as possible and shall *not be limited to monitoring compliance with treaty obligations only*.

221. The Handbook provides that,

“A NHRI with a broad mandate and independent status will ...possess a greater capacity to acquire and synthesize information and, thereby, to develop sophisticated opinions ...for transmission to those able to effect substantial change.”²⁵⁷

222. For instance, the Northern Ireland Human Rights Commission can advise the Government on its compatibility with “human rights” not simply the European Convention rights that incorporated into the UK domestic law through the Human Rights Act 1998, but also the human rights enshrined under other international human rights instruments. Many of these go much further than the European Convention.

223. The Fiji Human Rights Commission administers the Human Rights Commission Act 1999. Fiji’s Constitution and its Human Rights Act 1999 require the Fiji Commission to educate the public about the nature and content of the Bill of Rights and other international human rights instruments. Fiji’s constitutional Bill of Rights contains provisions addressing labour rights, the right to non-discrimination on several grounds such as economic status, and the right to education.²⁵⁸

2.2.2. *Self-initiated advice*

224. When advising the Government on policy issues, the effectiveness of the commission would be hampered if it does not take sides. Alan Bacquet, the President of the National Consultative Commission for Human Rights in France, underlined that NHRIs should not restrict themselves to a purely legal debate. Somehow, the boundary between the judicial and the political debates was at times rather blurred; taking sides and stirring up political reverberations would not make the position of the institution illegitimate.²⁵⁹

225. The powers to evaluate bills on their compliance with the international and domestic human rights obligations and human rights implications,²⁶⁰ the inadequacies and defeats of existing legislation, and to report to the relevant government agencies or to the

²⁵⁷ Id, paragraph 185.

²⁵⁸ Constitution of the Republic of the Fiji Islands 1997, Section 24 (Servitude and forced labour), Section 33 (Labour relations) and Section 39 (Education).

²⁵⁹ 6th Confernece at 12-3.

²⁶⁰ Id, paragraph 195.

legislature are important to the HKHRC or other relevant bodies.²⁶¹ The HKHRC or other relevant bodies should advise on the drafting of new legislation,²⁶² national policies,²⁶³ administrative regulations and practices,²⁶⁴ national policies relating to international human rights issues,²⁶⁵ judicial processes posing human rights implications,²⁶⁶ application of international treaties,²⁶⁷ incorporation of international treaties into domestic laws and practices,²⁶⁸ human rights violations in the private sectors,²⁶⁹ and development of a national action plan on human rights.²⁷⁰

226. The HKHRC or other relevant bodies should bring all the above recommendations to the notice of relevant ministry and department.²⁷¹ The HKHRC should have the right to present unsolicited opinions and recommendations.

2.2.3. Assistance to the Government in preparing the UN reports

227. The Paris Principles require the NHRIs to contribute to scheduled reports to the UN²⁷² and to ensure the accuracy, completeness and depth.²⁷³ NHRIs should organize follow-up meetings with civil society and government bodies, and advocate actions to implement UN recommendations. However, it should not submit reports to international bodies on behalf of the government.²⁷⁴
228. The CEHR in UK has “responsibility to keep the working of discrimination legislation and the Human Rights Act under review”,²⁷⁵ involving both monitoring the implementation of relevant statutes and making recommendations for change. The CEHR is anticipated to be “a centre of legal expertise on discrimination and human rights

²⁶¹ Id, paragraph 196.

²⁶² Id, paragraph 197.

²⁶³ Id, paragraph 200.

²⁶⁴ Id, paragraph 204.

²⁶⁵ Id, paragraph 206.

²⁶⁶ Id, paragraph 205.

²⁶⁷ Id, paragraph 209.

²⁶⁸ Id, paragraph 210.

²⁶⁹ Id, paragraph 203.

²⁷⁰ Id, paragraph 215.

²⁷¹ Id, paragraph 181.

²⁷² Id, paragraph 212; the Paris Principles, Article 3(d).

²⁷³ Id, paragraph 214.

²⁷⁴ Assessing the Effectiveness of NHRIs at 19.

²⁷⁵ Fairness for All: A New Commission for Equality and Human Rights, DTI in association with the Department for Constitutional Affairs, Department for Education and Skills, Department for Work and Pensions, and the Home Office, Cm.6185 (May 2004), paragraph.3.34 [hereinafter Fairness for All].

law”.²⁷⁶ The UK government has also assured in Parliament that the CEHR should work with UN Committees and contribute to examine the compliance of the UK legal system with international human rights treaties.²⁷⁷

229. Every five years, the HKSAR Government has to report to various UN Committees on the progress of implementation of UN treaties, which are applicable in Hong Kong. The HKHRC or other relevant bodies should be empowered to assist the HKSAR Government in the course of preparing scheduled reports to the United Nations and to comment on the report in public.
230. The HKHRC or other relevant bodies should engage in large-scale consultation exercises, which would assist the Commission’s public education efforts and strengthen the legitimacy of any recommendations.

2.2.4. Responsibility of the recipient

231. According to Mr. Dickson, Professor of International and Comparative Law at Queen’s University, Belfast, NHRIs are effective only if mechanisms ensuring that parliamentarians take their recommendation seriously are in place.”²⁷⁸

2.2.4.1. The duty to table the Commission’s advice

232. In Northern Ireland, Section 69(7) of the Northern Ireland Act places the Secretary of State under obligation to request information from the Commission on what additional rights might be protected under the Northern Ireland Bill of Rights. The Assembly’s Presiding Officer sends all bills to the NIHRC for examining compatibility with international human rights instruments as soon as reasonably practicable after tabling the bill in the Assembly.
233. The Commission may tender advice whether or not the Assembly request for it.²⁷⁹ Such advice is not legally binding. However, Section 6(2)(c) of the Northern Ireland Act ensures the Commission’s advice to be taken seriously by prohibiting the Assembly to pass legislation inconsistent with Convention rights. Ministers introducing the legislation

²⁷⁶ Id.

²⁷⁷ Hansard, HC (SCA) cols 57-60 (Meg Munn M.P., November 9, 2005) and HC (SCA) cols 99-100 (1 December 2005); Hansard, HL col. 926 (Baroness Ashton of Upholland, 11 July 2005).

²⁷⁸ Brice Dickson, The Contribution of Human Rights Commissions to the Protection of Human Rights,” The Harry Street Lecture, University of Manchester (21 November 2002), available at http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/35/harry_street_lecture.doc at 10-1.

²⁷⁹ Northern Ireland Act 1998, Section 14; Standing Orders of the Assembly.

are required to make a statement that the bill is within the Assembly's legislative competence.²⁸⁰

234. Regrettably, the above provisions in Northern Ireland only apply to legislation of the Assembly, but not several reserved or excepted matters, including the whole of policing and criminal justice, immigration law and the maintenance of public order can circumvent the Assembly under emergency salutations. The Northern Ireland Commissioner complained that the UK government had not taken their concerns on legislative proposals seriously, especially after the September 11 incident.²⁸¹
235. Currently in Hong Kong, the Legislative Council does examine whether the bills on the table are compatible with the BORO and their human rights implication before voting. Yet, the current practice is merely a political gesture rather than a fruitful discussion.

236. The enabling legislation of the HKHRC or other relevant bodies should impose on the Government an obligation to table its advice and recommendations in the legislature and to make public their response to those recommendations.²⁸² Moreover, the Government should neutrally assess the human rights impact posed by the bills and policies.²⁸³
237. As such, the HKHRC or other relevant bodies should submit in-depth reports on the compatibility of bills or government policy with international human rights norms, in order to facilitate fruitful and constructive debates in the Legislative Council or among the Government officials.

2.2.4.2. The duty to respond

238. The Australian HREOC advises the Government on policymaking and brings human rights violation to the attention of international bodies. However, the present conservative national government has failed either to respect the independence of the Commission or to respond its recommendations.²⁸⁴
239. The Committee on the Elimination of Racial Discrimination, in its concluding observations in 2005, recommended the Australian Government to take into account the comments expressed by the Australian HREOC on the proposed reform, and fully

²⁸⁰ Id, Section 9(1).

²⁸¹ Brice Dickson at 11-2.

²⁸² Handbook paragraph 187.

²⁸³ Best Practice at 24.

²⁸⁴ Sir Ronald Wilson, "Reflection on the Experience of the Australian Human Rights Commission," *Chang Fo-Chuan Center for the Study of Human Rights* (2-4 January 2001), available at <http://www.scu.edu.tw/hr/research.htm> at 6.

preserve and respect the integrity, the independence and efficiency of the Commission.²⁸⁵ Similarly, the Committee on the Rights of the Child, in its concluding observations in 2005, recommended the Australian Government implement the recommendations contained in the Australian HREOC report, and bring its immigration and asylum laws fully into conformity with the Convention.²⁸⁶

240. In a survey conducted for the preparation of the Sixth International Conference for NHRIs, only Argentina, France, Nigeria and Zambia stated that the government generally has followed the recommendations of the NHRIs. On the other hand, many countries, including Antigua, Barbuda, Canada, Colombia, El Salvador, Madagascar, Malaysia, Mongolia, Peru, the Philippines, Poland, the Republic of Ireland, Rwanda, and the Netherlands have not followed the recommendations of the NHRIs.²⁸⁷

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| 241. | The Government should be obliged to respond the recommendations of the HKHRC or other relevant bodies within a given time. ²⁸⁸ Reasons for refusal should be given, otherwise the credibility and reputation of the HKHRC or other relevant bodies will be damaged. ²⁸⁹ |
| 242. | The HKHRC or other relevant bodies should monitor government departments' compliance with their advice and recommendations by monitoring the progress of completed cases. The public authorities' compliance with recommendations should be recorded. ²⁹⁰ |

2.3. INVESTIGATING HUMAN RIGHTS VIOLATION AND HANDLING COMPLAINTS

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| 243. | A NHRI without the power to initiate investigations and to handle complaints is unlikely to fulfill the Paris Principles <i>unless there are other independent mechanisms for such purposes in force</i> . |
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²⁸⁵ Australia (CERD/C/AUS/CO/14, 14 April 2005), paragraph 10.

²⁸⁶ Australia (CRC/C/15/Add.268, 20 October 2005), paragraph 64.

²⁸⁷ The Danish Centre for Human Rights, "Report on Questionnaire Results," The Sixth International Conference for Human Rights Institutions, (Denmark: BookPartner, 2002) ISBN: 87-90744-55-1, at Chapter 5 at 98.

²⁸⁸ Assessing the Effectiveness of NHRIs at 22.

²⁸⁹ Handbook paragraph 188.

²⁹⁰ Assessing the Effectiveness of NHRIs at 22.

244. With the power to initiate investigations and to handle complaints, the HKHRC or other relevant bodies can serve as a complementary mechanism of the judiciary and hence guarantee “accessible, rapid and inexpensive” resolution.²⁹¹

245. The Committee on Economic, Social and Cultural Rights, in its Concluding Observation in 2001, welcomed the establishment of the German Institute for Human Rights, but criticized its limited functions to research, education and the provision of policy advice, and the absence of powers to investigate complaints, conduct national inquiries and formulate recommendations for employers and other actors.²⁹²

246. In some European countries, NHRIs are not authorized to handle individual complaints either because of “a reluctance to extend such competence to institutions outside the judiciary, or well-established and strong complaints structures such as ombudsmen.”²⁹³ For example, the ombudsman in Denmark has functions and powers quite similar to those of the courts. While there is no special administrative court in Denmark, the Ombudsman has fulfilled almost the same role as the highest administrative courts during the last forty years.

2.3.1. The problem of complaint-led approach and the recent retreat

247. Unless discrimination and human rights violations are systematically improved, merely dealing with complaints becomes “a stop-gap measure.” It is like treating the symptoms of a disease rather than eradicating the cause. For example in Ghana, a police officer requested a bribe from a person before charges against that person. The Human Rights Commission requested the police officer to return the bribe without addressing the larger and systemic problem of corruption.²⁹⁴

248. On the other hand, Performance and Legitimacy suggests that “a thematic approach will enable NHRIs to concentrate their resources on areas of acute need.” Staff should link actions to resolve individual cases with general policies of prevention.²⁹⁵

249. According to the findings of International Council on Human Rights Policy in 2000, NHRIs should move from a complaints-led to a programme-led approach.²⁹⁶ The Irish

²⁹¹ Handbook, paragraph 220.

²⁹² Germany (26th E/C.12/1/Add.68, 24 September 2001), paragraph 12.

²⁹³ Power and Functions, Chapter 6 at 117-8.

²⁹⁴ Andrew Drzemczewski, Mario Gomez and Yves Lafontaine, “Regional Mechanisms and National Institutions” (20 June 2001), available at <http://equitas.org/english/programs/downloads/ihrtp-proceedings/22nd/regional-mechanism.pdf> at 4.

²⁹⁵ Performance and Legitimacy, Recommendation 2.

- commissions, *in the absence of a dispute resolution function*, seemingly showed a better ability of “balancing individual, group and ‘holistic’ approaches, with an overall emphasis on achieving cultural change through strong enforcement against violators and intensive promotional and outreach work.”²⁹⁷
250. There has been a widespread retreat from the complaint-led approach in recent years. The Canadian, New Zealand and Australian commissions, *with an express dispute resolution function*, had committed to an individual-centered approach previously, but they shifted their focus on outreach and promotional activities. JCHR in the UK also recommended that the commission should not be adversarial or concerned principally with the enforcement.²⁹⁸
251. In 2000, the CHRA Review Panel recommended the Canadian Human Rights Commission relinquish its responsibility for investigating individual complaints. Instead, the Commission should abandon screening process, directly refer to the complainants to the Human Rights Tribunal, and intervene in support for the complainant when a Canadian human rights policy was involved. The Commission could use its freed resources to educate on human rights, draft policies and codes of practices, and make broader systemic discrimination inquiries.²⁹⁹ The oppositions were that, without new resources, the backlogs would only move from the commission to the court; and the complainants might not be able to hire their own lawyers.³⁰⁰
252. Nevertheless, strong enforcement power is very effective in eradicating mischiefs within a short period. Somehow, NHRIs need strong protective powers to gain legitimacy from the public and the media, whether a power to investigate complaints, or a power to play a significant part in court cases.³⁰¹ “Observers often judge the seriousness of a national human rights institution by its willingness to undertake and thoroughly execute investigations into disputed claims of abuses of human rights.”³⁰²

²⁹⁶ Performance and Legitimacy, Recommendation 2.

²⁹⁷ UCL Survey at 14.

²⁹⁸ JCHR 6th Report, paragraph 150.

²⁹⁹ CHRA Review, recommendations 23-5, and 28.

³⁰⁰ Iris Almeida and Marc Porret, “Renewing Canada’s Commitment to Human Rights: Strategic Actions for at Home and Aboard,” *Rights & Democracy* (October 2004), available at http://www.cdp-NHRI.uottawa.ca/e-bulletin/4_2005_e.html at 47.

³⁰¹ Sarah Harvie Clark and Murray Earle, “The Scottish Commissioner for Human Rights Bill: SPICe briefing” (12 December 2005), available at <http://www.scottish.parliament.uk/business/committees/justice1/papers-05/j1p05-40.pdf> at 19.

³⁰² S. Livingstone and R. Murray, “Evaluating the Effectiveness of National Human Rights Institutions: The Northern Ireland Human Rights Commission (Bristol: University of Bristol, 2005) at 82.

253. Moreover, allowing the NHRIs a certain degree of involvement in individual cases “arguably would give it a good sense of what was happening ‘on the ground’ which will better inform its general inquiry and monitoring function.”³⁰³

254. Furthermore, balancing enforcement and promotion requires sensitivity to the developmental stages of different pieces of human rights legislation and also the need for different approaches in different areas of concern. A ‘one-size fits all’ approach may not be appropriate.³⁰⁴ The UCL survey found that:-

“Balancing resource allocation between enforcement and promotion in a single commission does require due consideration of the different developmental stages of the legislation, and what promotional and enforcement activities are relevant to each specific strand. Well-established strands with a body of precedent and best practice already in place have less immediate need of enforcement proceedings serving to build-up case law rapidly than ‘new’ strands such as disability, age, religion and sexual orientation, and a strategic approach to enforcement may need to reflect this in terms of resource priorities. Also, in all the commissions surveyed, enforcing disability rights frequently involves less emphasis on litigation and more on conciliation and promotion than other grounds.”³⁰⁵ [emphasis added]

255. In Hong Kong, while the Basic Law, the three antidiscrimination ordinances and the BORO are relatively new, on which a handful of litigations were initiated, the HKHRC or other relevant bodies should spend a substantial amount of resources initiating “test cases” to provide standards and guidance for conduct on the part of the Government.

256. To conclude, the HKHRC or other relevant bodies should possess the power to initiate investigations and to handle complaints.

257. Complaint handling is not the sole and primary function of the HKHRC or other relevant bodies. Its education and promotion mandate should never be ignored. To maximize its effectiveness, the HKHRC or other relevant bodies have to balance enforcement and promotion, as well as the use of different enforcement and promotional tools.³⁰⁶

2.3.2. Admissibility of complaints

2.3.2.1. Subject matters

³⁰³ Sarah Harvie Clark at 19.

³⁰⁴ UCL Survey at 17.

³⁰⁵ Id at 16.

³⁰⁶ UCL Survey at 16.

258. Again, it is uncontroversial that the HKHRC or other relevant bodies should inquire into the complaints filed under the three antidiscrimination ordinances against both public and private bodies. The problem lies at whether HKHRC or other relevant bodies can inquire into *freestanding human rights* cases (the human rights cases which violates international human rights instruments that are applicable to Hong Kong but yet to be incorporated into domestic laws).
259. According to the Handbook, in cases where the matter at hand may not involve a justiciable claim under national law, the availability of complaints procedures of NHRIs is particularly important.³⁰⁷
260. The Australian HREOC can handle complaints in writing “alleging that an act or practice is inconsistent with or contrary to *any* human right” as defined in the Human Rights and Equal Opportunity Commission Act 1986, including all the human rights protected under those international human rights instrument to which Australia is a party.
261. Complaint handling of the Canadian Human Rights Commission is restricted to discrimination cases. In the Canadian Human Rights Act, grounds for discrimination are more explicit and narrower than the formulations in most international instruments. Some types of discrimination that prohibited under international standards are sometimes excluded. While ‘Age’, ‘sexual orientation’, ‘marital status’, ‘family status’ and ‘disability’ are protected, ‘language’, ‘political or other opinion’, ‘social origin’, ‘property’ and ‘birth’ protected by Article 2(1) of the Universal Declaration and Article 2(1) in the ICESCR are excluded.³⁰⁸
262. So far in Hong Kong, the complaint-handling role of the EOC is limited to discrimination practices committed by both public and private entities on the ground of sex, disability and family status.
263. In the Human Rights and Equal Opportunities Commission Bill 1994 [hereinafter the human rights bill 1994], the proposed Commission is empowered to deal with complaints lodged under the BORO, the Equal Opportunities Bill³⁰⁹, and international human rights treaties that are applicable to Hong Kong. However, the Commission cannot deal with or settle freestanding human rights cases through conciliation.³¹⁰ It should furnish a report to the Attorney-General in relation to a case or any structural human rights violation after inquiring into such a case.³¹¹
264. It is submitted that the HKHRC or other relevant bodies shall be empowered to handle complaints where an alleged violation falls within the remit of the BORO, the three

³⁰⁷ Handbook paragraph 93.

³⁰⁸ Canadian Human Rights Act, Section 2.

³⁰⁹ The Human Rights and Equal Opportunities Commission Bill 1994, Sections 41(1)(b), 42, and 43(2)(a).

³¹⁰ Id, Section 29(2).

³¹¹ Id, Section 32.

antidiscrimination ordinances, the six applicable international treaties, and any other legislation with reference to the Basic Law. The complaint-handling function of the institutional framework shall not be restricted to discrimination cases only.

265. Limiting HKHRC's power of inquiry to public authorities only is undesirable. The ICCPR and the ICESCR apply to both public and private bodies. For illustration, the Human Rights and Equal Opportunities Commission Act in Australia does not distinguish public and private bodies in relation to general inquiry power of the Commission.
266. Take the right to information as example. The right to information, protected by the Basic Law, includes citizens' right to access information held by public authorities. While no statute on access to information is in force, a citizen can lodge a complaint to the HKHRC if the Government refuse to disclose certain information to the public.

2.3.2.2. Restrictions on object matters

267. According to the Best Practice, "legislation should not exclude agencies within the state apparatus from NHRIs investigations."³¹² Restrictions on the object of a complaint are "common". For example, a NHRI may have no power to investigate complaint against members of the judiciary, the legislature, and electoral commission because other committees normally handle these complaints.³¹³
268. While the legislature consists of people's representatives, theoretically, decisions are best done by the Legislature. Thereby, it is not "necessary to duplicate the work of this Committee by imposing a duty on a commission to conduct parallel scrutiny of legislation."³¹⁴ However, the HKHRC should always be free to submit any kind of opinion on legislative proposals and motion debates.

2.3.2.3. Restrictions on other grounds

269. According to the Handbook, "an 'inappropriate' restriction on the object of complaint will be ... one which prevents or restricts the capacity of the institution to perform the functions or discharge the responsibility with which it has been entrusted."³¹⁵ Here are some examples of unwarranted restrictions involving unclear definitions, limitation, or resources.

³¹² Best Practice at 24.

³¹³ Id, paragraphs 230-231.

³¹⁴ JCHR 6th Report, paragraph 132.

³¹⁵ Handbook paragraph 232.

270. In February 2002, the Taiwan Government published an ambitious white paper, “Building a Human Rights State, which laid out the government’s proposed approach for making human rights an integral part of Taiwan’s politico-legal system. Under the proposed Taiwanese commission would investigate into “grave human rights cases that have a pervasive influence.” Such limitation is likely to be problematic in practice: “It will not be easy to tell [whether] a would-be complainant... [is] less than significant.”³¹⁶
271. In Fiji, Article 27 of the Human Rights Commission Act prohibited the Commission to investigate a case whenever there are “matters more worthy of its attention” or the “resources of the Commission are insufficient for adequate investigation”. The Committee on the Elimination of Racial Discrimination, in its concluding observations 2003, said that it would like to receive more information about the performance of the Fiji Commission, and the practical implications of Article 27.³¹⁷

2.3.2.4. Prioritizing its goals and primary areas of concern

272. Given the wide remit of the HKHRC or other relevant bodies, prioritizing significant human rights concerns in accordance with the Commission’s year plan is useful and essential. As the Handbook said:-

“Even with a strictly defined mandate, a national institution will almost always be required to establish priorities regarding issues to be considered. While human rights elements may be found in almost every area of human activity, an effective national institution must interpret its subject-matter mandate in a way *which avoids misallocation of human and financial resources*. An effective national institution will also ensure that *nothing in this regard negatively affects external perceptions of its competence, thereby discouraging the submission of genuine grievances*”³¹⁸ [emphasis added]

273. The HKHRC should strategically prioritize its goals and primary concerns and immediately draw up an action plan for the next five to ten years. In particular, it should identify “test cases” in important human rights areas to enforce constitutional guarantees within public authorities. Otherwise, the HKHRC will likely be overwhelmed by daily routines and pop-up human rights issues and thus be in danger of losing its focus.³¹⁹

³¹⁶ John Hucker, “Democracy and Human Rights with Reference to Taiwan” (October 2002), available at <http://www.newcenturyinstitute.us/docs/HuckerPaper.pdf> at 19-20.

³¹⁷ Fiji (CERD/C/62/CO/3, 2 June 2003), paragraph 25.

³¹⁸ Handbook paragraph 228.

³¹⁹ Telephone Interview with Mr. Patrick Yu (22 July 2006).

2.3.3. Complaint procedures

274. The general principle is that the jurisdiction and the complaints procedures must be clearly stipulated.

2.3.3.1. Who is entitled to lodge a complaint?

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| 275. | The locus shall be clearly specified to avoid the technical argument. ³²⁰ The HKHRC or other relevant bodies shall accept complaints from any person including non-citizens, refugees, children, or prisoners in other jurisdictions |
| 276. | The power to accept third party complaints lodged by a relative, friend, legal representative or concerned NGOs, under special circumstances where the victims are incapable of filing a complaint is “desirable” ³²¹ and “important” ³²² . |

277. The human rights commissions in Australia, Canada, Ghana, India, New Zealand, Nigeria, Philippines, South Africa and Uganda can recommend *compensation* to victims or members of his family.³²³

2.3.3.2. Procedures for submitting complaints

- | | |
|------|---|
| 278. | The procedures for submitting complaints should be as simple, accessible, inexpensive, and expeditious as possible; otherwise, it will discourage victims from seeking help from the HKHRC or other relevant bodies. ³²⁴ The HKHRC or other relevant bodies should develop methods to encourage complaints from particularly vulnerable groups and illiterate people. ³²⁵ |
|------|---|

2.3.3.3. Confidentiality

³²⁰ Handbook, paragraph 236.

³²¹ Id, paragraph 238.

³²² Professional Training Series No.12 at 49.

³²³ Power and Functions, Chapter 1 at 27-8.

³²⁴ Handbook paragraph 245, supra note 122; Best Practice at 20.

³²⁵ Best Practice at 21.

279. The HKHRC or other relevant bodies shall develop confidentiality structures and procedures, beginning with the receipt of complaint and continuing throughout the investigation process,³²⁶ through either policy or the enabling legislation.
280. According to Openness and Access to Information, anonymization of the personal information should be done to the extent it is possible. Other ways are to give access to only part of the information or to transform it into statistical information. “If this is not possible the entire information request should be refused unless the public interest in receiving it is deemed more important than the interest in protecting privacy.”³²⁷
281. Australian legislation protects confidentiality during the conciliation process by making any given evidence at this stage inadmissible during a subsequent court or tribunal hearing.³²⁸
282. In Hong Kong, the three antidiscrimination ordinances also contain similar restrictions on disclosure of information.³²⁹ They prohibit the Commission or any member acting on behalf of the Commission to disclose information given by informant in connection with a formal investigation.

2.3.3.4. Rejection of complaints

283. The common grounds of rejection are laches, ultra virus, and the absence of locus. Assessing the Effectiveness of NHRIs suggests that investigations of serious violations should not be time-limited because “fear, psychological trauma” or “difficulty in gathering supporting evidence” may delay the lodging of complaints.³³⁰
284. In practice, most of the jurisdictions enforce laches. The Best Practice suggests NHRIs not to consider complaints concerning events that took place *one year* before because of the difficulty in obtaining evidence.³³¹
285. In Hong Kong, time restriction stipulated under the three antidiscrimination ordinances is *12 months*.³³² The EOC normally does not entertain late complaints unless there are extenuating circumstances for the delay.

³²⁶ Handbook paragraph 247.

³²⁷ Openness and Access to Information at 84.

³²⁸ Human Rights and Equal Opportunity Act 1986 (Australia), Section 49(2).

³²⁹ Disability Discrimination Ordinance, Section 70; Family Status Discrimination Ordinance, Section 52; Sex Discrimination Ordinance, Section 74.

³³⁰ Assessing the Effectiveness of NHRIs at 21.

³³¹ Best Practice at 22.

³³² Disability Discrimination Ordinance, Section 80(4)(c); Family Status Discrimination Ordinance, Section 62(4)(c); Sex Discrimination Ordinance, Section 84(4)(c).

286. Similar provisions can be found the human rights bill 1994 in Hong Kong³³³ and in the Human Rights and Equal Opportunities Act in Australia.³³⁴
287. The Canadian Human Rights Act Review Panel recommends that the general limitation period for claims remains as *one year*. The Human Rights Tribunal may extend the time period where the claimant is incapable of filing a claim because of disability or other serious reason, or where the claimant can not have reasonably known that he has suffered until the limitation period expires.³³⁵
288. The time bar, if any, should not be shorter than *one year*. The HKHRC or other relevant bodies should have “the discretion to accept complaints that fall outside this time period under well-defined circumstances.”³³⁶ The procedures for submitting complaints, including the time limit for lodging complaints, should be widely disseminated.³³⁷

2.3.3.5. Fair and effective case flow management

289. The HKHRC or or other relevant bodies should establish and follow a complaint handling timeline covering the entire process of the complaints, from reception to a final disposition. At the same time, the complainant should be regularly informed of the status of their complaints³³⁸ and should be notified as soon as possible in case of rejection.³³⁹ Moreover, criteria for selection of what case will be entertained, if any, should be clear and made explicit.
290. While most of the commissions in the world represented handled complaints simply according to the dates on which they were received, prioritizing issues thematically could be necessary, provided that the criteria used are made explicit.³⁴⁰
291. As shown by the Canadian Human Rights Commission, improvement in efficiency can be achieved through the use of preliminary assessments and a single Dispute Resolution Branch.
292. Preliminary assessments are very useful in formulating the schedule and the possible handling methods. After the intake of a complaint, officers will first assess the admissibility of complaints and determine the next appropriate steps. If the complaint is *prima facie* admissible, a preliminary assessment will be undertaken. This process provides “an early opportunity for both parties to have a frank and open discussion and assessment of a case with a senior human rights specialist. The objective is to either

³³³ Human Rights and Equal Opportunities Commission Bill 1994, Sections 29(2)(c)(i) and 43(2)(c)(i).

³³⁴ Human Rights and Equal Opportunity Commission Act (Australia), Section 46PH (1)(b).

³³⁵ CHRA Review at 4, Recommendation 49.

³³⁶ *Id.*

³³⁷ Best Practice at 21.

³³⁸ *Id.*

³³⁹ Handbook paragraph 250.

³⁴⁰ Assessing the Effectiveness of NHRIs at 22.

- resolve the case or expedite the investigation by narrowing the issues and helping the parties to establish realistic expectations.”³⁴¹
293. In 2005, the Canadian Human Rights Commission was restructured. The new Dispute Resolution Branch integrates all services related to the processing of a complaint, including pre-complaint services, mediation before and after a complaint filed, conciliation, investigation, litigation, and liaison with the Tribunal.³⁴²
294. The above two measures are stimulating. The average age of cases has been reduced by 62%, from 25 months in 2002 to 9.5 months at the end of February 2006. By the end of February 2006, active cases aged two years and older were reduced by 86%; cases in the inventory have been reduced by 44%, from 1,287 in 2002 to 720 cases.³⁴³
295. In 2005-06, the Canadian Commission has continued its effort in streamlining case management and targeted to resolve 85% of cases within a year, to reduce the average age of the case load from 12 months to between 8 and 10 months, and to expand the effective delivery of alternative dispute resolution.³⁴⁴
296. The HKHRC or other relevant bodies should improve case flow management by establishing *complaint-handling units* and by conducting preliminary assessments upon receipt of cases. Those complaint-handling units “should install a system for monitoring the progress of completed cases.”³⁴⁵ Case monitoring should record compliance with recommendations and ensure that complainants’ needs have been met.³⁴⁶

2.3.4. The power to visit and to inspect places

297. According to the Best Practice and Assessing the Effectiveness of NHRIs, NHRIs should “make regular visits to all places of detention, at times of their choosing, preferably with minimal notice.”³⁴⁷ Such power has been found very useful in addressing the problem of unlawful detention in El Salvador and Nigeria.³⁴⁸

³⁴¹ Canadian Human Rights Commission, “Estimates: A Report on Plans and Priorities 2005 – 2006,” (24 March 2005), available at http://www.tbs-sct.gc.ca/est-pre/20052006/CHRC-CCDP/CHRC-CCDPPr5601_e.asp#Section1Summary

³⁴² Canadian Human Rights Commission, “Annual Report 2005,” (Ottawa: Minister of Public Works and Government Services, 2006) ISBN 0-662-49116-5 at 4.

³⁴³ Id at 3.

³⁴⁴ Estimates: A Report on Plans and Priorities 2005 – 2006.

³⁴⁵ Assessing the Effectiveness of NHRIs at 22.

³⁴⁶ Id at 22.

³⁴⁷ Id at 19; Best Practice at 20.

³⁴⁸ Power and Functions, Chapter 1 at 16.

298. The Suhakam in Malaysia, while the legislation is silent on the power to visit a detention site, the public authority often refused the Visitation Sub-working Group's request for visits and thereby seriously hampered the effectiveness of the Sub-working Group. As a result, the Suhakam has called for the power to visit at any time without prior authorisation.³⁴⁹
299. The Northern Ireland Human Rights Commission filed a lawsuit against the Government in February 2005 to fight for the right to monitor conditions at the Juvenile Justice Centre in Rathgael, Bangor. Without the power to visit places of detention, the Commission cannot effectively monitor the Government's performance in protecting children's rights.³⁵⁰ Although the Commission's attempt has been unsuccessful, the Northern Ireland government is now examining the possibility of granting the Commission the power to site visit.
300. In Norway, the Ombudsman for Public Administration can access to places of work, offices and other premises of any administrative agency and any enterprise which come under the scope of his powers.³⁵¹
301. In the Netherlands, the Ombudsman may institute an on-site investigation. He is entitled to access any site, other than a dwelling without the consent of the occupier, insofar as reasonably necessary for the performance of his duties.³⁵²
302. The Ombudsman of Finland may also conduct on-site investigations in public offices and institutions. She has a special duty to make regular inspection visits to prisons and other institutions, such as psychiatric hospitals, units of the Defence Forces and Border Guard, in which persons may be confined against their will.³⁵³ The Ombudsman and the Deputy-Ombudsmen conducted 76 on-site inspections in 2005. Inspection days totaled 45.³⁵⁴
303. So far in Hong Kong, the three antidiscrimination ordinances do not provide the EOC the power visit and inspect places. The same applies to the human rights bill 1994.
304. The HKHRC or other relevant bodies should be able to visit *all places of deprivation of liberty*, in office hours without the need of issuing any notice for the purpose of investigation.

³⁴⁹ Suhakam, "Annual Report 2001," available at http://www.suhakam.org.my/docs/document_resource/Annual%20Report%202001.pdf at 61.

³⁵⁰ *National Human Rights Commission of the Republic of Korea*, "Human Rights Worldwide," Newsletter Issue No. 2 (11 February 2005) at 5-6.

³⁵¹ Act concerning the Storting's Ombudsman for Public Administration of 22 June 1962 (Norway), Section 8.

³⁵² General Administrative Act (*Algemene Wet Bestuursrecht*) (the Netherlands), Section 9: 26.

³⁵³ *Parliamentary Ombudsman of Finland's* website, "The Work of the Ombudsman," available at <http://www.oikeusasiamies.fi/Resource.phx/ea/english/ombudsman/work/index.htm>

³⁵⁴ Id, "Inspections," at <http://www.oikeusasiamies.fi/Resource.phx/ea/english/ombudsman/work/inspections.htm>

2.3.5. *Power to inquiry*

305. In this report, the power of inquiry refers to the power of the NHRIs to compel any person or any organization to answer questions about its compliance with domestic or international human rights requirements either in writing or in person.³⁵⁵
306. The Handbook requires NHRIs to be able to pursue an inquiry on its own initiative. Inquiry issues may be selected by identifying a trend from complaints received.³⁵⁶
307. In India, in reaction to the nature and volume of the complaints received, the National Human Rights Commission chooses and searches inquiry subjects itself rather than at the behest of government.³⁵⁷
308. Subsequently endorsed by the UK Government, the JCHR recommended that the power to inquiry should be “*a novel, free-standing power* in relation to matters of public policy which engage human rights, not dependent on equality issues being engaged and the use of the existing anti-discrimination powers that will be vested in the new commission.”³⁵⁸
309. In practice, however, the distinction between human rights and equality inquiries is a blurred one. “Most inquiries into equality matters are likely to throw up human rights concerns, and often a human rights inquiry might reveal unlawful discrimination.”³⁵⁹
310. According to the JCHR, “the power of inquiry [of the CEHR] should extend to any body which is exercising a “public function” within the meaning of Section 6(3)(b) of the Human Rights Act as far as relevant to that function.”³⁶⁰ As the JCHR highlights, most general inquiries are likely to implicate government departments or other public authorities.³⁶¹
311. The CEHR in the UK may commence an investigation under Section 20 of the Equality Act if it suspects that a person may have committed an unlawful act in the course of an inquiry.
312. In JCHR’s view, in freestanding human rights issues, the CEHR shall not be granted formal investigation and enforcement powers comparable to that of anti-discrimination

³⁵⁵ Such definition differs from the usage of “power of inquiry” mentioned in the 1994 Bill. There “power of inquiry” amount to power of investigation as defined in this report.

³⁵⁶ Handbook paragraphs 288-9.

³⁵⁷ Protection of Human Rights Act, 1993 (India), Section 12(a).

³⁵⁸ Equality Act, Section 16; The UK Government Response, paragraph 14.

³⁵⁹ JCHR 11th report, paragraph 52.

³⁶⁰ Id, paragraph 59.

³⁶¹ JCHR 11th Report, paragraph 60.

commissions. However, where the commission in the course of an inquiry identifies an apparent breach of the Convention rights, “it should have power to identify the actual or potential violations occurring and to make recommendations as to changes in practice or in the law which it considered necessary or desirable.”³⁶²

313. In Hong Kong, the three antidiscrimination ordinances do not provide the EOC power to inquiry, but the power to conduct “formal investigation”.³⁶³ The Commission cannot inquire and is unwilling to inquire into discrimination cases on other grounds.

314. In the human rights bill 1994 in Hong Kong, the proposed Human Rights and Equal Opportunities Commission can inquire into any act or practice that may be inconsistent with or contrary to any human right where *it considers appropriate to do so*.³⁶⁴ As such, the Commission can exercise its power to inquiry over complaints alleged under the BORO, the Equal Opportunities Bill, and international human rights instruments scheduled under the Bill.³⁶⁵

315. The HKHRC or other relevant bodies should be able to pursue inquiry subject *on its own initiative*. They should be empowered to inquire into all types of human rights cases that alleged of violating the BORO, the antidiscrimination ordinances, and all the international human rights instruments that are applicable to Hong Kong. Inquiry issues can be selected by identifying the trend of the subject matter of complaints received and the existing and potential human rights violations in the community.

316. As to the effect of inquiry, the HKHRC or other relevant bodies may commence an investigation into any person if the Commission suspects that such person may have committed an unlawful act in the course of an inquiry. Whether HKHRC or other relevant bodies shall possess the power to commence of investigation on freestanding human rights remains a significant issue for further deliberation.

2.3.6. Power to investigations

2.3.6.1. *Suo moto* investigations

317. To impose a significant cultural change effectively, the power to conduct investigations *suo moto* (power to pursue the subject of inquiry on its own initiative) is an “important

³⁶² JCHR 11th report, paragraph 54.

³⁶³ Disability Discrimination Ordinance, Section 66; Family Status Discrimination Ordinance, Section 48; Sex Discrimination Ordinance, Section 70.

³⁶⁴ Human Rights and Equal Opportunities Commission Bill 1994, Sections 22(d) and 29(c).

³⁶⁵ Human Rights and Equal Opportunities Commission Bill 1994, Sections 22, 29 and 41.

- and far-reaching” power.³⁶⁶ Such a power “make[s] a significant contribution to ensuring that vulnerable groups are given a public voice and that human rights violations, where ever they occur, become a matter of general knowledge and public concern”.³⁶⁷
318. Many NHRIs have been granted the power to conduct *suo moto* investigations, including in India, Australia, New Zealand, South Africa, Ireland and Northern Ireland.³⁶⁸
319. The Australian HREOC’s proactive role involves conducting public enquiries for minority groups even if receiving no complaints. The minority groups include mentally ill, elderly people with dementia, and homeless children. According to Mr. Brain Burdekin, former special adviser to the UN High Commissioner for Human Rights, the victims in Australia “were so stretched and so tired from their role as care givers that they were not acting as advocates, so we became the advocates.”³⁶⁹
320. Comparatively, the Australian HREOC’s ability to make special reports to Parliament was proven to be much less effective at generating a political response.³⁷⁰
321. The Canadian Commission’s power to initiate investigations has been largely unused, because of a previous challenge before the court to its power to investigate on the grounds of bias and want of natural justice.³⁷¹
322. In Hong Kong so far, the three antidiscrimination ordinances allow the Equal Opportunities Commission the power to conduct formal investigation when the Commission thinks fit.³⁷²
323. The HKHRC should have the power to investigate *suo moto*³⁷³ and exercise it actively to investigate “human rights concerns of people who may have difficulty accessing HKHRC on their own” or any serious human rights violations.³⁷⁴

³⁶⁶ Handbook paragraph 284.

³⁶⁷ Id, paragraphs 28, and 284-6.

³⁶⁸ JCHR 6th Report, paragraphs 122-6.

³⁶⁹ Brain Burdekin, “Applying International Human Rights Standard,” speech in *Reports of the Workshop on the Importance of National Human Rights Institution*, (21 February 1998), available at <http://www.ccf.org.fj/publications/nhrights/11.htm>

³⁷⁰ UCL Survey at 21.

³⁷¹ Id at 20.

³⁷² Disability Discrimination Ordinance, Section 66; Family Status Discrimination Ordinance, Section 48; Sex Discrimination Ordinance, Section 70.

³⁷³ Mr. C. Raj Kumar, the lecture of the School of Law, the City University of Hong Kong, also advocate conferring the power to *suo moto* investigation to the HKHRC. See C. Raj Kumar, at 427.

³⁷⁴ Best Practice at 20.

324. While *suo moto* investigations often concern national policies or practices which involve difficult political, economic and social issues, advice and recommendations are the appropriate remedies as compared to redress to specific victims.³⁷⁵

2.3.6.2. Jurisdiction

325. The CEHR in the UK may commence investigations under Section 20 of the Equality Act if the CEHR reasonably suspects that a person may have committed an “unlawful act” in the course of an inquiry. Unlawful act is defined in Section 24 of the Equality Act as “contrary to a provision of the equality enactments”. The JCHR and the UK Government did not consider that powers of investigation should be extended to purely private bodies.³⁷⁶
326. As such, investigation can be conducted *in discrimination cases* but not all kinds of human rights cases in the UK. The JCHR supported the position because otherwise the CEHR would supersede the courts in determining rights violations.³⁷⁷
327. In the absence of the power of investigation on human rights violations other than discriminations, “arguably, *the CEHR should likewise be empowered to make recommendations relating to human rights abuse revealed during named investigations into discriminatory practices*. If, for example, in the course of examining the legality of “Do Not Resuscitate” notices under the Disability Discrimination Act, individual hospitals were found to be breaching standards required to protect the right to life, the CEHR might have a positive obligation to report this finding and make appropriate recommendations.”³⁷⁸ [emphasis added]
328. Similar to the CEHR, the Australian HREOC can investigate into complaints alleged of unlawful discrimination under the antidiscrimination ordinances, and can resolve these matters through conciliation where appropriate.
329. Section 69(8) of the Northern Ireland Act provides that the Northern Ireland Human Rights Commission may conduct any investigations “as it considers necessary or expedient” “for the purpose of exercising its functions under this section”.³⁷⁹ It appears that the Commission has a broader remit to conduct investigations than the CEHR and

³⁷⁵ Handbook paragraph 291.

³⁷⁶ JCHR 11th report, paragraph 59.

³⁷⁷ Id, paragraph 74.

³⁷⁸ Francesca Klug and Claire O'Brien, “‘Fairness for All’? An Analysis of Human Rights Powers in the White Paper on the Proposed Commission for Equality and Human Rights,” (Winter 2004) *Public Law* 712 at 718.

³⁷⁹ Northern Ireland Act 1998, Chapter 47, Section 69(8).

Australian HREOC.³⁸⁰

330. Suhakam can accept third party complaints and initiate investigations *suo moto*, as well as upon receipt of complaints.³⁸¹ But it has no jurisdiction over “the subject matter of any proceedings pending in any court”, that has finally been determined by any court,³⁸² or a subject matter subsequently becomes the matter of any court proceeding.³⁸³
331. In Hong Kong so far, the three antidiscrimination ordinances allow the Equal Opportunities Commission the power to conduct formal investigation “*for any purpose connected with the carrying out of any of its functions*”³⁸⁴ However, it should be noted the grounds of discrimination under the existing antidiscrimination laws that can initiate investigations are limited to gender, disability and family status only. [emphasis added]

332. The HKHRC or other relevant bodies should be able to investigate complaints filed under the BORO and the three antidiscrimination ordinances, either upon receipts of complaint or *suo moto*.³⁸⁵ They should not be empowered to investigate violations of freestanding human rights in order to prevent an overlap of jurisdiction between the Commission(s) and the courts.
333. Under the existing antidiscrimination laws only complaints relating to gender, disability and family status can be lodged before the EOC. Hence, the HKHRC or other relevant bodies should promote new antidiscrimination legislation that includes race, age, sexual orientation, etc.

2.3.6.3. Power to compel evidence

334. According to the UN and the Commonwealth Secretariat, the following investigating powers are fundamental to conducting an efficient and effective investigation³⁸⁶:-
- (a) Free access to all internal documents;
 - (b) Power to summon witnesses;

³⁸⁰ Id, Section 69(1).

³⁸¹ Human Rights Commission of Malaysia Act, No. 597 (1999), Section 12(1).

³⁸² Id, Section 12(2)(a) and 12(2)(b).

³⁸³ Id, Section 12(3).

³⁸⁴ Disability Discrimination Ordinance, Section 66; Family Status Discrimination Ordinance, Section 48; Sex Discrimination Ordinance, Section 70.

³⁸⁵ Identical to Human Rights and Equal Opportunities Commission Bill 1994, Section 42.

³⁸⁶ Handbook paragraph 259; Best Practice at 19.

(c) Power to receive oral and written evidence under oath; and

(d) Power to compel production of relevant information.

335. The investigatory powers can be further supplemented by an umbrella clause granting NHRIs the power to engage in all other activities, which the investigation body consider necessary.³⁸⁷
336. The Australian HREOC may compel the production of documents and attendance at conferences. These powers are rarely exercised since parties are generally cooperative.³⁸⁸
337. The Northern Ireland Human Rights Commission lacks the power to compel documents or to interview witnesses and hence the effectiveness of its investigations has been severely hampered. A government spokesman indicated that few political parties supported granting the power to compel evidence.³⁸⁹
338. The National Human Rights Commission in Korea investigates and recommends remedial measures for human rights violations occurred in federal and local government organs, and detention and protective facilities, except those the authorities are currently investigating, or those are closed.³⁹⁰ The Korean Commission may require subjects under investigation to submit necessary materials; and related entities, interested persons, or experts, to present relevant facts or opinions.³⁹¹
339. In the course of discussion about the White Paper in Taiwan, there is concern about the question of whether the investigative powers of the proposed National Human Rights Commission and those of the Control Yuan conflict with each other. However, the investigative powers of the Control Yuan do not exclude other agencies having similar investigative powers in particular areas. The investigative powers of the Commission and those of the Control Yuan “should be complementary, not mutually antagonistic.”³⁹²
340. In Hong Kong, the three antidiscrimination ordinances allow the EOC the power to furnish written information from any person and to require any person to attend a conference for the purpose of investigation.³⁹³

³⁸⁷ Handbook paragraph 260.

³⁸⁸ William Jonas, “Procedures and Remedies for Dealing with Complaints of Racial Discrimination and Vilification,” Key Note Speech in 6th conference at 86.

³⁸⁹ *House of Lords*, “Official Report,” vol. 593, 21 October 1998, col. 1539 (Lord Mostyn) at 1543.

³⁹⁰ National Human Rights Commission Act (Act No. 6481), Article 19(1), (2) and (3).

³⁹¹ *Id.*, Article 22.

³⁹² *Research, Development, Evaluation Commission and Executive Yuan*, “Human Rights Infrastructure-building for a Human Rights State—2002 Human Rights Policy White Paper of the Republic of China (Taiwan),” (February 2002), available at <http://www.rdec.gov.tw/public/Attachment/5341263671.pdf> at Chapter 2.

³⁹³ Disability Discrimination Ordinance, Section 68(4); Family Status Discrimination Ordinance, Section 50(4); Sex Discrimination Ordinance, Section 72(4).

341. In the human rights bill 1994, the proposed Human Rights and Equal Opportunities Commission also acquire the power to compel information and documents “where the commission has reason to believe that a person is capable of furnishing information or producing documents.”³⁹⁴

342. The HKHRC or other relevant bodies should be empowered to compel evidence from a person against whom the complaint is lodged for the purpose of investigation.

2.3.6.4. Power to impose sanction for non-cooperation

343. Some NHRIs have the power to impose sanction on parties who fail to cooperate during investigations. For example, the Indian National Human Rights Commission may prosecute persons refusing to answer inquiries or produce documents by bringing the case to the Magistrate.³⁹⁵ This power is akin to the powers of a civil court the Code of Civil Procedure.

344. At least, NHRIs “should be empowered to refer the matter to another body for consideration or action where ... its investigation cannot be properly conducted because of obstruction or failure to cooperate”³⁹⁶ and be able to recommend sanctions in case of refusal.³⁹⁷

345. In Hong Kong, the three antidiscrimination ordinances allow the EOC to apply to the District Court for an order to enforce the Commission’s request for information and attendance of conference.³⁹⁸

346. In the human rights bill 1994, if a person refuses or fails to produce information to attended examinations as requested by the proposed Human Commission, that person will be guilty of an offence, and liable to a fine not exceeding HKD \$10,000 in the case of a natural person, or HKD \$50,000 in the case of a body corporate.³⁹⁹ Such fines are enforceable by the courts.

347. The HKHRC or other relevant bodies can apply to the District Court to enforce a fine in case of failure to comply with the requirements to produce evidence either in writing or in person.

³⁹⁴ Human Rights and Equal Opportunities Commission Bill 1994, Sections 30 and 31.

³⁹⁵ The Protection of Human Rights Act, 1993 (India), Section 13(1).

³⁹⁶ Handbook paragraph 266.

³⁹⁷ Assessing the Effectiveness of NHRIs at 18.

³⁹⁸ Disability Discrimination Ordinance, Section 68(1); Family Status Discrimination Ordinance, Section 50(1); Sex Discrimination Ordinance, Section 72(1).

³⁹⁹ Human Rights and Equal Opportunities Commission Bill 1994, Sections 58(1) and 58(2).

2.3.6.5. Power to protect witnesses

348. Assessing the Effectiveness of NHRIs recommended that NHRIs to have the power to organise secure witness protection programmes. “They should be able to recommend suspension from duty of officials under investigation for human rights violations. This then ensures that the latter have no power over witnesses or complainants. This would be without prejudice to the investigation.”⁴⁰⁰
349. In the human rights bill 1994, it is unlawful for a person to subject or threaten to subject another person under physical violence on the ground that such person is a complainant, a potential complainant, or a witness to the Commission.⁴⁰¹

2.3.6.6. Investigation procedures

350. NHRIs should develop their investigation standards and guidelines, including an efficient and reliable filing of cases to enable the most efficient proceeding.⁴⁰² They should monitor case progress closely.
351. A preliminary procedure of admissibility will also help NHRIs determine which cases to be taken up, the most appropriate procedure and form.⁴⁰³
352. The principles of investigations shall reflect natural justice and procedural fairness⁴⁰⁴:
- (a) *Accuracy and objectivity*. Investigations must be objective, thorough and accurate. The collection of direct evidence and corroboration can enhance the accuracy of the investigation.
 - (b) *Timeliness*. Investigations should be carried out in a timely manner.
 - (c) *Diversity of information*. As many sources of information as possible should be used in investigations.
 - (d) *Adherence to human rights standards*. Relevant international and domestic human rights standards are points of reference when analyzing the information available.

⁴⁰⁰ Assessing the Effectiveness of NHRIs at 21; Handbook paragraph 265.

⁴⁰¹ Human Rights and Equal Opportunities Commission Bill 1994, Sections 107.

⁴⁰² Handbook paragraph 261.

⁴⁰³ Power and Functions, Chapter 5 at 101.

⁴⁰⁴ Best Practice at 21.

(e) *Respect for all parties.* Investigations should be carried out in an atmosphere of the utmost respect for all parties. Additional consideration may be required when dealing with victims of a traumatic experience. Persons accused of violating human rights are entitled to the presumption of innocence.

353. The purpose of human rights law is remedial, not punitive. Therefore, it is unfair to require the victim of discrimination to prove intention, which is “an obviously onerous burden that dwindles the possibility of successful discrimination claims by individual victims.”⁴⁰⁵
354. The standard of proof of “a balance of possibilities” is preferable to that of the criminal standard of “beyond reasonable doubt.”⁴⁰⁶
355. Public reporting on the results of investigations ensures that perpetrators are made accountable; victims are recognized and supported; the transparency and impartiality of the investigation process are guaranteed. The identity of the complainant shall remain confidential to protect privacy.⁴⁰⁷

2.3.6.7. The right to legal counsel and the right to fair trial

356. The rules of evidence applicable in courts should not be applied rigidly in NHRIs. HKHRC needs not provide a person against whom the complaint is lodged the right to counsel, but he should also be given the right to reply in the course of investigation.⁴⁰⁸
357. To date, the CHRC has developed investigation procedures that are heavily judicialized and with lawyers commonly involved.⁴⁰⁹ The Canadian experience suggests that increasing formalization of an adversarial system highlights disparities in power between parties. Complainants are likely to be far less affluent than respondents, who are usually government agencies and large companies. This power imbalance can affect the mediation process and the determination in favour of the powerful parties.⁴¹⁰
358. Thereby, the right to counsel must be balanced with the need for a speedy, fair, and flexible procedure.⁴¹¹ As concluded by the 6th Conference:-

⁴⁰⁵ Emile Francis Short, “Remedies: The Relationship Between National Human Rights Institutions and Other Statutory Institutions/Mechanisms, With Special Reference to Racial Discrimination,” 6th Conference at 125.

⁴⁰⁶ Handbook paragraph 263.

⁴⁰⁷ Professional Training Series No. 12 at 48.

⁴⁰⁸ Best Practice at 21.

⁴⁰⁹ John Hucker at 20.

⁴¹⁰ Id.

⁴¹¹ Power and Functions, Chapter 5 at 95.

“The right to have legal counsel ...only applies to a hearing by the court, but not to a national human rights institution... In addition, it could be emphasized that the role of the human rights commission is to guard the interests of those parties who would otherwise need the protective measure of legal counsel, and therefore the need for flexibility and informality could have greater weight in these cases.”

359. Nevertheless, the right to fair trial and the right to silence for the party that the complaint is directed against should not be undermined by the NHRI’s power to compel evidence. Professional privilege should also be respected.⁴¹² The Council of Europe’s Commissioner for Human Rights commented that:-

*“An additional guarantee for those appearing before the Commission would be that any information obtained during such proceedings could not subsequently be used in court ... Care would also need to be taken to clearly define the Commission’s investigative powers vis-à-vis different actors, including both different types of public official ...and private individuals, whether acting in a purely private capacity, or assuming typically public functions, and who might, again, have professional secrecy obligations, such as lawyers, doctors, priests, or journalists.”*⁴¹³ [emphasis added]

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| 360. Hence, the rules of natural justice should be observed and such information obtained should not be used to criminalize the informant in later legal proceedings. |
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2.3.7. Shall Parliament or the Executive be given the power to require the Commission to conduct a particular inquiry or investigation?

361. The power for Parliament and the Executive to direct NHRIs to initiate inquiries into matters of public policy is inappropriate according to the JCHR.⁴¹⁴ A Minister can of course invite the commission to undertake an inquiry publicly, but not to require an investigation as such.
362. The Scottish Executive proposal in its consultation paper also does not favour this arrangement.⁴¹⁵

⁴¹² Best Practice at 22.

⁴¹³ Alvaro Gil-Robles, “Opinion 2/2002 of The Commissioner For Human Rights,” (13 November 2002), Comm DH(2002)16, paragraphs 29-39.

⁴¹⁴ Id, paragraph 55.

⁴¹⁵ *Scottish Executive*, “The Scottish Human Rights Commission,” (2003), available at <http://www.scotland.gov.uk/consultations/justice/shrs00.asp> at chapter 5.

363. However, the UK Government regarded that the power of the Secretary of State to initiate an inquiry does not contradict the principles of independence, if the CEHR may also initiate inquiries itself.⁴¹⁶
364. In New Zealand, the Government may ask the Human Rights Commission to carry out an inquiry into a certain subject, but they do not provide extra funds for that inquiry. So far the New Zealand Government has requested the Commission to prepare a National Plan of Action on human rights.⁴¹⁷ The Attorney-General in Australia has also done so.⁴¹⁸
365. In Hong Kong, the three antidiscrimination ordinances provide that the EOC can conduct formal investigation either on its own initiative or on the request of the Chief Secretary for Administration.⁴¹⁹
366. This report prefers not granting the executive the power to request investigation on particular issues to maintain the independence of the HKHRC or other relevant bodies as far as possible.

2.3.8. Mediation and conciliation

2.3.8.1. The legacy of mediation and conciliation

367. Mediation is a voluntary process of negotiation between parties where the mediated settlements are subject to the approval of the Commissioners. While alternative dispute resolutions are available to the parties at all stages of the complaint process, in practice, most dispute resolutions take place immediately after a complaint has been filed and prior to investigation, or after investigation. If one party is unhappy with the settlement, NHRIs may initiate an investigation or pass the complaint to the courts.
368. Conciliation is a mandatory process which takes place after investigation, when the Commissioners have had an opportunity to review the investigator's findings and believe conciliation can resolve the case. The major difference from mediation is that conciliation is mandatory if the Commission believes further negotiations can be fruitful. Conciliation attempts to identify the position and attitude of both parties and to search for a mutually acceptable outcome.
369. Mediation and conciliation are much cheaper than litigation. As such, the Canadian Human Rights Commission has expanded mediation services since 2002. A pilot mediation program, launched in 1999, shows that mediation assists participants to

⁴¹⁶ UK Government's Response, paragraph 16.

⁴¹⁷ Human Rights Act 1993, Sections 5(2)(m) and 7(1).

⁴¹⁸ Human Rights and Equal Opportunities Commission Act 1986, Section 11(1)(j), (k) and (m).

⁴¹⁹ Disability Discrimination Ordinance, Section 66; Family Status Discrimination Ordinance, Section 48; Sex Discrimination Ordinance, Section 70.

- identify the real needs and interests behind a complaint.⁴²⁰ In 2005, out of the 863 cases that the Commission dealt with a decision, 352 (41%) cases were settled by either mediation or conciliation.⁴²¹
370. The assumption that the use of mediation and conciliation always hamper systemic enforcement is false. The UCL survey shows that mediation, conciliation, and systemic enforcement should not be regarded as competing priorities. “Mediated settlements can result in broader remedies, such as anti-discrimination training, a review of staff structures and pay scales, or modifying an internship programme to accommodate people with disabilities.”⁴²²
371. There has been a misunderstanding to equate mediation and conciliation with adjudication.⁴²³ Actually, in almost all the Australian states, Equal Opportunity Commissioner conducts conciliation and a separate Equal Opportunity Tribunal conducts adjudication. In the absence of a human rights tribunal, enforcement and adjudication power should be vested in the courts.
372. In some nations, the private sector, especially the employers, expresses concern about the credibility of combining enforcement and conciliation functions in the same organization and distrusts the conciliation and mediation process. For instance, the Canadian Commission has found investigation and negotiation an “uneasy mix”.⁴²⁴
373. Due to concerns about the independence of NHRIs in the role of conciliator or mediator, some countries have placed mediation functions in the hands of an independent unit within the Commission. The ADR Unit in the New Zealand Human Rights Commission is one such example. Alternatively, a separate body like the Office of the Director of Equality Investigations in Ireland, the Children’s Commission in New Zealand, and the Advisory Council on Alternative Dispute Resolution composed of eminent jurists in the Canadian Human Rights Commission, can be created.⁴²⁵
374. In Australia, according to Dr. William Jonas, former Aboriginal and Torres Strait Islander Social Justice Commissioner and acting Race Discrimination Commissioner in the Australian HREOC, “although no legislation defines conciliation or sets out the process or procedures to be followed, Australian courts have imposed a minimum standard of procedural fairness because of the legal hazard faced by the respondent

⁴²⁰ *Canadian Human Rights Commission*, “Annual Report 2003” (Ottawa: Minister of Public Works and Government Services, 2004) ISBN 0-662-68099-5 at 12.

⁴²¹ *Canadian Human Rights Commission*, “Annual Report 2005” at 17-8.

⁴²² UCL Survey at 26.

⁴²³ Spencer and I. Bynoe, “A Human Rights Commission: The Options for Britain and Northern Ireland” (London: IPPR, 1998) at 97.

⁴²⁴ UCL Survey at 26.

⁴²⁵ *Id*; *Canadian Human Rights Commission*, “Annual Report 2003” at 16.

[conciliator] if conciliation is flawed (namely the risk of court proceedings). Thus, for example, the conciliator must be independent and objective.”⁴²⁶

375. It is not mandatory to separate advocacy and conciliation functions into two different organizations. The cases of the Office of the Director of Equality Investigations in Ireland; the Disability Rights Commission in the UK, the Children’s Commission in New Zealand illustrate the practicability for a single organization to perform the role as advocacy and conciliation without undue conflict, given appropriate functional divisions and procedural safeguard. To a certain extent, conciliation and mediation will always work better against the fear of potential litigation.⁴²⁷
376. The JCHR also recommended the CEHR to be explicitly disbarred from providing conciliation. “Otherwise it would be a route by which it might again be drawn into individual cases and start developing an ombudsman-style role which would be at odds with the strategic role which we believe it should have.”⁴²⁸
377. The Canadian Human Rights Act Review Panel recommended mediators to be adequately trained and drawn from the members of the Human Rights Tribunal. However, the Tribunal member should not be the judge who hears the case nor a compellable or competent witness in the proceedings if the mediation is not successful.⁴²⁹
378. In the New Zealand Human Rights Commission, the Commission’s Dispute Resolution Service now deals complaints about racial discrimination. If mediation fails, complainants may take their complaint to the Human Rights Proceedings Tribunal where the Office of Human Rights Proceedings that forms part of the Commission may represent them.⁴³⁰

2.3.8.2. Jurisdiction

379. In the UK, conciliation and mediation services of the CEHR apply to antidiscrimination complaints but not freestanding human rights.⁴³¹ The JCHR, however, regarded a general power to undertake alternative dispute resolution is “a valuable ancillary to the commission’s general duty to promote a culture of respect for human rights”.⁴³²

⁴²⁶ William Jonas, “Procedures and Remedies for Dealing with Complaints of Racial Discrimination and Vilification,” 6th Conference at 89.

⁴²⁷ UCL Survey at 27.

⁴²⁸ JCHR 11th report, paragraph 71.

⁴²⁹ CHRA Review, at 4 Recommendation 94.

⁴³⁰ Human Rights Commission (New Zealand), “The History of Race Relations Legislation in New Zealand,” available at <http://www.NHRI.co.nz/index.php?p=13819>

⁴³¹ Fairness for All, paragraph 4.22.

⁴³² JCHR 11th report, paragraph 71.

380. Issuing guidelines to the parties and conciliators, and developing precedent for consideration in subsequent or similar cases can ease the task of conciliation.⁴³³ In particular, authorities against whom complaints are made should be required to make an initial response within a certain time.⁴³⁴
381. The Australian HREOC handles complaints by conciliation in respect of violations of the major international human rights conventions that Australia has ratified, including ILO No. 111, the ICCPR and the CRC. It does not provide representation, as those international treaties are unenforceable, though the Commission can report to Parliament the receipt of complaints.⁴³⁵
382. In the human rights bill 1994, the proposed Human Rights and Equal Opportunities Commission is empowered to conduct conciliation and mediation in cases where the BORO and the antidiscrimination laws are found to be violated.⁴³⁶ However, the proposed Commission cannot deal with or settle free-standing human rights cases through conciliation.⁴³⁷ It does not mention whether an independent conciliation and mediation unit should be established within the Commission.
383. After all, it seems inappropriate for NHRIs to conduct conciliation and mediation in freestanding human rights cases. In the absence of domestic legislation, it is doubtful as to how the Commission can conduct conciliation and mediation in those a case and where the Commission can draw guidance from.
384. The HKHRC or other relevant bodies should have the power to conduct conciliation and mediation, and these functions should be performed by a unit independent from advocacy and promotional services within the commission. Conciliation and mediation services should not be extended to freestanding human rights issues.

2.3.9. Remedies

385. In general, there is no universally applicable rule on remedies. Remedies vary widely across jurisdictions.⁴³⁸

⁴³³ Handbook paragraph 256.

⁴³⁴ Assessing the Effectiveness of NHRIs at 21.

⁴³⁵ Human Rights and Equal Opportunity Commission Act 1986 (Australia), Section 20(1)(b).

⁴³⁶ Human Rights and Equal Opportunities Commission Bill 1994, Sections 22(1)(d) and 36(1)(a),(b).

⁴³⁷ Id, Section 29(2).

⁴³⁸ Handbook, paragraphs 268-9.

2.3.9.1. Power to make determinations and enforceable order

386. In cases that concerns equality rights guaranteed by domestic antidiscrimination legislation, most NHRIs issue enforceable “anti-discrimination” orders, and subsequently take action to enforce them. These orders usually involve a reversal of a particular administrative decision, a public apology or an award of damages or compensation.
387. In cases that concerns freestanding human rights (human rights guaranteed by the international human rights instruments, but yet to be incorporated into domestic law), a majority of NHRIs do *not have the judicially binding power of the courts to enforce* their recommendation. They cannot make binding orders after investigations or public hearings. Their decisions are generally in the form of recommendations. They recommend settlements of disputes which are not legally binding. This is the case for Australia, Canada, Ghana, India, Latvia, Mexico, New Zealand and South Africa.⁴³⁹
388. For example, Suhakam has no powers of enforcement. Where it finds an infringement on human rights, it refers the matter and its findings, with any recommendations, to the relevant authority or persons.⁴⁴⁰
389. Section 8(2) of the Commission on Human and Administrative Justice Act 1993 (Act 456) empowers the Ghana Human Rights Commission to bring an action before any court and seek remedy if its recommendations have not been implemented after three months.
390. In considering this enforcement provision, the Ghana Court of Appeal in *The Ghana Commercial Bank* stated that:-
- “In my view, the High Court had no jurisdiction to usurp the functions of CHRAJ or to re-open the matter de novo. Its duty in relation to the originating Notice of Motion was simply to grant an Order compelling the Respondent herein to implement the decision of the Commission unless it was clearly in breach of the principles of natural justice or otherwise unjustified in law and/or in fact.”⁴⁴¹
391. NHRIs shall remain distinct from the court; otherwise, confusions of remit and duplication of work between the courts and the NHRIs will result. After all, the court should have the final say on whether the actions committed by the perpetrators are compatible with the legislations. As the JCHR said:-
- “We do not believe the commission we propose should have any adjudicative function in relation to complaints of violation of rights. In respect of Convention rights, these must remain a matter for the courts to determine. In respect of other rights not directly enforceable in law, it would in our view be inappropriate to

⁴³⁹ Power and Functions, Chapter 1 at 26.

⁴⁴⁰ HRCMA, §13(2).

⁴⁴¹ *Commissioner of CHRAJ v. The Ghana Commercial Bank*, Suit No. CA/165/2000 (20 December 2001).

hand a quasi-judicial function in this way to a body which is not a court, a legislative body or a branch of the Executive.”⁴⁴²

392. Different from most NHRIs, the Ugandan Human Rights Commission acquires quasi-judicial status, as it may, under Section 53(2) of the Constitution, order a release of a detained person, payment of compensation or any other legal remedy or redress. Section 53(3) provides that orders made by the commission can be appealed to the High Court.⁴⁴³
393. Currently in Hong Kong, the three antidiscrimination ordinances provide the EOC the power to issue enforcement notice to require any legal person not to commit any unlawful discriminatory acts.⁴⁴⁴ For certain kinds of unlawful discriminatory act including publishing discriminatory advertisements, giving instruction to discriminate, inducing or attempting to induce other person to discriminate, the commission issues a fine not exceeding HKD \$10,000 for first offence, or HKD \$30,000 for a subsequent offence.⁴⁴⁵
394. In the human rights bill 1994, the proposed commission may furnish a report to the Attorney-General in relation to a freestanding human rights case after inquiry.⁴⁴⁶ For antidiscrimination cases and the BORO cases, on the other hand, the proposed commission may issue a binding determination after conducting inquiries or conciliation.⁴⁴⁷
395. As such, the 1994 Bill in Hong Kong distinguishes the treatment and remedies available for freestanding human rights violation and the discrimination or the BORO cases. Distinguishing the two kinds of cases can have the benefits of maintaining a clear remit between the courts and the HKHRC or other relevant bodies. After all, it should be the role of the court to declare what practices or acts are unconstitutional.

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| 396. The HKHRC or other relevant bodies should issue binding decisions on cases that are found that to have violated the BORO, and the antidiscrimination laws, or any other legislation with reference to the Basic Law. |
| 397. The HKHRC or other relevant bodies should not have the power to issue binding determination on freestanding human rights cases. |

⁴⁴² JCHR 6th Report, paragraph 140.

⁴⁴³ Ugandan Constitution 1995, Articles 53(2) and 53(3).

⁴⁴⁴ Disability Discrimination Ordinance, Section 73(2)(a); Family Status Discrimination Ordinance, Section 55(2)(a); Sex Discrimination Ordinance, Section 77(2)(a).

⁴⁴⁵ Disability Discrimination Ordinance, Section 78(6); Family Status Discrimination Ordinance, Section 60(6); Sex Discrimination Ordinance, Section 82(6).

⁴⁴⁶ The Human Rights and Equal Opportunities Commission Bill 1994, Section 32.

⁴⁴⁷ Id, Sections 36(1)(a) and 36(1)(b).

398. The recommendations of the HKHRC or other relevant bodies should be enforceable by the courts. ⁴⁴⁸ Their decisions should be subjected to judicial review. ⁴⁴⁹

2.3.9.2. Interim order

399. The ability of NHRIs to order an interim injunction during the course of investigation is extremely valuable; as this power avoids the position of the complainants to be worsened in the course of investigations.⁴⁵⁰ There is no hard and fast rule concerning the criteria of the grant of interim relief, noting that an interim relief does not affect the right to legal actions.
400. In India, interim relief is available to “serious violations of human rights such as death in custody; torture; rape; illegal detention; kidnapping; destruction of private property; insults to personal dignity; and negligence by police, security forces or government agencies qualify for payment of immediate compensation.”⁴⁵¹
401. Under Section 24, the CEHR can apply for an injunction where it thinks that a person is likely to commit an act or omission contrary to a provision of the equality enactments *without the prior ruling from a court or tribunal*. This provision strengthens the ability of the CEHR to tackle persistent discrimination in a timely manner. However, the Equal Opportunities Commission in the UK expressed concern that the CEHR could only apply for an injunction to a county court and could not apply to a tribunal, where applications are more successful.⁴⁵²
402. Currently in Hong Kong, neither the three antidiscrimination ordinances or the human rights bill 1994 provide the EOC any power to issue interim injunction.

2.3.10. Power to recommend, power to referral⁴⁵³

403. Without the power to make a binding decision, NHRIs *should be empowered to refer the matter to another body for consideration or action* where the violator fails to follow the

⁴⁴⁸ Best Practice at 25.

⁴⁴⁹ Id at 29.

⁴⁵⁰ Handbook, paragraph 278.

⁴⁵¹ *Human Rights Commissions*, “A Citizen’s Handbook, 2nd Edition” (New Delhi: Matrix, 2006) ISBN: 81-88205-31-1 at 32.

⁴⁵² Equal Opportunities Commission (UK), “Equality Bill: 19th October Lords Report Stage” (October 2005).

⁴⁵³ Handbook, paragraphs 273-6.

settlements of the conciliation and mediation, including to the courts and the prosecutions.⁴⁵⁴ This empowerment is not controversial.⁴⁵⁵

2.3.11. Power to provide direct legal advice and assistance in strategic cases

404. The Best Practice suggest:-

“Courts should permit NHRIs to provide assistance to individuals seeking to redress grievances through the courts.”⁴⁵⁶

It is uncontroversial to empower the HKHRC or other relevant bodies to the power to provide direct legal advice and assistance in discrimination cases that are prohibited by anti-discrimination legislation.

405. In Northern Ireland, the Commission assists individual applicants raising their rights under the European Convention on Human Rights in either equality or freestanding human rights cases.⁴⁵⁷ There, the main problem of widely defining human rights is the potential for opening a floodgate of complaints alleging human right violation, which ultimately attract a budgetary crisis.
406. NHRIs therefore have to develop a strategy around priority areas when offering legal assistance. If not handled with care, however, a strategic approach can generate public disquiet that complainants are not treated equally.⁴⁵⁸
407. Canadian Human Rights Act Review Panel recommended the CHRC to continue to provide assistance to claimants by drafting their claims, putting together the necessary supporting material, and legal assistance.⁴⁵⁹
408. Under Section 28(12) of the Equality Act, the CEHR may assist an individual who is or may become party to legal proceedings under existing equality legislation or Community law.⁴⁶⁰ Assistance may take the form of legal advice, legal representation, facilities for the settlement of a dispute, or any other form of assistance.

⁴⁵⁴ Best Practice at 24.

⁴⁵⁵ JCHR 11th Report, paragraph 63.

⁴⁵⁶ Best Practice at 29.

⁴⁵⁷ Stephen Livingstone, “Analysis of the Northern Ireland Peace Agreement Academic Viewpoints: The Northern Ireland Human Rights Commission,” (1999) 22 *Fordham International Law Journal* 1465 at 1490.

⁴⁵⁸ *Id.*

⁴⁵⁹ CHRA Review, at 4 Recommendation 41.

⁴⁶⁰ Namely the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, Pt 2 of the Equality Bill on religious discrimination, the Employment Equality (Sexual

409. The rationale for limiting to equality rights but not freestanding human rights cases are (1) the Commission will be overwhelmed by a host of individual cases; and (2) all European Convention's rights which explicitly requires public authorities to act compatibly with human rights,⁴⁶¹ can be raised and enforced in any court or tribunal. Legal aids are generally available for judicial review, but not in proceedings before the employment tribunal which constitutes most of the discrimination cases.⁴⁶² As such, the JCHR concludes that there is not for the time being a need for "any express new power for CEHR to support individual freestanding human rights cases under the HRA."⁴⁶³
410. Opinion amongst those submitting evidence to the JCHR inquiry are divided on this issue. The Law Society and British Institute of Human Rights, for example, broadly favoured the CEHR to support individual cases, whereas others, including Justice and Liberty, warned against the dilution of the Legal Service's Commission. Liberty, for instance, warned "the existence of a litigation function in the commission [might be] used as a justification for further inroads into the ability of private practitioners and non-governmental organizations to take cases".⁴⁶⁴
411. In combined discrimination and human rights cases, the JCHR regarded it "quite wrong" for the CEHR to abandon a case where the facts continued to disclose a breach of human rights even if the founding equality argument fails.⁴⁶⁵ The EOC and the CRE previously in force were used to sponsor test cases, as they have power to give applicants direct assistance in cases raising "a question of principle".⁴⁶⁶
412. The human rights bill 1994, similar to the Equality Act 2006 in the UK, does not provide direct legal assistance to complaints in freestanding human rights cases.⁴⁶⁷
413. Whether the HKHRC or other relevant bodies should provide direct legal assistance to complaints in freestanding human rights violations depends on its resources and the relationship with the Legal Aid Department. It should be of course preferable if the HKHRC is allocated sufficient resources which enables it to assist most cases of human rights violations.

414. However, given the complication of the issue, this report remains open to the above issue. The HKHRC and Legal Aid Service should work closely in to avoid duplication of work.

Orientation) Regulations 2003 (SI 2003/1661) and the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), as defined in Equality Act, Section 33.

⁴⁶¹ Human Right Act 1998 (UK), Section 6(3)(a).

⁴⁶² JCHR 11th Report, paragraphs 64-66.

⁴⁶³ Id, paragraph 68.

⁴⁶⁴ Id, paragraph 65.

⁴⁶⁵ Id, paragraph 76.

⁴⁶⁶ JCHR 11th report, paragraph 76.

⁴⁶⁷ The Human Rights and Equal Opportunities Commission Bill 1994, Section 51.

The Commission should anticipate the potential of developing a memorandum of cooperations between two organizations.⁴⁶⁸

2.3.12. *The power to bring cases in its own name*

415. As Best Practice suggests, “NHRIs should be accorded standing to bring complaints to court in their own right.”⁴⁶⁹

416. Again, it is uncontroversial whether the institutional framework should have the power to take cases and to seek judicial review in its own name in antidiscrimination cases filed under the three discrimination ordinances and any other piece of domestic legislation.

417. As such, the powers to bring cases in its own name currently enjoyed by the EOC in Hong Kong should be transferred to the new institutional framework.⁴⁷⁰

418. The controversy lies at whether the HKHRC or other relevant bodies can bring actions and undertake judicial reviews in freestanding human rights cases.

419. Acting on behalf of test litigants, compared to intervention in legal proceedings, is time consuming and often expensive. Therefore, the main role of the CEHR is “to forestall future potential breaches of people’s rights rather than seek redress for past individual breaches.”⁴⁷¹ “It should not be able to initiate in its own name “test cases” or representative cases for example seeking exemplary damages or other remedies for past breaches.” This comment was subsequently endorsed by the UK government.⁴⁷²

420. Under Section 30 of the Equality Act, the CEHR may initiate or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the CEHR that the proceedings are relevant to the exercise of its functions. This means that CEHR may undertake a judicial review on freestanding human rights cases. Moreover, the CEHR need not satisfy the victim test under Section 7 of HRA.⁴⁷³

421. Initially the government resisted granting the CEHR such power for the fear of a potential flooding of litigation. However, the JCHR strongly commented that the CEHR will be

⁴⁶⁸ JCHR 11th report, paragraph 70.

⁴⁶⁹ Best Practice at 29.

⁴⁷⁰ Disability Discrimination Ordinance, Section 81(3); Family Status Discrimination Ordinance, Section 63(3); Sex Discrimination Ordinance, Section 85(3).

⁴⁷¹ *Id.*, paragraph 89.

⁴⁷² UK Government’s Response, paragraph 23.

⁴⁷³ Equality Act (UK), Section 30.

“neutered” without the power to initiate judicial review.⁴⁷⁴ In addition, the existing equality commissions might obtain a declaration from the specialized Administrative Court as to the law and its application, without resorting to legal proceedings filed by victims of breaches of the Sex Discrimination or Race Relations Acts.⁴⁷⁵ Such power has been proven cost-effective and proportional.

422. At the final stage of debate, the Government conceded that judicial review powers were important and would neither undermine the victim test in the Human Rights Act nor lead to excessive litigation. As Lord Falconer said:-⁴⁷⁶

“[T]he commission may act only if there is or would be one or more victims of the unlawful act--the effect being that there should still be a victim as before, but that the commission may bring the case. This amendment will therefore not create any new opportunities for litigation under the Human Rights Act, or permit purely hypothetical cases to be brought. The amendment is not about making the commission a major litigating body in respect of human rights. Its role remains essentially promotional ... [A] further important restriction [is] that no award of damages may be made to the commission ... [G]ranting the commission a limited power such as this allows it to bring strategic cases to clarify important points of law. In many such cases, the facts of the case will be agreed--perhaps as a result of an inquiry--but the legal framework will be in dispute. It is more efficient and more cost effective for the commission to be able to seek a clear declaration on a point of law in such circumstances, instead of requiring a victim to bring a case in their own right and for the commission then to intervene.”

423. On the other hand, the Canadian, New Zealand and Australian HREOC, Belgian CECLR and the Dutch anti-discrimination bureaux may all bring litigation in their own name.⁴⁷⁷
424. The absence of provision enabling the Northern Ireland Human Rights Commission to bring court proceedings in its own name has been regarded as one of “the most glaring omissions” of the Good Friday Agreement. Although Section 69(5)(b) of the Northern Ireland Act provides the Commission with the power to initiate proceedings on its own⁴⁷⁸, Section 71(1) stipulates that nobody can initiate proceedings alleging a breach of ECHR rights, unless they can show themselves to be a “victim”.⁴⁷⁹ The latter clause limits the

⁴⁷⁴ JCHR 11th Report, paragraph 91, *supra* note 202; JCHR, “Seventeenth Report, Review of International Human Rights Instruments” (2004-05 HL 99; HC 264), paragraph 34.

⁴⁷⁵ *Joint Committee on Human Rights*, Fourth Report, Legislative Scrutiny: Equality Bill (2005-06 HL 89; HC 766), paragraph 19.

⁴⁷⁶ Hansard, HL cols 804-805 (19 October 2005).

⁴⁷⁷ UCL Survey at 22.

⁴⁷⁸ Northern Ireland Act, 1998, Chapter 47, Section 69(5)(b).

⁴⁷⁹ *Id.*, Section 71(1).

remit of the Northern Ireland Commission in initiating legal proceedings, either a first instance case or a judicial review on its own.

425. The human rights bill 1994 only allowed the Commission to commence any legal proceedings in its own name in relation to violations against the BORO and the Equal Opportunities Bill.⁴⁸⁰ It does not allow the Commission to commence any legal proceedings in its own name in relation to freestanding human rights cases.

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| 426. The HKHRC or other relevant bodies should have, at least, the power to bring court actions in its own name in both judicial reviews and other cases against private entities. |
| 427. Where sufficient resources are available, the HKHRC or other relevant bodies should bring court actions in its own name in freestanding human rights cases. |

2.3.13. Intervention in legal proceedings

428. The Best Practice says that:-

“Courts should accord NHRIs official status as a friend of the court” [and] the rights to join as a party in relevant proceedings.”⁴⁸¹

429. The human rights commissions in Australia, Canada, India and Northern Ireland can intervene in legal proceedings brought under human rights legislation or which otherwise involve human rights issues over which the institution has jurisdiction⁴⁸², usually as *amicus curiae*, a “friend of the court”.

430. In the absence of directly applicable domestic human rights legislation to intervene in a legal proceedings, the Handbook say that,

“the national institution may need to show that human rights considerations are involved and ... there is a basis in domestic law for application of international human rights standards”⁴⁸³

431. The Northern Ireland Act makes no reference to the Commission’s power to intervene as *amicus curiae* in any proceedings before the courts. In 1998, the UK courts have shown

⁴⁸⁰ The Human Rights and Equal Opportunities Commission Bill 1994, Section 52.

⁴⁸¹ Best Practice at 29.

⁴⁸² Handbook, paragraph 295.

⁴⁸³ Id, paragraph 296.

an increasing willingness to accept amicus briefs at the appellate stage.⁴⁸⁴ In 2002, the House of Lords held that the Northern Ireland Commission has all the powers to intervene in court proceedings whereby the issues involved fall within the Commission's jurisdiction.⁴⁸⁵

432. In Australia, although used sparingly, each HREOC Commissioner may intervene in any discrimination complaint commenced in the Federal Court, which either would affect the human rights of others, or would be in the public interest for the Commissioner to act.⁴⁸⁶

433. A careful selection of cases is required for effective functioning of NHRIs. The Australian HREOC has set a good example in selection of cases for intervention and thereby the HREOC's applications for leave to intervene have usually been well received. According to Ian Clyde, the Chairman of Consumer Affairs Victoria and Simeon Beckett, the spokesman for Australian Lawyers for Human Rights:-

“In the now famous Teoh case, Australia's highest appellate court, the High Court, acknowledged the benefit of HREOC's focused intervention in the course of reaching a conclusion on the effect of Australia's ratification of the Convention on the Rights of the Child (CROC). *The intervention was based on the human rights intervention function in the HREOC Act and HREOC relied on the issues raised by Australia's ratification of the CROC as the lever to obtain leave.*

Most of HREOC's more recent interventions have targeted human rights issues other than discrimination: examples include the sterilization of young women with intellectual disabilities and the rights of children whose parents contemplate life-threatening, non-emergency surgical procedures for their child. As the law becomes increasingly complex with an overlay of international and regional human rights regimes, courts welcome sophisticated interventions from specialist human rights bodies. That has certainly been the experience in Canada and the United States and is increasingly the experience in Australia. In fact, HREOC has on at least one occasion actively been encouraged by the judiciary itself to consider applying for leave to intervene.”⁴⁸⁷ [emphasis added]

434. In 1997 and 1998 the Australian Government announced the Human Rights Legislation Amendment Bill (one and two) and proposed a change to the Commission's power to intervene in court proceedings. Under the proposal, the Commission must seek the

⁴⁸⁴ See for example, *R v. Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Ugarte* (Amnesty International Intervening) (1998) 4 All. E.R. 897.

⁴⁸⁵ *Re Northern Ireland Human Rights Commission* [2002] UKHL 25; [2002] N.I. 236.

⁴⁸⁶ In Australia, the Human Rights Legislation Amendment Act No 1 created the role of amicus curiae for all Commissioners in proceedings under the amending legislation that are before the Federal Court in 1999. The Human Rights and Equal Opportunity Commission Act 1986, Section 46, supra note 320; The Human Rights Legislation Amendment Bill 1998 (Cwlth).

⁴⁸⁷ Ian Clyde and Simeon Beckett, “A Human Rights Commission for the United Kingdom: The Australian Experience,” (2000)2 *European Human Rights Law Review* 131 at 144.

Attorney-General's approval before intervention.⁴⁸⁸ During the Senate debate, Mr. Richard Grant Moss, the Deputy Secretary of Attorney-General's Department explained that:-

“the primary purpose of this measure...is the government's desire that the commission's functions and emphasis be refocused and that, as part of that, it should concentrate its attention more on the amicus curiae role... than on the intervention role, which really presupposes that the intervener will become a party to the action and therefore will argue a particular viewpoint.”⁴⁸⁹

Such a proposal attracted widespread criticism and was subsequently rejected.⁴⁹⁰

435. Australian Human Rights Commission Legislation Bill 2003 reintroduced the AG's veto power over the intervention of HREOC. The Human Rights Council of Australia,⁴⁹¹ the New South Wales Councils for Civil Liberties and the University New South Wales Councils for Civil Liberties⁴⁹² strongly opposed such amendments because the independence of the HREOC would be severely hampered.
436. The CEHR possesses the power to intervene in freestanding human rights cases⁴⁹³. According to the CEHR, the power to intervene in “pure” human rights cases should be rarely exercised and form only a small part of the overall litigation strategy. However, interventions should be “of a strategic nature” and “closely tied to the CEHR's core aims”. Intervention should help to raise an important matter of principle concerning human rights and public policy.⁴⁹⁴
437. Malaysia has not ratified key human rights instruments such as the ICCPR, the ICESCR and the ICERD. However, the Commission on Human Rights' ability to intervene by the special procedures clearly illustrates that the ratification of human rights instruments is not a prerequisite for intervention.
438. The South African Human Rights Commission “may bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons.”

⁴⁸⁸ *Human Rights and Equal Opportunity Commission (Australia)*, “Annual Report 1997-98” (Sydney: Public Affairs Unit, 1998) at 14; *Human Rights and Equal Opportunity Commission (Australia)*, Annual Report 1998-99 (Sydney: Public Affairs Unit, 1999) at 12.

⁴⁸⁹ Senate, Commonwealth of Australia, “Official Committee Hansard: Legal and Constitutional Legislation Committee, Reference: Human Rights Legislation Amendment Bill (No. 2) 1998,” (5 August 1998) at 20.

⁴⁹⁰ *Id.*

⁴⁹¹ *Human Rights Council of Australia*, “Submission to the Senate Legal and Constitutional Committee on the Australian Human Rights Commission Legislation Bill 2003, (2003), available at <http://www.hrca.org.au/hreoc%20sub.htm>

⁴⁹² *New South Wales Councils for Civil Liberties and the University New South Wales Councils for Civil Liberties*, “Joint Submission to AHRC Bill Inquiry,” (April 2003), available at <http://www.nswccl.org.au/docs/pdf/CCL%20AHRC%20Bill%20Submission.pdf> at 3.

⁴⁹³ UK Government Response, paragraph 22.

⁴⁹⁴ JCHR 11th report, paragraph 80.

In the case of *Irene Groortboom & others*, the Commission acted as *amicus curiae* in a case involving 510 children and 390 adults who were rendered homeless as a result of eviction from their informal homes situated on private land earmarked for formal low-cost housing. The Commission had applied to the High Court for an order requiring the government to provide them with adequate basic shelter until they obtained permanent accommodation. The application against the Government was granted.⁴⁹⁵

439. The Scottish Commissioner for Human Rights has power to intervene in a court case where a human rights issue arises at the request of, or with the permission of, the court in question.⁴⁹⁶ However, such power is restricted to civil proceedings. Some respondents to the Executive's consultations argued that the Scottish Commissioner should be able to intervene in criminal as well as civil cases, because important human rights issues arise in criminal cases as frequently as in civil cases, if not more so.⁴⁹⁷

440. In Hong Kong, the human rights bill 1994 also gave the proposed Commission the right to intervene in court proceedings by leave of the court.⁴⁹⁸

441. The HKHRC or other relevant bodies should be able to intervene in equality as well as freestanding human rights cases. Given intervention is convenient and cost-effective, the HKHRC or other relevant bodies should actively exercise this function in strategic cases.
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⁴⁹⁵ Emile Francis Short at 130.

⁴⁹⁶ Scottish Commissioner for Human Rights Bill, Section 11.

⁴⁹⁷ *Scottish Executive*, "The Scottish Human Rights Commission: Analysis of Consultation Responses," (2004a), available at <http://www.scotland.gov.uk/library5/social/hrcacr00.asp>

⁴⁹⁸ Anna Wu's Summary at 4.

Chapter III. Effectiveness

442. The Paris Principles have been widely accepted as the benchmark for assessing the effectiveness of NHRIs. Nevertheless, while setting out the basic requirements of NHRIs, the Paris Principles do not provide sufficient legal basis for the existence of NHRIs, guidances of how to attain quasi-jurisdictional competence, and measures to ensure the independence and effectiveness of NHRIs.⁴⁹⁹
443. As such, the UN and regional institutions have attempted to strengthen and to elaborate on the Paris Principles for several times. The results include the *Handbook*, *Best Practice*, the *Professional Training Series No. 12*, and *Assessing the Effectiveness of NHRIs*.
444. This Chapter aims to enhance the effectiveness of the HKHRC or other relevant bodies. They should move beyond the Paris Principles to ensure their independence and effectiveness.⁵⁰⁰
445. According to the Handbook, effectiveness factors include independence, defined jurisdiction and adequate powers, accessibility, cooperation, operational efficiency and accountability.⁵⁰¹

1. INDEPENDENCE

446. Independence is the most important effectiveness factor.⁵⁰² Effective NHRIs must act independently of the Government, party politics, and all other entities and situations. In turn, independence can be achieved through legal and operational autonomy, financial autonomy, appointment and dismissal procedures, and the composition of personnel.⁵⁰³

1.1. LEGAL AND OPERATIONAL AUTONOMY

⁴⁹⁹ In an interview with Ravi Nair by Chris Sidoti, former Federal Human Rights Commissioner of Australia and currently the national spokesperson for the Sydney-based Human Rights Council of Australia, said that: “As I have indicated, the Paris Principles are very general statements; they do not constitute a clear, specific set of criteria or code for national institutions.” Voice of the Asia-Pacific Human Rights Network, ‘NHRIs will always need to criticise governments,’ *Human Rights Features* (18 March 2002 - 26 April 2002), available at <http://www.hrdc.net/sahrdc/hrfchr58/Issue6.htm#Dark,%20dark>

⁵⁰⁰ Voice of the Asia-Pacific Human Rights Network, NHRIs: Need to go beyond the Paris Principles, *Human Rights Features* (18 March 2002 - 26 April 2002), available at <http://www.hrdc.net/sahrdc/hrfchr58/Issue6.htm#NHRIs>

⁵⁰¹ Handbook, paragraph 6.

⁵⁰² Best Practice at 5.

⁵⁰³ Handbook, paragraphs 6-8.

1.1.1. Mode of establishment

447. The legal instruments establishing NHRIs should be, at best, the Constitution (as in Fiji, Ghana, Georgia, Malawi, South Africa, Uganda and Zambia); or at least, a statute (as in Australia, Benin, Canada, Chad, Denmark, India, Korea, Latvia, Mexico, New Zealand, Senegal, Sri Lanka, Togo, Nepal, Rwanda and Uzbekistan).⁵⁰⁴
448. Establishment through a presidential decree, which can be amended and repealed easily, is undesirable.⁵⁰⁵
449. NHRIs in Cameroon, France, Indonesia, Kazakstan, Kyrgyzstan and Nigeria were established by presidential decrees. According to the Danish Institute for Human Rights, no evidence has shown institutions established by a presidential decree necessarily less independent than those established by parliament. However, without the passage of a parliamentary act, these institutions may not enjoy majority supported of parliament.⁵⁰⁶

450. Given the complicated process of amending the Basic Law, the HKHRC or other relevant bodies should be established by a statute.

1.1.2. Line of reporting duty

451. The Handbook suggests NHRIs to answer directly to the legislature or the Head of the State. According to the Best Practice, NHRIs should report to the legislature.⁵⁰⁷ Its internal operation should not be subject to any reviewing mechanism by other agents unless reasonable suspicion of serious misconduct arises.⁵⁰⁸
452. To such a suspicion arisen, the legislature or the Head of the State should establish a special committee to investigate that particular event.
453. The Scottish Commissioner for Human Rights, similar to the Commissioner for Public Appointments in Scotland, the Scottish Public Services Ombudsman, the Scottish Parliamentary Standards Commissioner, the Scottish Information Commissioner and the Commissioner for Children and Young People, are accountable to the Parliament.⁵⁰⁹

⁵⁰⁴ Constitution of the Republic of the Fiji Islands 1997, Section 42; Constitution of Ghana 1992; Human Right and Equal Opportunity Commission Act 1986 (Australia), Section 7.

National Human Rights Commission Act of Republic of Korea, Act No. 6481, Article 1.

⁵⁰⁵ Best Practice at 10.

⁵⁰⁶ Power and Functions, Chapter 1 at 15.

⁵⁰⁷ Best Practice at 28.

⁵⁰⁸ Handbook paragraph 70.

⁵⁰⁹ Scottish Commissioner for Human Rights Bill, Sections 1, 9, 12–13 and Schedule 1, paragraph 13.

454. In Japan, the Government submitted the proposals to establish the Human Rights Committee of in March 2002. The proposed watchdog was not independent and was placed under the jurisdiction of the Justice Ministry. Hence, the bill triggered an outpouring of criticism from the public for violating the Paris Principles and was subsequently withdrawn in October 2003.⁵¹⁰
455. In Taiwan the submissions from the NGOs, the Kuomintang, and the government all considered the establishment of the National Human Rights Commission *under the Office of the President* a guarantee of independence. According to the White Paper of Taiwan:-
- “However, this may be considered a transitional arrangement; if future constitutional amendments alter ... If a presidential system is adopted, it may remain under the Office of the President; on the other hand, if we move towards a parliamentary system, it may perhaps need to be situated under the Cabinet. In any case, without a doubt the NHRC must maintain its independent status.”⁵¹¹
456. In the UK, the CEHR is a non-departmental public body, meaning that the CEHR is accountable to the Secretary of State for the propriety of their use of public money, and has to request the approval from the Secretary of the State for numbers of commissioners and sometimes to the acquisition of property. The Government is “confident that this will provide the CEHR with an effective and appropriate degree of autonomy from the Government of the day.”⁵¹² However, the JCHR comments that:-
- “The majority of respondents to our consultation agreed that the new commission should report to Parliament rather than Government, and most cited the Paris Principles in support of this position.”⁵¹³
457. The JCHR gave compelling reasons for its preference to establish the CEHR under a model similar to that of National Audit Office, the Civil Service Commissioners:-
- “First and most fundamental is the nature of the relationship between human rights and the State...Most NDPBs (Non-Departmental Public Body) are dealing with non-state actors (ie principally the various regulators of things such as the water suppliers, the railway operators, the energy industry, the telecommunications industry or the broadcast media) or what might be termed common property (for example the national heritage in the form of museums and galleries, the built environment, the natural environment, etc.). Even the existing anti-discrimination commissions have traditionally been involved as much, if not more, with the private rather than the public sphere...
- Second, whatever the reality of the independence of well-respected bodies like the discrimination commissions, their accountability structure does not give the

⁵¹⁰ Kosuke Takahashi, “Japan’s ‘rights’ act to muzzle the media” (17 March 2005), available at <http://www.atimes.com/atimes/Japan/GC17Dh01.html>

⁵¹¹ Human Rights Policy White Paper (Taiwan), Chapter 2.

⁵¹² UK Government Response, paragraph 26.

⁵¹³ JCHR 11th Report, paragraph 109.

appearance of full independence, and may accordingly not be judged fully to comply with the Paris Principles...

Third, the nature of the constitutional settlement could be argued to indicate that, on the matter of the protection of fundamental rights and freedoms, Parliament should be involved more fully than it is with a typical regulator or enforcement body. It is clear that very few NDPBs have developed a close working relationship with Parliament...

Fourth, and pragmatically, the nature of the new commission will mean that it has responsibilities ranging across those of all Government departments.”⁵¹⁴

458. Currently in Hong Kong, the EOC, as far as its finance is concerned, directly reports to the Chief Secretary for Administration, who would later on table the financial and annual report of the Commission in the Legislative Council.⁵¹⁵ Similar arrangement is prescribed under the human rights bill 1994.⁵¹⁶

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| 459. The HKHRC or other relevant bodies should directly report to the Legislative Council and should be a genuinely independent body, but not a Non-departmental public body. |
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1.1.3. Operational autonomy

460. NHRIs should issue operational procedures without any requirement subject to external modifications.⁵¹⁷ For example, the CEHR’s Board have the power to establish committees to support or assist in any of its functions, which may be advisory or have delegated powers. The board should be allowed to appoint strand-specific or other committees as discretion requires.⁵¹⁸
461. Under the Equality Act 2006, the Secretary of State has a duty to ensure that the CEHR is under as few constraints as possible in determining its activities, timetables and priorities.⁵¹⁹ The original version of the Equality Bill provided the Secretary of State the power to direct the CEHR to issue codes of conduct, to conduct inquiries and investigations, and to assess compliance with equality provisions in public sectors.⁵²⁰ These direction-making powers were removed in the amendment following strong criticism by the JCHR. The Lord Chancellor noted that the Secretary of State may still invite the commission to carry out certain work rather than using compulsory powers.⁵²¹

⁵¹⁴ Id, paragraphs 121-4.

⁵¹⁵ Sex Discrimination Ordinance, Schedule 6, Section 18.

⁵¹⁶ Human Rights and Equal Opportunities Commission Bill 1994, Sections 19-21.

⁵¹⁷ Handbook paragraph 71.

⁵¹⁸ Fairness for All, paragraph 5.14.

⁵¹⁹ Equality Act (UK), Schedule 1, Part 4, Section 42(3).

⁵²⁰ Id.

⁵²¹ Hansard (UK), HL col.754 (19 October 2005).

462. It is submitted that the HKHRC or other relevant bodies should enjoy full-fledge operational autonomy and the Executives cannot issue any directive or administrative order to the HKHRC or other relevant bodies which affect the independence of the overall institutional framework.

1.2. FINANCIAL AUTONOMY

463. According to the Handbook, “nothing in the enabling legislation relating to fiscal autonomy should require the institution to act in accordance with the directives of the national government or any of its department or agencies.”⁵²² NHRIs should be entitled to determine their own spending within the allocated budget.

464. Effective use of resources within the Commission should be ensured by annual public financial reporting and independent auditing.⁵²³

1.2.1. Source of funding

465. The source of funding must be specified in the legislation and should be drawn from the central budget, with the amount of funds subject to the direct approval of the legislature. The funding of NHRIs *must not be linked* to any budget of the government bureau or ministry.⁵²⁴ The commission must draft the annual budget on its own without seeking approval from the government.

466. In Mongolia, the *Great Hural* (Parliament) is required to “approve and reflect specifically the budget of the Commission in the State Consolidated Budget on the basis of the latter's proposal” and ensure that the Commission has adequate funding.⁵²⁵

467. Under the Scottish Commission for Human Rights Bill the Scottish Parliament is responsible for appointing the Commissioner and Deputy Commissioners and managing the selection process.⁵²⁶

468. The Fiji Islands Government directly funds the work of the Fiji Human Rights Commission. So far, budgetary support for the Fiji Human Rights Commission has been inadequate. Shaista Shameem, the Director of the Fiji Human Rights Commission, urges that “the government should be giving money to us not through the Ministry of Finance

⁵²² Best Practice at 15.

⁵²³ External scrutiny should be limited to the review and evaluation of financial report. Handbook, paragraph 74; Best Practice at 13.

⁵²⁴ Handbook paragraph 75; Best Practice at 28. It's the legislature to approve the budget proposals.

⁵²⁵ Law of the National Human Rights Commission of Mongolia 2000 (Mongolia) Article 21, setting out a range of economic and legal protections to enhance the independence of Commissioners.

⁵²⁶ Scottish Commission for Human Rights Bill, Section 1(2).

- budget, but through the consolidated fund which should come directly from parliament”.⁵²⁷
469. Similarly, the South African Human Rights Commission criticized the budget of the Commission has been given a lower priority than other activities of the Ministry.⁵²⁸
470. Even worse, the Ghana Human Rights Commission has to apply to the government for a particular project. The Government can always refuse to budge the project or cut the budget “after a lengthy and cumbersome vetting process undermining the Commission’s independence”.⁵²⁹
471. In the UK, “Fairness for All” proposes that CEHR should operate within the “standard framework” of executive non-departmental public bodies, where the CEHR would negotiate their budgets with their sponsoring Department, and have their funds voted by Parliament as part of that Department’s Estimate.⁵³⁰ An annual report will be presented to both Houses of Parliament, which in turn may be scrutinized by a Select Committee.⁵³¹
472. However, the JCHR favours the “best practice” model of financial independence, in which there is no direct ministerial control of funding and a new statutory committee for approving and overseeing the CEHR’s budget and strategic plan, and also recommending Commissioners and the terms of reference to the Head of the State would be established.⁵³² JUSTICE also favours the model suggested by the JCHR and considers that the JCHR is the appropriate committee to oversee the activities and finances of CEHR.⁵³³
473. The UK Parliament voted in favour of the non-departmental public body framework⁵³⁴. The JCHR has given only qualified support to the decision and urged the government not to rule out the possibility of transforming the constitutional basis of the Commission in the future if the non-departmental public body framework is found to be ineffective.⁵³⁵
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⁵²⁷ Voice of the Asia-Pacific Human Rights Network, “In at the deep end: The Fiji Human Rights Commission,” *Human Rights Features, Special Weekly Editoin for the Duration of the 58th Session of the Commission on Human Rights*, (18 March 2002 - 26 April 2002), available at <http://www.hrdc.net/sahrdc/hrfchr58/Issue6.htm#Fiji%20Human%20Rights%20Commission>

⁵²⁸ Pityana, B., “National Institutions at work: The case of the South African Human Rights Commission,” British Council Seminar, Belfast, (May 1998) in *National Human Rights Institutions: Articles and working papers*, Birgit Lindsnaes, Lone Lindholt, and Kristine Yigen (ed.), ISBN: 87-90744-18-7 (Denmark: The Danish Centre for Human Rights, 2001).

⁵²⁹ Andrew Drzemczewski at 13.

⁵³⁰ Fairness for All, paragraph 5.19.

⁵³¹ Id, paragraph 5.20.

⁵³² JCHR 11th Report, paragraphs 126-137.

⁵³³ JUSTICE (UK), “A Human Rights Commission: Structure, Functions and Powers, Joint Committee on Human Rights,” (May 2003), available at <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/78/78we18.htm>, paragraph 14.

⁵³⁴ Hansard, HL col.753 (19 October 2005).

⁵³⁵ JCHR 11th Report, paragraph 68.

474. In the HKHRC or other relevant bodies, it is submitted there should be no direct control of funding from the executive branch and one of the panel of the Legislative Council, probably the Home Affairs Panel, for approving and overseeing the budget of the HKHRC or other relevant bodies and strategic plan should be established.

1.2.2. External funding

475. Generally speaking, NHRIs can raise funds from other sources, such as private or foreign donor agencies. Such funds should not disqualify the institution from receiving public funds.⁵³⁶
476. For instance in Fiji Human Rights Commission, Sections 14(1)(b) and 14(1)(c) of the Fiji Human Rights Commission Act allows the funds of the Commission to consist of “*all other moneys lawfully received by the Commission for its purposes; and all accumulations of income derived from any such money*”.
477. Currently in Hong Kong, the resources of the Equal Opportunities Commission consists of all money (i) appropriated for that purpose by the Legislative Council; and (ii) otherwise provided to the Commission by the Government; and (iii) all other money and property, including gifts, donations, fees, rent, interest and accumulations of income received by the Commission.⁵³⁷ As such, it can receive external funding.

478. However, excessive reliance on donor money will affect the independence and autonomy of the Commission and the overwhelming outreach of fund raising activities could be fatal to the Commission’s development as an effective NHRIs. Thus, the best scenario is for the government to bear the Commission’s entire administrative as well as program costs.⁵³⁸
479. In case external funding and donation is allowed, the donation should be one-off, subject to a donation ceiling prescribed by law as well as the approval of another body, preferably the Legislative Council or the Home Affairs Panel of the Legislative Council.

1.2.3. Adequacy of funding

480. Adequate funding is fundamental to effective functioning of NHRIs. As such, various United Nations committees have been stressing the importance of sufficient resources being allocated to NHRIs. However, many NHRIs have been suffering from financial problem.

⁵³⁶ Assessing the Effectiveness of NHRIs at 13.

⁵³⁷ Sex Discrimination Ordinance, Schedule 6, Section 15.

⁵³⁸ Jogendra K Ghimire, “National Human Rights Institutions,” *HURIGHTS OSAKA*, (2001), available at http://www.hurights.or.jp/asia-pacific/no_26/02nepal.htm

481. For instance, the Committee on the Rights of the Child, in its concluding observations, recommended that the Palau Government⁵³⁹ and the Australian Government⁵⁴⁰ provide the National Committee on Population and Children (*CoPopChi*) and the Australian HREOC with adequate human and financial resources in 2001 and 2005 respectively. The UNCESR, in its concluding observations in 2002, criticized the National Ombudsman in Georgia as ineffective due to severe resource constraints.⁵⁴¹
482. The question of resources is closely linked to the question of whether the institutions have sufficient number of staff.⁵⁴² In Australia HREOC, the number of staff in the human rights policy unit was more than halved late in 1997 due to a budget reduction of about 40% of its previous operation expenses.⁵⁴³
483. The provision of adequate resources can be a basic indicator of political will. Without adequate political commitment, the Government can effectively undermine the goals and work of NHRIs by curbing the budget of the Commission.
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| 484. The HKHRC or other relevant bodies should be allocated sufficient funding in order to allow the Commission to discharge its mandate. |
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1.2.4. Allocation of funding

485. On the other hand, the enabling legislation of NHRIs should not impose unwarranted requirements on the allocation of the funding across different areas of human rights concern.
486. For example, section 74 of the Northern Ireland Act 1998 requires the Equality Commission to specify publicly in its annual accounts its levels of expenditure broken down across the separate grounds: this provision was inserted to ensure transparency in funding allocation. In Australia, each strand is now allocated equal amounts of money.
487. However, allocating a fixed sum for specific strands may impose unfavourable restraints on the commission's freedom and autonomy in identifying areas of focus and setting up its own priority. Sometimes, breaking down cross-strand and functional activities into strand-specific expenditure may be artificial.”⁵⁴⁴

⁵³⁹ Palau (CRC/C/15/Add.149, 21 February 2001), paragraph 16.

⁵⁴⁰ Australia (CRC/C/15/Add.268, 20 October 2005), paragraph 16.

⁵⁴¹ Georgia (29th E/C.12/1/Add.83, 19 December 2002), paragraph 13.

⁵⁴² Power and Functions at 23.

⁵⁴³ The Australian HREOC, Annual Report 1997-98, at 68.

⁵⁴⁴ UCL Survey at 29.

488. A more flexible approach, for example, adjusting the funding on different areas of concern every year to reflect changing priorities and new conditions, is preferable to locking a fixed amount of funding into a specific strand.⁵⁴⁵

1.3. APPOINTMENT AND DISMISSAL PROCEDURES

489. According to the Handbook, the terms and conditions of appointment, the method, the criteria, the duration of appointment, the requirement of reappointment, and privileges and immunity shall be laid down by the legislation.⁵⁴⁶
490. Given the track record and previous scandals of the HKSAR Government in appointing commissioners of various independent institutions, it is of utmost importance to ensure that the power to appoint chairpersons and members to the HKHRC and other relevant bodies will not be abused again.⁵⁴⁷

1.3.1. Power of appointment

491. There are three options for the power of appointment to be vested in: the legislature, or the Head of the State, or another autonomous institution involving civil societies.

1.3.1.1. Vested in the legislature

492. According to the Handbook, the task of appointment shall be entrusted to a “representative body such as parliament.”⁵⁴⁸ Assessing Effectiveness of NHRIs said the appointment system by Parliament will “work well if Parliament vigorously exercises independent oversight.”⁵⁴⁹ The Best Practice suggests a special parliamentary committee to be established to handle the selection process.⁵⁵⁰ The composition of the selective committee shall reflect the principle of diversity and pluralism. Members of the civil public shall be invited to express their opinion.
493. In Mongolia, the *Great Hural* (Parliament) has responsibility for appointing members to its Human Rights Commission.⁵⁵¹ The national *Defensor del Pueblo* of Argentina,

⁵⁴⁵ Id.

⁵⁴⁶ Handbook, paragraph 78.

⁵⁴⁷ *World Forum for Democratization in Asia*, “WFDA Strategy Workshop II: Assisting Transitions to Democracy in Asia—Strategy Paper,” (9-10 March 2005), available at http://www.wfda.net/activities_strategy_detail.htm?id=57&type=strategypaper

⁵⁴⁸ Id, paragraph 79.

⁵⁴⁹ Assessing the Effectiveness of NHRIs at 14.

⁵⁵⁰ Best Practice at 16.

⁵⁵¹ Law of the National Human Rights Commission of Mongolia 2000 (Mongolia), Article 5.

- established under the Constitution in 1994,⁵⁵² requires the *Defensor* to be appointed by the National Congress and to be dismissed only by the same body pursuant to a special vote in each Chamber.⁵⁵³
494. In Norway, the Parliamentary Ombudsman for Public Administration is elected by the Parliament after every general election for a term of four years. The Ombudsman may be removed from office by the Parliament with a majority of two thirds of the deputies. Citizens of Norway who are trained in law and who have turned 30 years are eligible for appointment as Ombudsman.⁵⁵⁴
495. In the Netherlands, the appointment of the National Ombudsman by the House of Representatives follows a recommendation by a committee comprising the vice president of the Council of State, the president of the Supreme Court of the Netherlands, and the president of the Netherlands Court of Audit.⁵⁵⁵
496. The advantage of the appointment system by the legislature is that the legislature can ensure an overall pluralistic and balanced composition as required by the Paris Principles.⁵⁵⁶ The appointment committee under the legislature can also receive nominations from NGOs and the civil society.

497. The problem of this mechanism is that it may not be feasible to agree with appointments upon a diversified composition of the legislature. For example, the JCHR found that there is no obvious way to reconcile differences of view between the two Houses.⁵⁵⁷

498. Although there aren't two houses in the Legislative Council, the legislators from geographical constituencies often vote in a different way from that of the functional constituencies. The concern of the JCHR is to some extent applicable in Hong Kong.

1.3.1.2. Vested in the executive

499. On the other hand, if the appointment is purely vested in the executive, the independence of the proposed HKHRC or other relevant bodies would be undermined. The Commissioners may be formally appointed by the Chief Executive after the determinations of appointments by a separate body.⁵⁵⁸

⁵⁵² Constitution of Argentina, Article 86.

⁵⁵³ *Id.*, Article 86.

⁵⁵⁴ Act concerning the Storting's Ombudsman for Public Administration of 22 June 1962 (Norway), Section 1; see also the *Ombudsman Information Network's* website, "Norway: the Parliamentary Ombudsman for Public Administration," available at http://www.anticorruption.bg/ombudsman/eng/readnews.php?id=4966&lang=en&t_style=tex&l_style=default

⁵⁵⁵ National Ombudsman Act, Act of 4 February 1981 (the Netherlands), Chapter II, Section 2(2).

⁵⁵⁶ Assessing the Effectiveness of NHRIs at 14.

⁵⁵⁷ JCHR 6th Report, paragraph 134.

⁵⁵⁸ Assessing the Effectiveness of NHRIs at 14.

500. In the case of Commission on Human Rights and Administrative Justice of Ghana and the Indian Human Rights Commission in India, the President appoints the commissioners in consultation with the Council of State and a special committee.⁵⁵⁹
501. Similarly, the human rights bill 1994 recommended the Commissioners to be appointed by the Governor subject to the confirmation of the Legislative Council.⁵⁶⁰
502. Appointment by the President upon the recommendation of a special committee does not always guarantee that the selected commissioners are independent of party politics and government interests. According to Gerald Staberock, a director of the International Commission of Jurists in Geneva, “the most important challenge to independent NHRIs... is the lack of legal or factual independence from presidential powers.”⁵⁶¹
503. In India, the Appointments Committee, which is entirely made up of politicians including the Prime Minister; the Minister for Home Affairs; the Speaker and leader of the opposition in the House of the People and Deputy Chairman and leader of opposition in the Council of States, has been sharply criticized as conducting the appointments inside a black box and not seeking the voices from public.⁵⁶²
504. In view of the above problem, the JCHR in its 6th Report favours an appointment system which requires the Head of the State a statutory duty to consult Parliament as a guarantee of independence and democratic accountability.⁵⁶³ Subsequently in its 11th Report, JCHR further suggested that a statutory committee shall be established to “recommend commissioners for appointment whom the Secretary of State for Constitutional Affairs would recommend for appointment by Her Majesty.”⁵⁶⁴ Such statutory committee should include “the chair of the parliamentary committee charged with considering the reports of the commission, the Secretary of State for Constitutional Affairs or his or her deputy, Ministers representing other departments with a stake in the commission’s work, a person appointed by the Lord Chief Justice, a person appointed by the presiding officer of each of the Scottish Parliament and the National Assembly for Wales, and persons appointed by the presiding officers of each House, the majority of whom should be members of one or the other House.”⁵⁶⁵
505. By ensuring the diversity of the statutory committee, the executive control on the appointment is minimized while avoiding a bifurcated debate at the legislature. It’s

⁵⁵⁹ Commission on Human Rights and Administrative Justice Ghana Act of 1993, Article 1 and 2.

⁵⁶⁰ The Human Rights and Equal Opportunities Commission Bill 1994, Section 7(2).

⁵⁶¹ Gerald Staberock, “A Rule of Law Agenda for Central Asia,” 2(1) *Essex Human Rights Review* 1 at 2, available at <http://projects.essex.ac.uk/EHRR/archive/pdf/File1-Staberock.pdf>

⁵⁶² Amita Punj, Mandeep Tiwana and Sneh Aurora, “Human Rights Commissions: A Citizen’s Handbook,” Commonwealth Human Rights Initiative (June 2006), available at http://www.humanrightsinitiative.org/publications/NHRI/NHRI_handbook.pdf at 37;

G.P. Joshi, “Human Rights Commission-Need for Review,” available at http://www.humanrightsinitiative.org/programs/aj/police/papers/gpi/national_human_rights_commission.pdf at 2.

⁵⁶³ JCHR 6th Report, paragraph 223.

⁵⁶⁴ JCHR 11th report, paragraph 134.

⁵⁶⁵ Id, paragraph 133.

unfortunate that the UK government rejected the JCHR's recommendation and adopted the usual practice in appointing the chair for non-departmental public bodies, in other words, appointment by the Head of the State.⁵⁶⁶

506. On the other hand, a selective committee comprised of merely political appointees is undesirable. The selection committee of the Chief Commissioner of the Indian National Human Rights Commission in the Human Rights Act 1993 of India and the Bangladesh Human Rights Commission Draft Bill of 1999 consists of the Prime Minister, the Leader of the opposition party and Minister of Home Affairs, etc., and other representatives from the state.⁵⁶⁷ As such, the appointment is unlikely to be in practice independent from political pressure and influences.

1.3.1.3. Vested in autonomous institution involving the civil society

507. Another mechanism is an *appointment by another autonomous institution* akin to that of the appointment of judges.⁵⁶⁸
508. At the Danish Institute for Human Rights, half of the Board members are appointed directly by Council consisting of various NGOs with the right to a seat on the Board and representatives of all political parties and individuals with specific knowledge and commitment in the field. In practice, the Board is composed of six university representatives, one member of the bar association, three members representing NGOs and two members of parliament. Nevertheless, the Danish Institute for Human Rights is not in accord with any quasi-judicial powers.⁵⁶⁹
509. Korea adopted a mixed appointment system. The National Human Rights Commission in Korea, established by the passage of the Human Rights Act on 30 April 2001, is an 11-member Human Rights Commission comprising four presidential appointees, four recommended by the National Assembly and three appointed by the Supreme Court.⁵⁷⁰
510. Currently in Hong Kong, it is the Chief Executive in whom the sole power of appointment of the Chairperson and members of the Equal Opportunities Commission of a number of four to sixteen is vested.⁵⁷¹
511. The human rights bill 1994 provides that “the Chairperson and other Commissioners shall be appointed by the Governor, subject to the confirmation by the Legislative Council.”⁵⁷²

⁵⁶⁶ UK Government Response, paragraph 27.

⁵⁶⁷ Human Right Act 1993, Chapter II, Section 4(1).

⁵⁶⁸ Assessing the Effectiveness of NHRIs at 14.

⁵⁶⁹ Act Governing the Establishment of the Danish Centre for International Studies and Human Rights (Act No. 411 of 6 June 2002), Chapter 2, Section 7(1).

⁵⁷⁰ National Human Rights Commission Act (Korea), Article 5.

⁵⁷¹ Sex Discrimination Ordinance, Section 63(3).

⁵⁷² The Human Rights and Equal Opportunities Commission Bill 1994, Section 7(2).

512. It is submitted that the power of appointment should be vested in the Chief Executive, who should be under a statutory duty to appoint commissioners upon the recommendation of an independent statutory committee. The composition of such a statutory committee shall reflect the Paris Principles and should not be comprised of the members of the Executives and political appointees.
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1.3.2. Selection process

513. The appointment should be with the involvement of a civil society. No matter who has the final say on the appointment of the commissioner, the executive should never exclusively determine the selection of members. The process of appointment should always be as transparent as possible and should involve both the legislature and civil society.⁵⁷³ Public consultation should be conducted to gain legitimacy from the public at large.⁵⁷⁴

514. In 2005, human rights NGOs and civil society groups in Angola complained because they have had no part in the selection procedure of the new Ombudsman. Former Justice Minister Paolo Tjipilica was the sole candidate for the post.⁵⁷⁵ Albeit the appointment requires the confirmation from the National Assembly, the appointment cannot satisfy the Paris Principles without genuine public consultation.

515. The Best Practice suggests that the selection process could include:

(a) Public advertisement of vacancies

*Nomination by civil society organizations should be allowed.*⁵⁷⁶

(b) Short-listing of candidates for interview

(c) Interview of short-listed candidates

(d) The making of recommendations to the Parliament

(e) Consideration by the Parliament and vote and the name to be recommended to the Head of the Government.⁵⁷⁷

516. In Hong Kong, the first Chairperson of the Equal Opportunities Commission, Dr. Fanny Cheung, was selected after advertisement for the post and public disclosure of the job requirements and selection criteria by the Government. However, since 1997, the

⁵⁷³ Best Practice at 16; Carole. J. Petersen, *Slipping Away*, at 522.

⁵⁷⁴ Best Practice at 10.

⁵⁷⁵ Human Rights Worldwide at 6-7.

⁵⁷⁶ Assessing the Effectiveness of NHRIs at 14.

⁵⁷⁷ Best Practice at 16.

Government has maintained very tight control over the appointment process. The position of Chairperson of the Equal Opportunities Commission is no longer advertised and the selection process has been entirely hidden from NGOs and the general community.⁵⁷⁸ Definitely, it is the former selection procedures of the Equal Opportunities Commission that should be appreciated and encouraged.

517. The best approach in practice to handle the above selection procedure of the Chief Commissioner of the HKHRC or other relevant bodies is to establish a steering committee comprising of Secretary of relevant Bureaus, members of the Legislative Council, the officials of relevant government departments, NGOs, judges, human rights experts and professionals.⁵⁷⁹

518. There remains the question as to how the voting should proceed for the committee and whether should there be rules prescribing when an appointment is invalid.

519. The Indian Act prescribes that “*no appointment of a chairperson or a member shall be invalid merely by reason of vacancy in the committee.*”⁵⁸⁰ [emphasis added]

1.3.3. *Criteria of selecting the Commissioners*

520. Like any other institution, including the judiciary, the efficacy of a human rights commission will depend to a large extent on the “*integrity, moral courage and competence*”⁵⁸¹ of the Commissioners and that of its executive staff.⁵⁸²

521. Commissioners of the HKHRC or other relevant bodies should be selected on the basis of “proven” expertise, knowledge and experience in the promotion and protection of human rights. They should have practical expertise and abilities.

522. Currently in Hong Kong, the three antidiscrimination ordinances are silent on the criteria of the Commissioner.

523. On the other hand, the human rights bill 1994 stipulates that the Chairperson of the Commission and the Human Rights Commissioner should be a “legally qualified person”, in other words, either judges or qualified barristers or solicitors.⁵⁸³

524. However, the enabling legislation of NHRIs all over the world usually stipulates the

⁵⁷⁸ Carole. J. Petersen at 521.

⁵⁷⁹ Best Practice at 9.

⁵⁸⁰ Human Right Act 1993 (India), Chapter II, Section 4(2).

⁵⁸¹ Best Practice at 13.

⁵⁸² A recent Human Rights Watch survey of the commissions in Africa illustrates the impact that personalities can have.” Human Rights Watch, “Protectors or Pretenders? Government Human Rights Commission in Africa,” (2001), available at <http://www.hrw.org/reports/2001/africa> at 39-41, 63-65 and 154-167.

⁵⁸³ The Human Rights and Equal Opportunities Commission Bill 1994, Sections 7(3) and 7(9).

- qualification of the Commissioner.
525. In Malaysia, the Suhakam comprises not more than 20 members⁵⁸⁴ appointed by the executive from among “*prominent personalities*”⁵⁸⁵, in which the composition shall reflect religious and ethnic diversity with perpetual succession.⁵⁸⁶ The term of office is two years, with only a member may be reappointed.⁵⁸⁷
526. The use of retired judges as Commissioners is generally regarded as a positive step in ensuring the independence of NHRIs.⁵⁸⁸
527. The Indian National Human Rights Commission probably has the most elaborate and strict criteria for the qualification of commissioners.⁵⁸⁹ Under Section 3 of the Protection of Human Rights Act, 1993, three out of five members in the Human Rights Commission should be judges (with a chairperson who is qualified as Chief Justice of the Supreme Court, one member must be qualified as Judge of the Supreme Court, one member must be qualified as Judge of High Court) and the remaining two members should be “*from amongst persons having knowledge of, or practical experience in, matters relating to human rights.*” [emphasis added]
528. However, the strict requirements on former judges have been hindering the establishment of commissions in some Indian states because of the non-availability of judges.⁵⁹⁰ Even judges are available; those three appointed judges need not a proven record of protecting human rights and upholding constitutional values. As for the other two, public officials are often “*assumed* they have acquired knowledge of human rights in the course of their past work without substantial examination on their values and ability.”⁵⁹¹ Hence, Commissions become post-retirement arrangement for judges, police officers and bureaucrats *with political clout*.⁵⁹²
529. The Nepalese Human Rights Commission also requires that one member be a retired judge,⁵⁹³ while the Korean Human Rights Commission allows the Chief Justice of the Supreme Court to nominate three of the eleven members of the Commission.⁵⁹⁴

⁵⁸⁴ Human Rights Commission of Malaysia Act, No. 597 (1999), Section 5(1).

⁵⁸⁵ Id, Section 5(2).

⁵⁸⁶ Id, Section 5(3).

⁵⁸⁷ Id, Section 5(4).

⁵⁸⁸ Carolyn Evans, “Human Rights Commissions and Religious Conflict in the Asia-Pacific Region,” (2004) 53 *International & Comparative Law Quarterly* 713 at 717.

⁵⁸⁹ Power and Functions at 18.

⁵⁹⁰ National Human Rights Commission (India), “Annual Report 1996-97” at 57.

⁵⁹¹ Amita Punj at 37-8.

⁵⁹² Commonwealth Human Rights Initiative at 3-4.

⁵⁹³ Human Rights Commission Act 2053 1997 (Nepal), Section 1.

⁵⁹⁴ Four members are nominated by the President, the other three being nominated by the National Assembly. National Human Rights Commission Act of Republic of Korea No 6481 2001 (Korea), Article 5.

530. In New Zealand, the parliament, president or governor when making appointment must regard “*not only* to their personal attributes but also to their knowledge of or experience in the different aspects of matters likely to come before the Commission.”⁵⁹⁵
531. Under the Equality Act 2006 of the UK, the Secretary of State can make appointments of the CEHR based only on an individual’s relevant experience or knowledge of discrimination or human rights, unless he thinks the individual is suitable for appointment for some other special reason.⁵⁹⁶ According to the Lord Chancellor, if the Secretary of State were to invoke some special reason, “it would be implicit that ... he would be required to explain that reason clearly.”⁵⁹⁷
532. In the National Ombudsman of the Netherlands (*de nationale ombudsman*), the National Ombudsman Act prescribes no formal qualifications for the post but “legal expertise and a knowledge of public administration are obvious selection criteria”.⁵⁹⁸
533. While most NHRIs are headed by lawyers, judges, political scientist or academics, and while they generally are found to have a high level of expertise in human rights and legal matters, it is found that “most of them have limited professional backgrounds in organisational management and administration. Leadership and management training for the top management of the NHRIs are needed in most cases reviewed in this study, in order to ensure that the organisations are professionally managed.”⁵⁹⁹ As such, the leadership and management ability of the candidates must also be taken into account.
534. In practice, there is no cogent reason for slavishly pursuing a policy of appointing portfolio commissioners from their client groups. “Apart from attracting allegations of bias in favour of the client group to which the commissioner personally belongs, it can threaten independence and impartiality.”⁶⁰⁰
535. In addition, there is the risk that the office will become politicized if the legislature or executive appoints persons too closely connected with the government, who thus may be perceived to be aligning themselves with government positions.
536. In the Philippines, the Commission on Human Rights of the Philippines is a weak NHRI while its personnel are political appointees who are closely linked to the Government but have received little resources and training. The Commission failed to intervene effectively to address the issue of political assassinations and other gross abuses and to

⁵⁹⁵ Human Rights Act 1993 (New Zealand), Section 9.

⁵⁹⁶ Equality Act (UK), Schedule 1, Part 1, Section 2.

⁵⁹⁷ Hansard, HL Col.752 (19 October 2005).

⁵⁹⁸ *The National Ombudsman’s (Netherlands) website*, “About the National Ombudsman: The institution: High Council of State,” available at http://www.ombudsman.nl/english/ombudsman/the_institution/high_council_of_state.asp

⁵⁹⁹ *Danish Institute for Human Rights*, “Issues Paper: Supporting National Institutions for the Promotion and Protection of Human Rights – a Strategic Niche for UNDP?” (October 2004), available at http://europeandcis.undp.org/files/uploads/HR/ISSUE_PAPER_Executive_summary_NHRI_DANISH.pdf at 59.

⁶⁰⁰ Australian Experience at 142.

push for implementation of important laws. And the Philippines Commission has consistently been used by the Government for its own propaganda activities.⁶⁰¹

1.3.4. The conditions of appointment

1.3.4.1. Rank and salary

537. To enable members of NHRIs to undertake their duties as professionals, the commissioners should be accorded a rank and salary comparable to that of senior judicial officials⁶⁰² (as in Commission on Human Rights and Administrative Justice of Ghana) or that of “officer of Parliament”.⁶⁰³

538. The commissioners should also be “protected [from] employment related reprisals for work performed in line of duty.” Commissioner should be “appointed on standard terms that are publicly known”⁶⁰⁴

539. Currently in Hong Kong, the level the remuneration and the terms and conditions of appointment of the Chairperson of the Equal Opportunities Commission are exclusively determined by the Chief Executive. Undesirably, the legislation doesn’t provide any reference level of remuneration.⁶⁰⁵ Nor the human rights bill 1994.⁶⁰⁶

540. In the Danish Center of Human Rights, the salaries of the staff are similar to those in the public administration. There is criticism that the remuneration is not competitive enough, compared to the private market, to attract competent candidates.⁶⁰⁷ At the very least, the salary of the commissioner should be independent from any executive decision.

541. There remains the question as to what standard should it be that of the judges in the court system or that of the public officials in the administration should be applied to commissioners of the HKHRC or other relevant bodies.

1.3.4.2. Conflict of interests

542. No conflict of interests during and also after commissioners’ term of office should be allowed.⁶⁰⁸

⁶⁰¹ “National Human Rights Institutions in the Asia Pacific Region,” Report of the Alternate NGO Consultation on the Second Asia-Pacific Regional Workshop on National Human Rights Institutions, (March 1998), available at <http://www.hrdc.net/nhris/AsiaPacNHRIs.rtf> at 3.

⁶⁰² Best Practice at 13.

⁶⁰³ JCHR 6th Report, paragraph 128.

⁶⁰⁴ Best Practice at 17.

⁶⁰⁵ Sex Discrimination Ordinance, Schedule 6, Section 1(1).

⁶⁰⁶ Human Rights and Equal Opportunities Commission Bill 1994, Section 11.

⁶⁰⁷ Power and Functions, Chapter 3, at 77.

⁶⁰⁸ Best Practice at 13.

543. Commissioners should relinquish other public offices during appointment. According to the Uganda Human Rights Commission Act, 1997, a commissioner holding office as a member of parliament, member of local government, member of a political party or political organization or public officer should relinquish that office on appointment as a member of the Uganda Human Rights Commission.⁶⁰⁹
544. A commissioner in the Indian National Human Rights Commission may be removed from office if he “engages during his term of office in any paid employment outside the duties of his office.”⁶¹⁰ A retired commissioner “shall be ineligible for further employment under the governments of India.”⁶¹¹ These strict conditions of employment ensure the independence and the full time commitment of the commissioners. Desirably, these requirements of the Indian National Human Rights Commission go beyond the requirements of the Paris Principles.⁶¹²
545. Currently in Hong Kong, the Chairperson of the Equal Opportunities Commission shall not, without the specific approval of the Chief Executive, hold any office of profit or engage in any occupation for reward other than his office as Chairperson.⁶¹³
546. The human rights bill 1994 in Hong Kong stipulates that the Chairperson of the Commission and the member of the Commission must disclose their direct or indirect pecuniary interest, if any, at a meeting of the commission.⁶¹⁴ Otherwise, the Governor may terminate the appointment of that member.⁶¹⁵

1.3.4.3. Terms of office

547. It is preferable that members to be appointed for a fixed term of five years, with the possibility of reappointment of an additional term of the same length⁶¹⁶ (as applied in Indian National Human Rights Commission⁶¹⁷). Re-appointment is allowed in most NHRIs.⁶¹⁸
548. Canadian Human Rights Act Review Panel recommended a term of seven years for each Commissioner in Canadian Human Rights Commission. “This provides them with sufficient security of tenure to be able to act independently of the government and time to

⁶⁰⁹ Uganda Human Rights Commission Act, 1997, Article 5.

⁶¹⁰ Human Right Act 1993 (India), Chapter II, Section 4(2).

⁶¹¹ Id.

⁶¹² Power and Functions, Chapter 3, at 75.

⁶¹³ Sex Discrimination Ordinance, Schedule 6, Section 1(2).

⁶¹⁴ The Human Rights and Equal Opportunities Commission Bill 1994, Section 15(1).

⁶¹⁵ Id, Section 14(2)(e).

⁶¹⁶ Best Practice at 16.

⁶¹⁷ Human Right Act 1993 (India), Chapter II, Article 6.

⁶¹⁸ For example, Human Rights and Equal Opportunity Commission Act 1986 (Australia), Section 46D(1), Human Rights Act 1993 (New Zealand), Section 17(1); the (South Africa Human Rights Commission Act, Article 3(3) : IHRC Act, art.6.2; Mexican National Commission for Human Rights Act, Act of June 1992, Article 11.

develop the experience and to use it to give the Commission continuity in its goals and methods.”⁶¹⁹

549. Currently in Hong Kong, the term of office of the Chairperson of the Equal Opportunities Commission does not exceed five years, and the chairperson is “eligible for reappointment.”⁶²⁰ The same applies to the human rights bill 1994.⁶²¹

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| 550. The terms of office the Commissioners in the HKHRC or other relevant bodies should be five to seven years, with the chance of reappointment of an additional term of the same length. |
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1.3.4.4. Privilege and immunity

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| 551. Members shall enjoy immunity from civil and criminal proceedings for his actions performed under his official capacity, ⁶²² subject only to laws related to judicial review. ⁶²³ |
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552. Neither Indian Human Rights Commission, Commission on Human Rights and Administrative Justice nor Danish Center of Human Rights provides for privileges and immunities of leading members. However, HRCs in Mexico, Ugandan and Sri Lanka provide immunities and privileges to commissioners as applied for judges.⁶²⁴

553. Currently in Hong Kong, the Chairperson of the Equal Opportunities Commission and the Commission do not enjoy any privilege and immunity. Nor the human rights bill 1994.

1.3.5. Dismissal of Commissioners

1.3.5.1. Power of dismissal

554. The power of dismissal shall be vested at the parliamentary level or at an equivalently high level.⁶²⁵

555. In Kazakhstan, despite considerable international efforts for the establishment of a parliamentary NHRI, the institution was finally established in 2002 by a presidential

⁶¹⁹ CHRA Review, at 97 and Recommendation 112.

⁶²⁰ Sex Discrimination Ordinance, Schedule 6, Section 2.

⁶²¹ Human Rights and Equal Opportunities Commission Bill 1994, Section 10(1).

⁶²² Handbook paragraph 81; Best Practice at 17.

⁶²³ Best Practice at 17.

⁶²⁴ Mexican National Commission for Human Rights Act, Act of June 1992, Article 13; The Ugandan Human Rights Commission Act, Article 12; Human Rights Commission of Sri Lanka Act, 1996, Article 26 (1).

⁶²⁵ Handbook, paragraph 80.

- decree which can be repealed at any time.⁶²⁶ Moreover, it is the President who appoints and dismisses the Ombudsman and no specific reason for dismissal is required.⁶²⁷
556. Another dismissal mechanism is based on a request or a decision from a parliamentary committee. In South Africa, the President shall remove a commissioner from office if such removal is requested by a joint committee composed of one member of each party in Parliament and a request must be approved by a special majority.⁶²⁸
557. The JCHR suggest that power of dismissal should be vested in the statutory committee which is also in charge of appointment and overlooking its budget.⁶²⁹ Again, the UK government favoured the power to be vested in the Secretary of State.⁶³⁰
558. Currently in Hong Kong, the power of dismissal of any member appointed by the Chief Executive is also vested in the Chief Executive.⁶³¹ The same applies to the human rights bill 1994.⁶³²
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| 559. The power of dismissal of the commissioner in the HKHRC or other relevant bodies shall be vested in the same entity on which the power of appointment will be vested. |
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1.3.5.2. The grounds of dismissal

560. The power of dismissal and the circumstances under which a member can be dismissed shall be of a serious nature and specified in the legislation.⁶³³ Best Practice suggests that the ground of dismissal of a commissioner should be parallel to that of the judiciary.⁶³⁴ Such model is adopted in Ghana.⁶³⁵
561. There may be dispute whether a commissioner should be dismissed on grounds of receiving any other paid employment outside the commission⁶³⁶ and any other paid employment other than academic activities.⁶³⁷

⁶²⁶ See generally the Statute on the Kazakh Commissioner for Human Rights.

⁶²⁷ Id, Article 2.

⁶²⁸ South Africa Human Rights Commission Act, Article 15(a)(b).

⁶²⁹ JCHR 11th report, paragraph 128.

⁶³⁰ UK Government's Response, paragraph 27.

⁶³¹ Sex Discrimination Ordinance, Schedule 6, Section 5.

⁶³² Human Rights and Equal Opportunities Commission Bill 1994, Section 14.

⁶³³ Handbook, paragraph 80.

⁶³⁴ Best Practice at 16.

⁶³⁵ Commission on Human Rights and Administrative Justice Ghana Act of 1993, Article 5.

⁶³⁶ Human Right Act 1993 (India), Chapter I, Section 2(b); Human Rights Commission of Sri Lanka Act, 1996, Article 4(ii).

⁶³⁷ Mexican National Commission for Human Rights Act, Act of June 1992, Article 12. It provides that the functions of commissioners are incompatible with any other position, post or job at the federal level, state or municipal level, or in the private organizations, or with the exercise of a profession other than academic activities.

562. In Indian Human Rights Commission, the chairperson and members can be removed on grounds of misbehaviour or mental or physical incapacity or conviction or sentence for an offence which involves moral turpitude, engagement of any paid employment outside the Commission during his term of office. The removal conditions shall be proved by Supreme Court,⁶³⁸ or that initiated by the President with an order “declared by a competent court”⁶³⁹
563. Currently in Hong Kong, the grounds of dismissal of any member appointed by the Chief Executive are (a) absence from three consecutive meetings of the Commission without permission, (b) bankruptcy, (c) incapacity caused by physical or mental illness, or (d) incapacity to discharge the functions.⁶⁴⁰
564. The human rights bill 1994 underlines similar ground of dismissal, including (a) bankruptcy, (b) engagement in any paid employment outside the Commission, (c) absence from duty for 14 consecutive days, (d) absence of three consecutive meetings of the Commission without the permission, or (e) failure to disclose conflict of interest.⁶⁴¹

1.3.6. Vacancy

565. “A vacancy in the position of commissioner should be filled expeditiously.”⁶⁴² If a term of a commissioner expires and it is not possible to appoint a new commissioner immediately, the term of a serving commissioner should continue for such period, not exceeding 12 months, until a new commissioner is appointed.⁶⁴³

1.3.7. Composition of personnel

1.3.7.1. Pluralistic composition

566. The Paris Principles require that the composition shall reflect a degree of sociological and political pluralism, representing the views of NGOs, trade unions, professional organizations and trends in philosophical and religious thoughts⁶⁴⁴. The composition of commissioners should reflect “gender balance, the ethnic diversity of the society and the range of vulnerable groups” in the society.⁶⁴⁵

⁶³⁸ Human Right Act 1993 (India), Chapter II, Sections 5(1) and 5(2).

⁶³⁹ Id, Section 5(2)(d).

⁶⁴⁰ Sex Discrimination Ordinance, Schedule 6, Section 5.

⁶⁴¹ Human Rights and Equal Opportunities Commission Bill 1994, Section 14(2).

⁶⁴² Best Practice at 16.

⁶⁴³ Best Practice at 17.

⁶⁴⁴ Handbook paragraph 82; See also the Paris Principles, Section 4.

⁶⁴⁵ Best Practice at 15.

567. A pluralistic composition, bearing a broad range of expertise and experience of human rights issues, can also “*ensure that each Commissioner would have the benefit of drawing on the expertise of other Commissioners.*”⁶⁴⁶
568. Decision within the commission should be determined by voting, with the Chief Commissioner casting the deciding vote in case no consensus can be reached by voting.⁶⁴⁷
569. Pluralistic representation can be ensured by appointment of commissioners who represents specific vulnerable groups (as applied in Australia, India and New Zealand) or direct involvement of relevant NGOs in the commission (as applied in Denmark and France). The presence of disadvantaged and minority group members within NHRIs helps to ensure that their concerns are heard and addressed. Nonetheless, these methods cannot ensure that all minority interests are represented, while the commission should be retained in a manageable size at the same time.⁶⁴⁸
570. The Danish Centre for Human Rights consists of a Council and a Board. The Council of Danish Centre for Human Rights consists of 10 NGOs which are entitled by statute to be represented and other NGOs which have applied for membership. Currently, there are more than 30 NGOs sitting on the Council. The Council also consists of representatives of all political parties represented in the Danish Parliament, including the ministries of Foreign Affairs, Justice, Education, Social Affairs and Labour, and a number of human rights specialists.
571. All Board members are members of the Council as well. The Board of the Danish Centre for Human Rights consists of twelve members in total. Six members are appointed by the Council, two members are appointed by the Rector of the University of Copenhagen, two members are appointed by the Rector of the University of Aarhus and two members are appointed by the Collegium of Rectors.⁶⁴⁹ The chairperson is elected among the twelve members. The centre has no commissioner but a director who represents the centre publicly. However, it should be noted that the Danish Centre for Human Rights differs from other NHRIs as it is a research-based human rights center which has been given an advisory role only but no power to handle individual complaints.
572. The Human Rights Commission in Ireland consists of nine members including its president and at least four members of the commission will be men and that at least four members will be women. The Human Rights Act also emphasizes the importance of pluralism and thereby reflects the nature of Irish society in the making of appointments, and that the members of the commission should have some background in, or connection with, human rights. Mr. O’Donoghue, the Minister for Justice, Equality and Law Reform

⁶⁴⁶ 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.

⁶⁴⁷ Best Practice at 14.

⁶⁴⁸ Power and Functions at 22.

⁶⁴⁹ Act Governing the Establishment of the Danish Centre for International Studies and Human Rights, Act No. 411 of 6 June 2002, Chapter 2, Section 7(1).

of Ireland, assured the Parliament that all the members of the Commission, including the president, will be appointed in accordance with these criteria.”⁶⁵⁰

1.3.7.2. An advisory board

573. An advisory board with broader social representation can be formed to ensure formal diversity. *This is particularly important in single-member institutions where diversity cannot be reflected in membership.*⁶⁵¹ It should be noted that such a board should only in an advisory capacity in order not to endanger the independence of the institution.
574. The Canadian Human Rights Act Review Panel recommended the establishment of “an Advisory Council consisting of twelve members drawn from employers and service providers, employee organizations and equality seeking groups who reflect the diversity of the Canadian population, including a gender balance.” The Commission should consult the Council on policy and rule-making of the commission, objectives for the kinds of cases that the Commission should intervene,⁶⁵² and “provide with its own section of the Annual Report to comment on policy issues and other aspects of the Commission’s functions.”⁶⁵³
575. The Australian Human Rights Commission Legislation Bill 2003 proposed the deletion of the provision in the Human Rights and Equal Opportunity Commission Act 1986 for the appointment of advisory committees to the Commission and of the provision in the Racial Discrimination Act 1975 for the Community Relations Council.⁶⁵⁴
576. The Human Rights Council of Australia supports the deletion of the advisory committee provisions. “These provisions have been used on one occasion only since the Acts were passed, in relation to an advisory committee on ILO Convention 111 under the Human Rights and Equal Opportunity Commission Act 1986. The provisions have been essentially inoperative since the Acts were passed. In any event, express power to appoint an advisory committee is not needed.”⁶⁵⁵
577. The JCHR is of the view that it should be the commission to decide whether it should establish consultative committees to represent the different strands of its activities. Hence, the setting up of advisory boards should not set down as a statutory requirement.⁶⁵⁶

578. To conclude, whether an advisory council is needed largely depends on the size and the composition of the Commission. For a pluralistic and large commission, the effect of an advisory council may not be significant. But for a small commission, an advisory council
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⁶⁵⁰ Palimentary of Ireland, Minutes (27 June 2000), available at <http://www.irlgov.ie/debates-00/27june/d270600b.pdf> at 488-9.

⁶⁵¹ Assessing the Effectiveness of NHRIs at 16.

⁶⁵² CHRA Review, at 2 Recommendation 107.

⁶⁵³ Id, Recommendation 118.

⁶⁵⁴ Human Rights and Equal Opportunity Commission Act 1986, Section 17 and Part V.

⁶⁵⁵ Human Rights Council of Australia, Submission to the Senate.

⁶⁵⁶ JCHR’s 11th Report, paragraph 106.

may be able to facilitate the participation of the civil society into the policy making of the NHRIs.

2. ACCESSIBILITY

579. According to an Introduction to Openness and Access to Information, “being providers of information between different parties in the society, independent institutions must seek to organize themselves in a way ...to be open and accessible to state institutions as well as to the public at large.”⁶⁵⁷ An institution which is perceived as responsible and devotes attention to cultivating relationships with individual clients will automatically enhance its own accessibility.⁶⁵⁸

2.1. AWARENESS OF THE EXISTENCE OF THE HKHRC

580. The HKHRC or other relevant bodies should undertake creative publicity to encourage person to voice out who will be otherwise reluctant to voice out to “official bodies”⁶⁵⁹. It should provide, as far as practical, information and documentation not only in the dominant language, but other relevant languages.⁶⁶⁰

581. The disadvantaged and marginalized groups, who are in most need of help, will often be difficult to reach through standard channels of communication. Hence, *NHRIs must proactively reach out to vulnerable and disadvantaged persons. Unconventional channels of communication should be used as needed to ensure that all groups in society are reached*”⁶⁶¹

582. Promotional activities aimed at disadvantaged groups are important by drawing the attention of disadvantaged and marginalized groups to the institution, the services it offers, and ways to access them. Such targeting should be done in languages and the media that the beneficiaries use.⁶⁶² At its best, NHRIs shall accept complaints in any language.⁶⁶³

583. The client should be able to request for information and lodge complaints via toll-free hotlines, the Internet or by e-mail. Annual Reports and various kind of information should be also made available through the internet.

⁶⁵⁷ An Introduction to Openness and Access to Information at 78

⁶⁵⁸ Handbook, paragraph 98.

⁶⁵⁹ Handbook, paragraph 100.

⁶⁶⁰ Best Practice at 31.

⁶⁶¹ Id.

⁶⁶² Assessing the Effectiveness of NHRIs at 17.

⁶⁶³ Best Practice at 31.

584. In Ecuador, the Ombudsman Office has established a national web-based system for the processing of complaints on human rights violations and the monitoring of the human rights situation in detention centers.⁶⁶⁴

2.2. PHYSICAL ACCESSIBILITY

585. *NHRIs should be geographically and physically accessible by constituents, including people with disabilities.*⁶⁶⁵ In addition, the location should favour those who rely on public transport.⁶⁶⁶
586. *The offices of a NHRI should, wherever possible, be located away from other government and military offices.*⁶⁶⁷ It is to “protect complainants from retaliation and dispel the impression that a NHRI is simply an organ of government”⁶⁶⁸

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| 587. Given the small size and the wide coverage of public transport in Hong Kong, the number and location of the offices of NHRIs should not be a great problem. Although obviating the requirement of attendance of the complainant and witnesses can increase the physical accessibility, ⁶⁶⁹ it may not be necessary in Hong Kong. |
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2.3. ACCESSIBILITY OF THE INFORMATION

588. NHRIs should adopt procedures which can support consistent provision of news and which prevent the concealing of information.⁶⁷⁰ Public complaints procedure, practical tool kits or handbooks with relevant directives, guidelines and outline of information and work processes, information about function and assistance of institution, directives on how to seek and collect reliable information, and how extensively to use indirect source, meeting papers and minutes should be made available to public by hard copies or via the Internet. The language of independent institutions should be kept simple and accessible to all, and due account is taken of possible linguistic diversity within the country.

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| 589. <i>The Information unit</i> should be established within the HKHRC as it can provide a clear |
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⁶⁶⁴ Ecuador (E/CN.4/2005/133, 8 March 2005), paragraph 76.

⁶⁶⁵ Best Practice at 31.

⁶⁶⁶ Id at 32.

⁶⁶⁷ Id at 31.

⁶⁶⁸ Id at 32.

⁶⁶⁹ Handbook, paragraph 104.

⁶⁷⁰ An Introduction to Openness and Access to Information at 78-9.

entry point of the Commission for media, any organization or any individual who seeks information or wants to lodge a complaint.⁶⁷¹ In order to avoid unnecessary overlaps and inconsistencies in provision of information, internal coordination between different information structures should be established. This is especially the case between headquarter and district offices, information unit and those managing website, information unit and person(s) charged with providing access to information upon request.⁶⁷² Such an information unit can also assume the role of the documentation centre as mentioned above.

3. COOPERATION⁶⁷³

3.1. WITH NGOS

590. The Commonwealth Best Practice states that “*NHRIs should work with other democratic institutions*” and “*where appropriate, form alliances with NGOs to enhance its accessibility and effectiveness.*”⁶⁷⁴ [emphasis added]
591. All relevant NGOs should be consulted regularly at all stages, from planning to implementation and evaluation. They are an essential source of information and play a valuable practical role in identifying issues and cases. As intermediaries between citizens and a NHRI, NGOs have a greater flexibility and are often more effective in articulating what the public wants and needs. Thereby, the UK Government endorsed JCHR’s suggestion that the CEHR should have a statutory duty to consult NGOs on its strategic plan.⁶⁷⁵
592. NGOs can be *active partners* of a NHRI by assisting the implementation of various programmes and activities. Strategic alliances can ensure a rational and effective division of labour between a NHRI and the NGOs.⁶⁷⁶
593. In some cases, these programmes also involve co-operating with government departments and international organisations. For example, the Nigerian Human Rights Commission is undertaking two projects on criminal justice. The first, on juvenile justice, is being carried out in partnership with UNICEF, the Penal Reform International, the Constitutional Rights Project, the Nigeria Prisons Service and other key ministries. The second provides human rights training for lower court judges and is being carried out in partnership with the Civil Liberties Organisation, the Judiciary, the National Judicial Institute and the Danish Institute for Human Rights.

⁶⁷¹ Id at 79.

⁶⁷² Id at 80.

⁶⁷³ Hanbook, paragraph 106.

⁶⁷⁴ Best Practice at 31.

⁶⁷⁵ JCHR 11th report, Paragraphgraph 136; UK Government Response, paragraph34.

⁶⁷⁶ Assessing the Effectiveness of NHRIs at 16.

594. Many NHRIs receive a significant number of complaints from NGOs lodged on behalf of others. For example, about 10% of all complaints received by the Commonwealth Ombudsman in Australia are lodged by NGOs on behalf of individuals or groups.
595. But NGOs should not confuse their role with that of NHRIs. A NHRI is neither a “super-NGO” nor a government body but rather an autonomous and independent institution. The Kandy Declaration, which was adopted by the Asian Pacific Forum in 1999 “recognized that NHRIs and NGOs have different roles in the promotion and protection of human rights and that the independence and autonomy of ... NGOs and NHRIs must be respected and upheld.”⁶⁷⁷
596. In practice, NHRIs can play a far more influential and official role than NGOs, because of their official character as State institutions and the potential of bridging the NGOs and the United Nations bodies.⁶⁷⁸
597. It is possible that the roles and functions of NHRIs and civil society actors conflict, particularly with regard to approach of dissent to government policies. For example, National Human Rights Commission of the Republic of Korea sometimes found that domestic NGOs do not always agree with it in human rights actions, causing difficulties in implementing its policy agenda.⁶⁷⁹ Under these circumstances, it is important for both civil society actors and NHRIs to understand their differences in roles, functions and powers.⁶⁸⁰

3.2. BETWEEN NATIONAL INSTITUTIONS

598. The HKHRC can enrich its methods and work by developing cooperative relationships with other NHRIs in the Asia-Pacific region and other regions. This process of cross-fertilization and internationalization has the power to strengthen the work of all human rights commissions. The HKHRC should also actively collaborate, share information with other NHRIs and be willing to learn from best practices of HRCs in other jurisdictions.
599. As the CRC commented in its General Comment No 2:-

⁶⁷⁷ *Kandy Declaration*, “Non Government Organisations and National Human Rights Institutions,” Concluding Statement, (26-28 July 1999); House of Representatives of Australia, “The Involvement of the UN and Other International and Regional Government and Non-government Organisations,” available at <http://www.apf.gov.au/house/committee/ifad/hrgoodgov/report/chapter4.pdf>, at 23, paragraphs 4.105.

⁶⁷⁸ See generally Mu’taz Qafisheh.

⁶⁷⁹ “Evolution of the National Human Rights Institutions in Asia Pacific Region During 10 Years After Vienna World Conference on Human Rights, Experiences of the National Human Rights Commission of the Republic of Korea,” <http://forumasia.org/downloads/Viennaplus10/vienna10-DrPark-Final.doc>

⁶⁸⁰ Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, (1999) 14 *Am. U. Int’l L. Rev.* 1335 at 1371-72.

“International and regional mechanisms and exchanges are encouraged, as they provide NHRIs with an opportunity to learn from each other's experience, collectively strengthen each other's positions and contribute to resolving human rights problems affecting both countries and regions.”⁶⁸¹

600. Such cross-fertilization would certainly be enhanced by the development of regional forum of NHRIs. The establishment of formal regional networks in Africa, the Americas, the Asia Pacific and Europe has strengthened the networks between NHRIs. In the Asia Pacific region, the Advisory Council of Jurists was established in September 1998 to advise the APF and its members on the interpretation and application of international human rights standards. The initiative reflects the commitment of the Forum members to strengthen the effectiveness and capacity of NHRIs in the region to improve the promotion and protection of human rights.⁶⁸²

3.3. WITH INTERGOVERNMENTAL ORGANIZATIONS

601. The effective functioning of NHRIs pre-supposes a good working relationship between a NHRI and government departments. The relationship should not be willfully confrontational. If an institution is conducting professional work of high quality, government will eventually recognize that it is fruitful to enter into a consultative process with the respective NHRI. It should be perceived beneficial to seek their advice before new legislation is passed or to alter practices conflicting with the domestic or international human rights instruments.⁶⁸³
602. Government officials should consider supporting the activities and endeavors of NHRIs to be “an essential part of their duties”.⁶⁸⁴ Governments should ensure that the NHRIs are adequately funded, respond to the recommendation of the NHRIs in a timely manner, and facilitate the NHRIs to build contact with other national institutions, NHRIs, and multilateral and regional bodies.⁶⁸⁵
603. The House of Lords in 2005, when proposing the establishment of a government body, the Fundamental Rights Agency in the UK, suggests that “the Agency should develop

⁶⁸¹ *United Nations Committee on the Rights of the Child*, General Comment No. 2 (2002), “The role of independent national human rights institutions in the promotion and protection of the rights of the child, UN Doc. CRC/GC/2002/2 (2002), paragraph 29.

⁶⁸² *The Asia Pacific Forum of National Human Rights Institutions’* website, “The Advisory Council of Jurists,” available at <http://www.asiapacificforum.net/jurists/index.html>

⁶⁸³ Power and Functions, Chapter 6, at 118.

⁶⁸⁴ Best Practice at 29.

⁶⁸⁵ Id at 28.

close relations with national human rights institutions.”⁶⁸⁶ NHRIs may benefit from the expertise of the Agency and shall call on the Agency for assistance where necessary.

4. OPERATIONAL EFFICIENCY

4.1. WORKING METHODS

604. The formulation of internal procedures, including the formation of working groups, the complaint handling procedures, the time and frequency of staff meeting should always maximize operational efficiency.⁶⁸⁷ For example, the HKHRC or other relevant bodies should set a deadline for dealing with complaints and for informing the parties of the status of the complaint.

4.2. PERSONNEL MATTERS

4.2.1. General management

605. The HKHRC or other relevant bodies should have the power to recruit its own supporting staff.⁶⁸⁸ Selection and recruitment should be conducted openly on the basis of established procedures; and set an example of non-discriminatory hiring of staff.⁶⁸⁹ Training of the supporting staff is essential so as to enhance their knowledge and sensitivity to human rights matters.⁶⁹⁰

606. In order to involve the human-rights staff of Norwegian Centre for Human Rights more directly, each staff member is responsible for keeping up-to-date and for sharing information on specific areas of human rights (thematic rapporteurs). Such information-sharing takes place at internal meetings held every three weeks.⁶⁹¹

4.2.2. Secondment of Government experts

607. The Handbook suggests that secondment of Government experts to facilitate the investigation process should be available.⁶⁹² But, “Staff should not automatically be

⁶⁸⁶ *House of Lords* (UK), “Human rights protection in Europe: the Fundamental Rights Agency,” 29th Report of Session 2005–06, HL Paper 155, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200506/ldselect/ldcom/155/155.pdf>

⁶⁸⁷ Handbook, paragraph 125.

⁶⁸⁸ Handbook, paragraph 126; Best Practice at 13.

⁶⁸⁹ Handbook, paragraph 128; Best Practice at 14.

⁶⁹⁰ Best Practice at 13.

⁶⁹¹ *Norwegian Centre for Human Rights*, “Annual Report 2004” (Oslo: University of Oslo, 2005) ISBN 82-90851-93-6, at 14.

⁶⁹² Handbook, paragraph 264.

seconded or re-deployed from branches of the public service.”⁶⁹³ The India National Human Rights Commission’s investigation team has been drawn from the police personnel, however a majority of the complaints received concern atrocities that were committed by some of these officials.⁶⁹⁴

608. Amnesty International believes that NHRIs should have their own investigative machinery and sufficient access to expert assistance to ensure the independence of the experts. Amnesty International has frequently received reports that the experts who have strong links with state officials or investigators on secondment from the regular police forces were “unwilling to investigate allegations against fellow police officers”.⁶⁹⁵ Similarly, JCHR strongly commented that “commissioners and staff of the commission should not be crown servants.”⁶⁹⁶

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| 609. As such, the HKHRC or other relevant bodies should be authorized to bring experts from outside the country when ever is necessary. ⁶⁹⁷ |
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4.3. REVIEW AND EVALUATION

610. Goal setting, regular review and evaluation can improve the effectiveness of a NHRI⁶⁹⁸. A NHRI should be evaluated against their programme goals, including their success in meeting the needs of the vulnerable groups identified, keep casework statistics published to demonstrate how the institution has dealt with its priorities and with the vulnerable groups identified.
611. It is desirable that the legislation establishing the commission impose a duty “to review its own functions and powers, and to report to Parliament and the Secretary of State for Constitutional Affairs, periodically, on any proposals it has for modifications to the legislation under which it is itself established.”⁶⁹⁹

5. ACCOUNTABILITY

5.1. EXTERNAL SCRUTINY

⁶⁹³ Assessing the Effectiveness of NHRIs at 13.

⁶⁹⁴ Vijayashri Sripati, “India’s national Human Rights Commission: A Shackled Commission?,” (2000) 18 *Boston University International Law Journal* 1 at 32.

⁶⁹⁵ Amnesty International’s recommendations for effective protection and promotion of human rights, paragraph 4.B.1, Independent investigation professionals.

⁶⁹⁶ JCHR’s 11th report, paragraph 131.

⁶⁹⁷ Assessing the Effectiveness of NHRIs at 21.

⁶⁹⁸ Handbook, paragraph 132-5.

⁶⁹⁹ JCHR’s 11th report, paragraph 146.

5.1.1. From the legislature

612. While NHRIs rest upon a particular form of public legitimacy;⁷⁰⁰ they must ensure that they perform in an effective and efficient manner. In order to promote a good governance agenda for human rights and to ensure its effectiveness, NHRIs should conform to the good governance agenda which includes a more open, accountable, and transparent approach.⁷⁰¹
613. NHRIs should be required to report to the legislature. The legislature should examine the work of a NHRI and its effectiveness thoroughly. “Parliaments should have an opportunity to discuss the reports of the NHRI and to debate its budget proposals. The use of parliamentary committees to provide an opportunity for in-depth consideration of such reports should be encouraged.”⁷⁰² The reports of the NHRIs should be required to be tabled in a timely manner.⁷⁰³
614. That’s why the JCHR recommended that the JCHR itself, as a sub-committee of the Parliament, should be empowered to consider “the expenditure, administration and policy of the CEHR, any reports of the commission which are laid before Parliament, and any matters connected with those reports.”⁷⁰⁴

615. The law should stipulate the frequency of reports, the possibility of submission of ac hoc reports, issues to be reported and the procedure for examining the reports.⁷⁰⁵ The financial issues to be reported should include the sources of income, the expenditure, a detailed breakdown of the operating costs as well as the costs of their programmes and activities.⁷⁰⁶ Moreover, records of external reporting of the HKHRC or other relevant bodies should be publicly available.⁷⁰⁷

5.1.2. From independent external audits

616. According to the International Council on Human Rights Policy's report, NHRIs can achieve accountability for their effective performance through independent external audits.⁷⁰⁸ The audit report should evaluate financial and administrative functions of the

⁷⁰⁰ See generally Obiora Chinedu Okafor, *The Global Process of Legitimation and the Legitimacy of Global Governance*, (1997) 14 *Ariz. J. Int'l & Comp. L.* 117 at 127- 28 (explaining that maintaining a system of global governance depends on legitimizing international rules and institutional processes).

⁷⁰¹ Linda C. Reif, at 18-19 (explaining how NHRIs should build good governance by being participatory, transparent, and accountable).

⁷⁰² According to the JCHR, “There should be a committee of both Houses charged with considering the reports of the commission.” JCHR 11th report, paragraph 137; Best Practice at 28.

⁷⁰³ Best Practice at 28.

⁷⁰⁴ JCHR 11th Report, paragraph 141.

⁷⁰⁵ Handbook, paragraph 137.

⁷⁰⁶ Assessing the Effectiveness of NHRIs at 23.

⁷⁰⁷ *Id.*

⁷⁰⁸ Performance and Legitimacy at 70-71 (giving an example of the yearly external audit of the South African

NHRIs, as well as the effectiveness of the complaints redress mechanism of the NHRIs.⁷⁰⁹ This would promote efficiency and enhance the working quality of the NHRIs, while also helping to overcome the legal and bureaucratic hurdles associated with government created institutions.

5.1.3. *Internal Evaluation*

617. NHRIs need to constantly and actively assess their performance in all functional areas, including through “the engagement of independent consultants.”⁷¹⁰ The results of evaluation should be incorporated in annual reports.⁷¹¹ Based on the result of evaluation, NHRIs need to constantly evolve their activities to ensure that the protection and promotion of human rights remains their primary objective.

618. Evaluations should examine the quantity, quality, and the impacts of the programmes of the NHRIs. NHRIs should undertake a strategic exercise to establish programmatic targets and goals, some of which should be measurable.⁷¹²

619. Developing performance and impact indicators can be a useful tool to help a NHRI plan and evaluate its work. First, indicators help the HKHRC or other relevant bodies to gather information about the organization itself and its programmes. Secondly, they can help the commissioner monitor the effectiveness and the progress of the annual plan of the HKHRC or other relevant bodies and set targets for future work. Third, performance and impact indicators are easily understandable and can be readily communicated to the public. Finally, indicators can strengthen consultation and collaboration with all stakeholders including beneficiaries and partners.⁷¹³

620. However, indicators aren’t off-the-peg solutions to the challenges of planning and implementation. Commissioners and supporting staff should not concentrate solely on meeting indicators and lose sight of the ultimate goal of addressing human rights problems.

Human Rights Commission’s budget).

⁷⁰⁹ Id at 71 (discussing how a regular audit, coupled with an account of what the NHRI has done, increases effectiveness).

⁷¹⁰ Best Practice at 27.

⁷¹¹ Id.

⁷¹² Id.

⁷¹³ Assessing the Effectiveness of NHRIs at 41-2.

Part IV. The Best Institutional Framework — A Dual Commission Model: a Human Rights Commission Working Along With an Equal Opportunity Commission

621. This Chapter concerns the design of the institutional framework for promotion and protection of human rights [the institutional framework], in other words, the way to allocate all the functions and relevant powers to appropriate institution(s).
622. The powers and functions mentioned in Chapter II concerns the whole institutional framework. Although the HKHRC is certainly the core of the institutional framework, some of the functions within the framework may be diverted to other institutions. What must remain a central focus is that relevant independent institution(s) should take up all the functions promoting and protecting human rights in an *effective manner*.
623. This Chapter first outlines the general principles of designing the institutional framework, and then the nature of different categories of NHRIs, and which category the HKHRC should belong to in order to effectively bring about a culture of human rights. Lastly, the Chapter explores the pros and cons of various institutional frameworks.

1. THE GENERAL PRINCIPLES OF DESIGNING THE INSTITUTIONAL FRAMEWORK

624. The Vienna Declaration recognizes each state's right "to choose the framework that is best suited to its particular needs at the national level."⁷¹⁴
625. The ICCPR, the ICESCR and General Comment No. 10 do not specify the nature of domestic remedies and the structure of NHRIs. "National institution" is loosely defined to include ombudsman, human rights commissions, offices of public defenders and various specialist commissions, depending on variations in each country.⁷¹⁵
626. Whilst comparative experience is useful in identifying the issues and problems that need to be addressed when designing the most appropriate institutional framework, the political, constitutional and legal situation in which the NHRIs operate vary considerably

⁷¹⁴ Vienna Declaration, paragraph 36.

⁷¹⁵ Isaac Scott, "The Ombudsman, the Executive and Collective Rights in Underdeveloped Countries," (1979) 13 *Q.J. Admin* at 101-2.

and are significant factors determining their institutional structure. According to Professor John Hatchard, the visiting professor of Law Programme in Open University in the United Kingdom, there is no right or wrong answer. “The whole joy of NHRIs is that they are established to reflect national needs.”⁷¹⁶

627. The JCHR, in its 11th Report, considered that four basic criteria should be met by any institutional design of CEHR:-

“It must enable the special circumstances of the separate jurisdictions of the UK to be recognized;

It must provide for co-ordination at UK-wide level;

It must avoid overlap of responsibilities and duplication of effort;

It must provide clear lines of democratic accountability.”⁷¹⁷

The first criteria stresses that the NHRIs must suit the country where they operate, while the other criteria enhance the effectiveness and efficiency of the NHRIs.

628. A potential difficulty faced by any newly established NHRIs is how to fit its work with the remit of existing NHRIs to avoid duplication of works.⁷¹⁸ The greater numbers the specialized commissions, the more significant the problem.

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| 629. When determining the institutional framework, what must remain a central focus is that relevant independent institution(s) should take up all the functions promoting and protecting human rights recommended in Chapter II in an <i>effective manner</i> . In addition, it must suit the constitutional settings, legal and political culture and any other relevant special circumstances in Hong Kong. |
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2. THE NATURE OF THE HKHRC

2.1. THE GENERAL CATEGORIES OF NHRIS

630. The UN has classified NHRIs into two broad categories, namely the ombudsmen and human rights commission.⁷¹⁹ Ombudsmen’s primary role is to oversee fairness and

⁷¹⁶ John Hatchard at 34.

⁷¹⁷ JCHR’s 11th Report at 99.

⁷¹⁸ Jane Williams, Anne Crowley and Rhian Croke, “Righting the Wrongs: The Reality of Children’s Rights in Wales,” *Save the Children*’s website (25 January 2006), available at http://www.savethechildren.org.uk/scuk_cache/scuk/cache/cmsattach/3815_walesuncrc.pdf at 12-3.

⁷¹⁹ Handbook, paragraph 41.

legality in the area of *public administration* and to receive and handle complaints *against public authorities*; while human rights commission generally addresses the human rights violations committed by *both private entities as well as governments*.

631. The classical ombudsman, first created in Sweden in 1809, started to proliferate in the 1960s during the trend for governmental bureaucratization. The classical ombudsman “oversees fairness and legality of public administration”⁷²⁰ except the conducts of the judiciary and the legislature.⁷²¹ Ombudsmen do not usually have an explicit human rights mandate and cannot examine complaints against the private sector. Without the power to make legally binding decisions, classical ombudsmen usually make recommendations to relevant public authorities.
632. Human rights commissions, first created in France, have started to proliferate since the last decade. In general, human rights commissions have explicit human rights mandates and may have jurisdictions over both the public and the private sector. They provide advice to governments on human rights laws and policies, conduct research, undertake human rights education and investigate complaints made by private individuals.⁷²² Usually, they cannot make binding decisions but their recommendation on settlement and conciliation can be enforced by a court order.⁷²³
633. On the other hand, Morten Kjærum, the Executive Director of the Danish Centre for Human Rights, identified five different groups of NHRIs according to their powers and mandates in a more detailed way, namely *consultative commission*, *National human rights centers*, *Commissions with judicial competence*, *commission with judicial and ombudsman competence*, and *human rights ombudsmen*.⁷²⁴ This classification is popular among academics.⁷²⁵
634. *Consultative commissions* are broad-based commissions with a membership consisting of representatives from key NGOs, the academia and other different groups. The Commission deliberates on human rights issues but they neither deal with individual complaints nor issue binding decision. This type of institutions is found in France, Greece and Morocco.

⁷²⁰ Id, paragraph 57.

⁷²¹ Id, paragraph 59.

⁷²² Id, paragraphs 48-9, and 51.

⁷²³ Id, paragraph 50.

⁷²⁴ Morten Kjærum and Martinus Nijhoff, “National Human Rights Institutions: Implementing Human Rights,” (Denmark: Det Danske Center for Menneskerettigheder, 2003) at 8-9.

⁷²⁵ Anna-Elina Pohjolainen classified NHRIs into 4 broad categories, encompassing the human rights commission model, the advisory committee model, the ombudsman model, and the human rights institute model. But the author didn’t draw a difference between *Commissions with judicial competence* and *Commissions with judicial and ombudsman competence* in this study. Anna-Elina Pohjolainen, “The Evolution of National Human Rights Institutions - The Role of the United Nations,” (Denmark: The Danish Institute for Human Rights, 2006) ISBN 87-90744-97-7 at 16-20.

635. *National human rights centers*, resembling consultative commissions with a broad membership base, are research-based and do not deal with individual complaints. This type of commission has developed in Northern Europe, *e.g.*, Denmark, Germany and Norway.
636. *Commissions with judicial competence* are commissions entrusted with the function of handling complaints and the power to issue binding decisions either enforceable by the commissions themselves or by the court. They usually have a number of commissioners appointed according to different criteria. Examples for this type of commission are found in India, Ireland, South African, Latvia and Nepal.
637. *Commissions with judicial and ombudsman competence* resemble *Commissions with judicial competence* but they possess the mandate of a traditional ombudsman. This is the case in Ghana, Mexico, Mongolia and Tanzania.
638. *Human rights ombudsmen* have mandates extended to a wide range of human rights issues. However, members of the public are seldom formally represented. This is the case in Sweden, where there was six specialized ombudsmen.

2.2. THE CLASSIFICATION OF THE HKHRC

639. The Human Rights and Equal Opportunities Commission, introduced by the human rights bill 1994, would probably be classified as *Commissions with judicial competence*.
640. In 27 June 1990, the ad hoc group concerning the legislation of the BORO urged the Government to study the feasibility of the NHRIs. The ad hoc group opined that the Commission should educate the public on human rights, act as an arbitrator in action between individuals, review legislation and recommend changes to laws that may conflict with the BORO, receive and investigate complaints, and issue guidelines on the definition of human rights.⁷²⁶
641. During the debate of the human rights bill 1994, Anna Wu's argued that the proposed Human Rights and Equal Opportunities Commission should be authorized to:-⁷²⁷
- (a) monitor government policies and programmes,
 - (b) provide advice on legislation and other human rights matters,
 - (c) promote awareness of human rights and educate the public,

⁷²⁶ Legislative Council's meeting (5 June 1991) at 52.

⁷²⁷ See Anna Wu, "Why Hong Kong Should Have Equal Opportunities Legislation and a Human Rights Commission," *Human Rights and Chinese Values: Legal, Philosophical, and Political Perspectives*, Michael C. Davis (ed.), (Hong Kong: Oxford University Press, 1995) at 185.

- (d) provide reports on human rights development in Hong Kong to international supervisory bodies,
 - (e) investigate complaints,
 - (f) provide dispute settlement on matters relating to human rights,
 - (g) provide legal expertise and financial assistance to complainants initiating proceedings relating to human rights violations,
 - (h) help develop jurisprudence and standards of interpretation relating to human rights in Hong Kong in a manner consistent with international norms, and
 - (i) initiate proceedings to clarify the status of laws which may be inconsistent with Hong Kong's international obligations and domestic laws relating to human rights such as the Hong Kong Bill of Rights.
642. The fundamental defeat of consultative commissions and national human rights centers is the absence of the power of enforcement. They cannot issue enforceable recommendations. However convincing the recommendations are, the Government may merely pay lip service to the advice of the NHRIs.
643. For instance, the German Institute for Human Rights has always considered it its task to play a systematically evaluate and implement the Concluding Observations of the UNs' treaty bodies."⁷²⁸ In practice, the Institute only "discussed [the concluding observations] with representatives from government, parliament, civil society and academia, and recommendations on how to implement them."⁷²⁹ How effective such institutions can be, in particular when the Government does not genuinely commit to a human rights agenda, is doubtful.

<p>644. It is submitted the HKHRC shall possess the power to issue enforceable order. Its functions and powers should be akin to <i>the Commissions with judicial and ombudsman competence</i>, or at least, that of <i>Commissions with judicial competence</i>. The HKHRC shall have a jurisdiction over a wide range of human rights issues unless other existing or prospective independent statutory body has taken up that particular area of human rights concern.</p>

⁷²⁸ German Institute for Human Rights, "Annual Report 2004," (August 2005), available at <http://www.etc-graz.at/webseiten-alt/about/Jahresbericht2004.pdf> at 12.

⁷²⁹ Id.

3. THE POSSIBLE CHOICES OF INSTITUTIONAL FRAMEWORK FOR HUMAN RIGHTS PROMOTION AND PROTECTION

645. There are three categories of institutional framework, namely the multiple-commission model, the single and integrated human rights commission model, the dual model consisting of a human rights commission and an equal opportunities commission.

3.1. THE MULTIPLE-COMMISSION MODEL

646. The multiple-commission model consists of an array of commissions mandated narrowly to deal with specific human rights violations. Usually, each commission monitors a limited number of human rights legislation and seldom cooperates with each other.

647. The NHRIs in Sweden and South Africa are the examples of a multiple-commission model. In Sweden, there are six official ombudsmen.⁷³⁰ They deal with individual complaints within their respective fields of responsibility.⁷³¹

648. South Africa has established the Public Protector (an office of the ombudsman), the human rights commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, Auditor-General,⁷³² the Electoral Commission, and the Independent Authority to Regulate Broadcasting.

3.1.1. Intersectionality of multiple discriminations

649. As far as equality rights are concerned, the proliferation of various specialized equality commission is undesirable because of the intersectionality of multiple discriminations. In reality, discrimination cases usually involve multiple grounds. Specialized commissions mandated to deal with discrimination on a particular ground often fail to distinguish and address the particular problems faced by different groups.

⁷³⁰ They are the Office of the Parliamentary ombudsman, Consumer Ombudsman, the Office of the Equal Opportunities Ombudsman, the Ombudsman against Ethnic Discrimination, the Children's Ombudsman, the Office of the disability Ombudsman and Ombudsman against Discrimination because of Sexual Orientation.

⁷³¹ *EU Network of Independent Experts on Fundamental Rights*, "Opinion of the EU Network of Independent Experts in Fundamental Rights Regarding the Role of National Institutions for the Protection of Human Rights in the Member States of the European Union," (March 2004) CFR-CDF.Avis1.2004, available at http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2004_1_en.pdf at 139-42.

⁷³² Constitution of South Africa, Chapter 9, Articles 182-92.

650. On the other hand, a single equality commission is able to deal with multiple grounds of human rights violations, while also being open to the diversity and specific needs of all human rights issues.
651. Mr. Pru Goward, the Australian Federal Sex Discrimination Commissioner, when delivering a speech at the University of Hong Kong, urged the Hong Kong Government to take into account the intersectional nature of discrimination when formulating the Race Discrimination Bill so that the Bill could achieve greater effectiveness and longevity.⁷³³ He said that:-

“One of the challenges facing HREOC, the NHRI in Australia, is intersectionality, in particular in the field of race and gender...

“HREOC’s legislation and its structure suggest that discrimination can’t be neatly dealt with by considering separately these aspects of identity. We have created race discrimination legislation, sex discrimination legislation etc. HREOC itself is structured into policy and complaints handling units along these same divisions. *The effect of setting up legislation and human rights structures that deal with these aspects of identity separately is that they are often inadequate for dealing with situations of discrimination or disadvantage that have been brought about as a result of the intersection of different aspects of identity.*” [emphasis added]

“In Australia for example, race and gender intersectionality mean that the experiences of women from non-English speaking backgrounds...and Indigenous women are unique, however our human rights system often struggles to work with this overlap...The challenge is to recognise that different groups and persons will have very different experiences of racism, for example, because of other aspects of their identity, such as gender.”⁷³⁴

3.1.2. Cost effectiveness

652. Because of the intersectional nature of discriminations, a number of specialized antidiscrimination commissions would be involved in a single discrimination case under a multiple-commission model. Although the jurisdictions of various specialized commissions do not overlap as such, the antidiscrimination commissions always need to work with each other. Hence, undesirable conflicts and duplications of jurisdictions, which the Handbook expressly warns against, may be generated.⁷³⁵ Even if the

⁷³³ Pru Goward, “HREOC: Its structure, its functions and its challenges,” Speech at Faculty of Law, the University of Hong Kong (11 March 2003), *the University of Hong Kong’s website*, available at <http://www.hku.hk/ccpl/pub/conferences/11032002.pdf> at 26.

⁷³⁴ Id at 23-5.

⁷³⁵ Handbook, paragraph 91, and 94.

commission can cooperate well with each other, the transactional cost of the multiple-commission model is higher than the other two models.

653. Ian Clyde, the Chairman of Consumer Affairs Victoria and Simeon Beckett, the spokesman for Australian Lawyers for Human Rights argued that, due to its structure, its size, power and resources, the Australian HREOC has been able to conduct major systematic human rights inquiries which have not been possible under the pre-2006 structure in the UK.⁷³⁶ On the other hand,:-

“The proliferation of single issue statutory authorities in the United Kingdom is problematic because of the potential inconsistencies between the practice of such organizations, the lesser effectiveness of smaller organizations and the differences between legislative regimes. There seems to be little real basis for maintaining the separation of such organizations apart from anxiety about fusion and natural corporate resistance.”⁷³⁷

654. In Malawi, the existence of both a Malawi Human Rights Commission (MHRC) and an Ombudsman illustrates a clear overlap of jurisdiction. The Constitution provides that the MHRC shall protect and investigate violations of the rights accorded by the “Constitution or any other law”.⁷³⁸ The Ombudsman investigates cases where a person has suffered *injustice* and where there is no other practicable legal remedy.⁷³⁹ The jurisdiction of the MHRC covers both the public and private sectors whereas the Office of the Ombudsman extends only to members of the public service.
655. To facilitate the cooperation of the MHRC and the Office of Ombudsman, the Ombudsman is an *ex officio* member of the MHRC. Together with the Law Commissioner, the Ombudsman can effectively control the appointment of human rights commissioners. Thereby, frequent communications as well as a close working relationship are essential to constructive cooperation.⁷⁴⁰
656. One can argue that a clear definition of remits of various NHRIs can avoid duplication of jurisdiction. Where jurisdictions overlap, NHRIs can communicate with each other to resolve the disputes. The presence of the Malawian Ombudsman as an *ex-officio* member of the Malawi Human Rights Commission has been regarded as a useful way to resolve any duplication over jurisdictions.⁷⁴¹
657. Frequent communication is required to maintain inter-institutional cooperation in the multiple-commission model. The transactional cost for communication and decision

⁷³⁶ See generally Ian Clyde and Simeon Beckett.

⁷³⁷ *Id* at 146.

⁷³⁸ Constitution of Malawi, Article 129.

⁷³⁹ *Id*, Article 123(1).

⁷⁴⁰ John Hatchard at 36.

⁷⁴¹ *Id*.

making for multiple agencies would usually be greater than a single institution or a double-institution.

658. At the same time, the multiple-commission model “restrict or preclude shared use of services which could well be cost-effective, particularly in outreach and education, but also in legal advice and administrative support.”⁷⁴²

3.2. A SINGLE COMMISSION MODEL

659. Under a single commission model, there is ONE single and integrated commission mandated broadly to deal with *both equality and human rights issues*. The exact powers and functions of that single commission may vary across jurisdictions, but such a commission always assumes the role of overlooking the overall human rights performance of the Government. Notably, the single commission model handles both equality and human rights issues within a single body, but it may divert some functions to other independent bodies.

3.2.1. Holistic approach of human rights protection

660. The major advantage of the single commission model is the holistic approach that it can bring about. According to the JCHR, “*the integrated commission may have the ability to adopt a more holistic approach than two separate bodies could*”⁷⁴³ and “could strengthen the ability to promote a culture that respects the dignity, worth and human rights of everyone.”⁷⁴⁴ [emphasis added]
661. A ‘holistic’ approach emphasizes a human rights cultural change in society by combining tough enforcement measures with promotion across all the stakeholder groups and in the society.⁷⁴⁵ The reasons why the single commission model can achieve a holistic approach in human rights protection are as follows.

3.2.1.1. Centralized, coordinated and systematic approach

662. First, the single commission model can bring about a centralized, coordinated and systematic approach in promotion and protection of human rights by (1) emphasizing the

⁷⁴² JCHR’s 6th Report, paragraph 193.

⁷⁴³ Id, paragraph 200.

⁷⁴⁴ Id, paragraph 203.

⁷⁴⁵ Clare Collins, “A Single Equality Body: Issues Paper,” prepared for the *Equality and Diversity Forum*, October 2002, available at <http://www.edf.org.uk/publications/clairecollinspaper.pdf>

- interconnectedness of human rights and equality, and (2) formulating and implementing the National Human Rights Action Plan with the Government.
663. By emphasizing the interconnectedness of human rights and equality, a combined commission could provide a “one-stop shop” for those suffering from multiple grounds of discrimination⁷⁴⁶ and contribute to breaking down and to eroding distinctions and hierarchies between strands.⁷⁴⁷
664. Lord Lester of Herne Hill in the United Kingdom appreciated that the single commission model could take into account experiences of multiple discriminations and hence could “*encourage an overarching and strategic approach to the principle of equal treatment without discrimination, bringing together the different strands and avoiding wasteful duplication.*”⁷⁴⁸ [emphasis added]
665. In a survey conducted by the UCL, the general consensus among stakeholders is that the single commission model is “*essential to provide the required coordinated approach in both enforcing and promoting equality.*”⁷⁴⁹
666. The Australian HREOC and the Human Rights Commission in New Zealand have found that their combined human rights and equality functions have allowed them to “*take a multifaceted and comprehensive approach to the treatment of the Aboriginal and Maori communities in both states, as well as infusing their equality work with human rights values.*”⁷⁵⁰
667. NHRIs have the potential to become central players in the development of a country’s human rights strategy.⁷⁵¹ This role can be further enhanced if the NHRIs actively formulates the national human rights action plan and monitors its implementation.
668. The processes around the formulation of a National Human Rights Action Plan is found to have intrinsic value because it includes participatory processes, inter-sectoral coordination and cooperation among stakeholders. Approximately 17 countries

⁷⁴⁶ Lord Lester of Herne Hill and Kate Beattie, “The New Commission for Equality and Human Rights,” (Summer 2006) *Public Law* 197 at 206-7.

⁷⁴⁷ UCL Survey at 43.

⁷⁴⁸ Lord Lester of Herne Hill and Kate Beattie at 206-7.

⁷⁴⁹ UCL Survey at 6.

⁷⁵⁰ Id at 43.

⁷⁵¹ Cees Flinterman and Marcel Zwamborn, “From Development of Human Rights to Managing Human Rights Development: Global Review of the OHCHR Technical Cooperation Programme Synthesis Report,” *Netherlands Institute of Human Rights* (September 2003), available at <http://www.humanconsultancy.com/ReviewTC%20program%20Synthesis%20final%2017-09-03.pdf> at 56.

worldwide have adopted a National Human Rights Action Plan.⁷⁵² For example, the New Zealand Commission has responsibility for developing a National Action Plan to promote human rights and ensure mainstreaming of rights and equality across the entire public sector.

669. In the 1993 Vienna Declaration and Programme of Action, the World Conference on Human Rights:-

*“recommended that each State consider the desirability of drawing up a national action plan identifying steps whereby the State would improve the promotion and protection of human rights. In developing their respective actions plans, States will be required to set priorities in the field of human rights as well as to identify appropriate vehicles through which the plan is implemented. In recognition of their expertise and experience, national institutions should be recruited to assist in the drafting of action plans and utilized as much as possible in the implementation process.”*⁷⁵³ [emphasis added]

670. The Handbook also encourages the NHRIs to participate in developing national action plan on human rights.⁷⁵⁴ The formulation and implementation of a human rights action plan is best entrusted to a body that has a wide mandate to overlook all areas of human rights.

671. In a survey conducted for the preparation of Sixth International Conference for National Human Rights Institutions, 7 out of 25 countries responding to the questionnaire have a Human Rights Plan of Action.⁷⁵⁵ In these 7 countries, “NHRIs have participated in the elaboration of the respective Human Rights Plan of Action, primarily by being involved in the actual drafting, but in some cases also by providing input and engaging in consultations.”⁷⁵⁶

672. Thereby, the single commission model, accompanied by a human rights action plan, can provide a focal point for the promotion and the coordination of human rights policies currently in force or formulation of such policies. Given that the UN has encouraged the state party *“to coordinate their actions, with the objective of establishing a consistent,*

⁷⁵² Danish Institute for Human Rights, Supporting National Institutions for the Promotion and Protection of Human Rights at 64.

⁷⁵³ Handbook, paragraphs 71 and 215.

⁷⁵⁴ Id, paragraph 215.

⁷⁵⁵ Responses were received from 25 countries, including Antigua/Barbuda, Argentina, Canada, Colombia, El Salvador, Mexico, Peru, Denmark, France, Poland, Slovenia, Greece, the Republic of Ireland, the Netherlands, Hong Kong, Malaysia, Mauritius, Mongolia, New Zealand, Philippines, Madagascar, Nigeria, Rwanda, Uganda, and Zambia.

^{6th} Conference, Questionnaire to combat racism at 172.

⁷⁵⁶ But the survey indicated that some of the 7 countries did not monitor the implementation of the Plans. Id.

*integrated and structured approach to the protection of the rights of non-citizens,”*⁷⁵⁷ it seems that the single commission model is a better model to achieve a consistent, integrated and structured approach than the multiple-commission model. [emphasis added]

3.2.1.2. Wide coverage of human rights issues

673. Secondly, a single human rights commission model can provide coverage of a wide spectrum of human rights, including equality rights under both the domestic laws and international instruments.
674. Human rights are more than just about equality. The remit of human rights is not exhaustive, including for example the right to life, the right to education, the right of access to information, the right to be free from degrading treatment, the right to housing, the right to food. However, these types of human rights, albeit enshrined under the rectified human rights instruments, may or may not be incorporated in the domestic laws.
675. While the jurisdiction of a specialized commission is often limited to particular grounds of human rights intrusion prohibited by a statute, a single human rights commission with a wide remit extended to international human rights instruments is able to deal with the gaps between existing legislations.
676. Lord Lester of Herne Hill and Kate Beattie commented that:-

*“With the combining of equality with human rights protection, equality work will be able to take account of broader human rights law. The CEHR will be able to tackle problems outside the scope of the equality provisions but within the scope of Art.14 ECHR [European Convention on Human Rights].”*⁷⁵⁸ [emphasis added]

3.2.1.3. Projection of a stronger voice and a definite access point

677. Thirdly, the single commission model can project a stronger voice for human rights protection in a society; and provide a single and a definite access point for the public and thereby generate a broader public appeal than separate bodies.⁷⁵⁹

⁷⁵⁷ *The Office of the United Nations High Commissioner for Human Rights*, “Implementation of the Durban Programme of Action: An exchange of ideas on how to move forward” (10-12 December 2003), available at <http://www.ishangohouse.com/docs/un.pdf>, paragraph 47.

⁷⁵⁸ Lord Lester of Herne Hill and Kate Beattie at 206-7.

⁷⁵⁹ UCL Survey at 8.

678. In survey conducted by the UCL, employers, service providers, public authorities and complainants in general favour a single unified commission giving a single definite set of advice.”⁷⁶⁰

679. A large number of specialized institutions would confuse people as to where to go for assistance and advice. In Quebec, the Office of the Ombudsman acknowledged that people sometimes get confused with the scope of the work of Ombudsmen.

“This is not altogether surprising where complainants have to be reminded to file their complaints with the appropriate authority ie: The *Office de la protection du consommateur* for consumer matters; the *Commission des normes du travail* for complaints about non-compliance of employers with labour standards; and the *Commission d'accès à l'information du Québec* where a person is dissatisfied with a decision by public organisations regarding access to documents and the protection of personal information. In cases of alleged discrimination, harassment or exploitation, the matter is dealt with by the human rights commission.”⁷⁶¹
[emphasis added]

3.2.2. *Cost-effectiveness and number of commissioners*

680. By definition, the single commission model would not overlap jurisdictions with any other NHRI. Hence, the transactional cost of the single-commission model is low.

681. While there are significant overlaps between human rights and equality cases issues, the single commission model “avoids both uncertainties as to which institution(s) has jurisdiction and a duplication of work and ensures integrated institutions are better able to adopt “a rights-based approach to their performance of their multi-pronged roles” as compared to the dual-commission model.”⁷⁶²

682. The single commission model does not require as many commissioners as the multiple-commission model or the dual-commission model do. John Hatchard, the visiting professor of Law Programme in the Open University in the United Kingdom said that the number of commissioners is an issue “particularly significant in developing countries with a relatively small pool of qualified and willing candidates for appointment.”⁷⁶³

683. Nevertheless, if a scope of power too large is granted to a single commission, that commission may turn into a large and unwieldy bureaucratic organization, in which the

⁷⁶⁰ Id at 6.

⁷⁶¹ John Hatchard at 35.

⁷⁶² Id at 34.

⁷⁶³ Id at 35.

transactional cost for communication among different strands or units comparable to that of the dual-commission model.

3.2.3. *Tensions within the single commission model*

684. The single commission model may produce an unfavourable outcome. The first weakness of this model is that tensions can arise within the commission across different human rights concerns. The broader the remit of a NHRI, the greater the internal tension.
685. Firstly, the rights of different people may sometimes conflict. For example, the right to freedom of association may be used to protect the rights of individuals to belong to far right groups that advocate the inferiority of some racial groups.
686. Secondly, under scarce resources, different strands and different rights will be accorded different priorities. Separate strands within a single commission may sometimes over-emphasize mutual competition among the strands at the expense of the core agenda. Various strands then may compete for scarce resources.⁷⁶⁴ In addition, equality practitioners in one strand often do not understand particular needs of other strands.⁷⁶⁵
687. The Australian experience clearly illustrates such problems. Comprising of the Commissioners for sex, race and disability, the Human Rights Commissioner, the Privacy Commissioner and the Aboriginal and Torres Strait Islander Social Justice Commissioner in 1997, the Australian HREOC had suffered from severe internal conflicts concerning the different allocation of resources across different strands. Such cross-strand tension was substantially reduced after a severe budget cuts by 55% imposed on the Australian HREOC from 1997-2002, each strand has been allocated equal amounts of money since then.
688. As such, a single commission must operate in a manner that addresses the specific needs of specific strands, while avoiding tensions between those strands and effectively implementing a cross-strand agenda.
689. To do so, representatives of the separate strands need also to recognize *openness* and *diversity* as the core values that underpin all grounds for equality.⁷⁶⁶ With these values in mind, the practitioner of various strands would be able to appreciate that the different strands in fact mutually reinforce one another. Evidenced by the UCL Survey,:-

⁷⁶⁴ JCHR's 6th Report, paragraph 200.

⁷⁶⁵ UCL Survey at 11.

⁷⁶⁶ Id at 6-7.

“Progress in one ground can impact positively on another, the equality agenda cannot be separated out into component parts, and overlapping grounds add value to each other in a mutually reinforcing process.”⁷⁶⁷ [emphasis added]

3.2.4. Potential loss of focus on equality rights or civil and political rights

690. There has been concern whether the single commission model is capable of monitoring the implementation of a number of human rights instruments. With such a wide remit, a single human rights commission it may lose its focus and fail to prioritize different areas of human rights concerns.
691. Although equality and human rights agendas may sometimes overlap with each other, there are significant differences between human rights and equality issues.⁷⁶⁸
692. Human rights govern the relationship between the state and the individual whereas equality rights usually involve the relationship between individual(s) against private sector organizations.⁷⁶⁹ Therefore, the targets to complaints of human rights violation and discrimination and the appropriate remedies for the two types of violations are distinct. For example, the promotion of equality may focus on legal remedies for discrimination in employment and the advancement of the economic status of disadvantaged groups; while the promotion of human rights may focus on advancing a culture of respect for human rights within the public authorities.
693. Dealing with bureaucratic government “demands considerable expertise and experience and the development of a sound working relationship with public servants.”⁷⁷⁰
694. On the other hand, discrimination needs to be tackled by specific measures, expertise and experience that are not the same to other human rights violations. Take disability as an example. The barriers to disabled people participating in society are very often unique to their disability and not related to individual prejudice or behaviour. The expertise and measures for the disabled person may not be applicable in other antidiscrimination issues, needless to say in other human rights violations.
695. In practice, certain stakeholder groups found that a single commission lacked specialist units that represent their perspectives.⁷⁷¹ The Northern Ireland Human Rights Commission was perceived to lose focus on gender after the replacement of gender commission. The Commission immediately addressed the problem by proposing the

⁷⁶⁷ Id at 11.

⁷⁶⁸ JCHR’s 6th Report, paragraph 180.

⁷⁶⁹ Id.

⁷⁷⁰ John Hatchard at 35-6.

⁷⁷¹ UCL Survey at 16-20.

establishment of “an advisory reference groups on particular issues” to co-ordinate gender policy across the functional units and added gender-focused campaigns on equal pay and promotion of equality in its business plan for 2002.⁷⁷² However, the proposal was not implemented.

696. In the UK, the community fears that the establishment of a single commission is an excuse of the government to water down the particular needs of vulnerable groups in the name of saving public expenses.⁷⁷³
697. Hence, the single commission model, as compared to the multiple-commission model and the dual-model commission, is less focused on the equality agenda or the human rights agenda, but is focused in representing all complainants, particularly when it has to fulfill different mandates under a budget constraint. The single commission model thereby is comparatively less competent in allocating sufficient resources to specific equality or human rights agenda.
698. Despite the above findings, however, the JCHR believed that it is still possible “to construct an agenda that put the priorities of the equality bodies and those of a potential human rights commission at different ends of a spectrum which has group rights and economic rights at one end and individual rights and civil and political rights at the other.”⁷⁷⁴ At the same time, the UCL survey commented that “structural and functional issues relating to how such a commission is established”⁷⁷⁵ are other causes for the difficulties experienced by the single commission model and stakeholders remained “supportive of single commissions, and [saw] their benefits as considerably outweighing the drawbacks”⁷⁷⁶.

3.3. THE DUAL-COMMISSION MODEL

699. The third possible institutional framework is to establish a general human rights commission and an equal opportunities commission that are responsible for general human rights, and equality rights respectively. Again, two commissions may divert some of their functions to other independent institutions.

⁷⁷² *Northern Ireland Human Rights Commission*, “Strategic Plan 2000 –2002,” available at http://www.nihrc.org/index.php?page=subresources&category_id=27&from=1&resources_id=57&search_content=&Itemid=61 at 7.

⁷⁷³ UCL Survey at 9; conformed by Patrick Yu, telephone interview (22 July 2006).

⁷⁷⁴ JCHR 6th Report, paragraph 182.

⁷⁷⁵ UCL Survey at 9.

⁷⁷⁶ *Id* at 9.

700. The best-known examples of the dual commission model are found in the Republic of Ireland and in the Northern Ireland. Relatively few countries have adopted the dual-commission model.

3.3.1. Prevention of the potential loss of focus on equality rights or civil and political rights

701. The dual-commission model guarantees particular focus and resources are guaranteed to the equality agenda irrespective of political atmosphere. It can prevent the possible loss of focus on the equality agenda in favour of broader and often more political human rights issues. The UCL survey said that:-

“[A C]ombined commission could by virtue of its human rights functions be dragged into controversial terrain such as surveillance powers, family law and bioethical issues. This could not only divert resources and energy away from the equality functions of a combined commission, but also result in those functions suffering a negative backlash by association.”⁷⁷⁷

702. Mary Robinson, the High Commissioner for Human Rights, sincerely believed that “[t]hese ‘dual’ National Institutions could...become a model for other countries which have been and are still divided by a history of conflict— emanating from religious or ethnic differences.”⁷⁷⁸
703. As a result of the 1998 Good Friday Agreement, the Northern Ireland and the Republic of Ireland have established their Equality Commission as well as their Human Rights Commissions.⁷⁷⁹ Given 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. While the human rights commission emphasizes civil and political rights and the Equality Commission emphasizes equality rights, such an institutional framework can prevent the possible loss of focus on the equality agenda in favour of broader and often more political human rights issues.⁷⁸⁰

3.3.2. Overlapping of jurisdictions and cost-effectiveness

⁷⁷⁷ UCL Survey at 44.

⁷⁷⁸ Mary Robinson, Speech at Queen’s University of Belfast (2 December 1998); see also Stephen Livingstone, “Analysis of the Northern Ireland Peace Agreement, Academic Viewpoints, The Northern Ireland Human Rights Commission,” (1999) 22 *Fordham International Law Journal* 1465 at 1465.

⁷⁷⁹ 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].

⁷⁸⁰ UCL Survey at 44.

704. The major objection to the dual-commission model is the considerable overlap of jurisdiction between the human rights commission and the equality commission, particularly in areas such as domestic abuse, forced marriages, and children's rights. The interconnected nature of human rights and equality rights may lead to confusion in the mind of the public and possibly to conflicting decisions from the two commissions.
705. However, a clear division of labour and a cooperative working relationship between the human rights commission and the equality commission is achievable. To do so, the relationship and allocation of functions between the two commissions must be clearly set out and delineated in writing.⁷⁸¹ As such, the human rights commission and the equality commission should work out a memorandum on division of work and keep it under review.
706. The Northern Ireland Human Rights Commission and the Northern Ireland Equality Commission have developed a strong working relationship, and have agreed a memorandum of understanding clearly delineating their relationship and approach to overlapping complaints.⁷⁸² The Memorandum provides that:-

“Where a matter of conflict of interest arises, the two Commissions will keep each other informed of their respective positions and the reasons underpinning their views.”⁷⁸³

“When an individual...contacts the Northern Ireland Human Rights Commission with a complaint relating to alleged discrimination which apparently falls within the remit of the Equality Commission for Northern Ireland..., the Northern Ireland Human Rights Commission will refer the individual as quickly as possible to the Equality Commission. Likewise, when an individual, or his or her representative, contacts the Equality Commission for Northern Ireland with a complaint relating to an alleged human rights abuse which apparently does not fall within the remit of the Equality Commission, the Equality Commission will refer the individual as quickly as possible to the Northern Ireland Human Rights Commission. Neither Commission will give the impression to any individual... that the other Commission will be able to take up the complaint in question. Neither Commission will commit the other to any course of action.”⁷⁸⁴

“Each organisation, when referring an individual to the other, will make it explicit that it is the individual's responsibility to get a decision from the other body on whether it can be of assistance, that there are specific time limits affecting any

⁷⁸¹ UCL Survey at 47.

⁷⁸² “Memorandum of Understanding Between the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland,” *Northern Ireland Equality Commission's* website (23 October 2000 (as amended 5 March 2002)), available at <http://www.equalityni.org/uploads/word/MoUEC&NIHRC.doc>

⁷⁸³ Id, paragraph 4.

⁷⁸⁴ Id, paragraph 6.

possible claim the individual may have, and that the individual should get back to the referring body by a particular date if that body is to be in a position to take a decision on any application for assistance before the time limit expires. When dealing with a referred case the organisation in question will seek to ensure that decisions relating to it are taken in time to allow the referring organisation to deal with the case... that is necessary.”⁷⁸⁵

707. Moreover, the Chief Commissioners and the Chief Executives of the human rights commission and the equality commission should maintain regular contact with one another to consider matters that are of mutual concern, in order to maintain a harmonious and cooperative relationship between the two commissions.
708. Although the JCHR is in favour of the single commission model, it considers that the dual-commission model in the Northern Ireland and the Republic of Ireland “would be a *viable alternative*, provided that they were closely linked in their work.”⁷⁸⁶

3.4. THE INSTITUTIONAL FRAMEWORK FOR HUMAN PROMOTION AND PROTECTION WORLDWIDE: ITS DEVELOPMENT

3.4.1. Retreat from the multiple commissions model

709. Many commonwealth countries including New Zealand, Australia, Canada (without enforcement function on free-standing human rights cases) have moved away from the multiple-commission model in the last decade to the single commission model and regarded that human rights and equality issues were inseparable.⁷⁸⁷
710. Similarly, in England and Wales, upon the recommendation of the JCHR, the UK Government finally decided to establish the CEHR, a single and integrated equality and human rights commission, which is going to be in operation by 2007. Specialized antidiscrimination commissions including the Equality Opportunities Commission, the Race Relations Commission and the Disability Rights Commission would be absorbed.

3.4.2. The recent decentralization

711. As shown in Sections 2.2.3 and 2.2.4 of this Chapter, 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

⁷⁸⁵ Id, paragraph 7.

⁷⁸⁶ JCHR’s 6th Report, paragraph 203.

⁷⁸⁷ UCL Survey at 42.

adopting the single commission model have established several specialized independent commissions, particularly for protection of privacy and protection of children.

3.4.2.1. Separate Privacy Commissions

712. The Australian HREOC was widely regarded as a success in monitoring the implementation of a number of human rights instruments which were very different from each other.⁷⁸⁸ The existence of specialized commissioners within the Australian HREOC ensured that it cannot become preoccupied with some areas of discrimination or human rights to the exclusion of others.
713. Under recent amendment of the Australian Privacy Act 1998, privacy cases are addressed by the Federal Privacy Commissioner, a new statutory office independent of the HREOC. The duty of the Privacy Commissioner, previously mandated to implementing the “information privacy principles”, has extended to consumer credit information, tax file numbers, medical research guidelines, convictions and data-matching regimes.
714. Since 1 July 2000, the Privacy Commission is no longer a member of the Australian HREOC.⁷⁸⁹ The Australian amendment mirrors “the New Zealand trend to delegate these areas of human rights responsibilities from the over-stretched human rights commissions.”⁷⁹⁰
715. Until the recent re-organization of the commission, the Privacy Commissioner in New Zealand previously had sole authority for adjudicating on privacy complaints, while also being a full-time member of the New Zealand Human Rights Commission. Now, the Privacy Commissioner is entirely separate from the New Zealand Human Rights Commission.⁷⁹¹

3.4.2.2. Separate Children’s Commission

716. The Australian Children’s Commissioner was first established by the Children’s Commission Act 1997 to review children’s death and to receive complaint once other relevant mechanisms are exhausted.
717. In 2002, the Child, Family and Community Service Act was introduced to repeal the Children’s Commission Act 1997 and to set up the new Office for Children and Youth.

⁷⁸⁸ Australian Experience at 141.

⁷⁸⁹ *Human Rights and Equal Opportunity Commission (Australia)*, “Annual Report 1999 –2000,” available at http://www.hreoc.gov.au/annrep/99_00/ar00.pdf at 14.

⁷⁹⁰ UCL Survey at 46-7.

⁷⁹¹ *Id.*

The new office provides direct children's protection services, advocates for children's welfare policies and handles complaints.

718. In New Zealand, the Office of the Commissioner for Children was first established under the Children, Young Persons and Their Families Act 1989. In 2003, the Children's Commissioner Act was passed setting out the Commissioner's power in an independent statute. The Office of the Commissioner for Children is now an independent board under the Crown Entities Act 2004, but it reports to the Minister of Social Development and Employment. The Commissioner inquires into any matter affecting children and youth in any service and organization and investigates the actions of the Department of Child, Youth and Family Services.
719. In 2002, the Ministry of Justice in New Zealand reconsidered whether or not the Privacy, Children's and Health and Disability Commissioners should be merged within the Commission. In the end, it felt that it would be more effective for these separate offices to operate outside the commission structure.⁷⁹²
720. If a single and integrated commission is to be established, the HKSAR Government should consider the extent of decentralization (i.e., the areas of concern to be diverted to other independent institutions) and the issue whether the existing specialized commissions should be absorbed.
721. JUSTICE, a human-rights-related-NGO in the United Kingdom supports the single commission model while recommending that the CEHR should not absorb the existing equality commissions and the office of the Information Commissioner. It said:-

"Equality issues should not be specifically excluded from the remit of a Human Rights Commission, since clearly equality and discrimination issues will arise in the course of the Commission's work in cases where other rights issues are also involved. However, issues within the work programmes of the existing commissions should not form the primary focus of the Human Rights Commission." [emphasis added]

4. THE BEST MODEL FOR HONG KONG

⁷⁹² Ministry of Justice, New Zealand, "Re-Evaluation of the Human Rights Protections in New Zealand," (October 2000), available at http://www.justice.govt.nz/pubs/reports/2000/hr_reevaluation/index.html at 14.

722. 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.
723. The dual-commission model strikes a balance between the multiple-commission model and the single commission model. It allocates special focus to both equality rights and freestanding human rights, while provides the two commissions a manageable remit and hence an acceptable transactional cost on the cooperation between the two commissions. In other words, the dual-commission aims to benefit from the advantages of the single commission model and to minimize the drawbacks of that model at the same time.
724. The model also provides a two-tier protection for human rights. In the dual-commission model, equality agenda is less likely to be compromised by the concurrent political climate and emergency of political human rights issues.
725. Firstly, under the notion of “one country, two systems”, there are plenty of constitutional issues await to be resolved. Freestanding human rights issues, particularly those related to the relationship between the PRC central government and the HKSAR Government can be very politically sensitive and may subsequently attract intervention from the PRC government. The caseload of freestanding human rights issues will likely be very heavy.⁷⁹³
726. Secondly, given the track record of human rights actions of the Hong Kong Government in the scandals relating to appointments to the EOC, the Privacy Commissioner and the Ombudsmen, it is possible that the Hong Kong Government will attempt to control the HKHRC and other NHRIs in Hong Kong. If there is only one commission in Hong Kong, the Commission may pursue less politically sensitive issues like discrimination cases against the private sector, rather than areas involving civil and political rights.
727. Thus, the dual-commission model would be much more capable of addressing both equality rights and freestanding human rights than the single-commission model.
728. It is more cost effective for Hong Kong to follow the single commission model, whereby the HKHRC would take up almost all the functions of the institutional framework as mentioned in Chapter II. Best Practice suggests that:-

“In small and developing states or states with very limited resources, it may be more practical to confer the mandates of both a NHRI and an Ombudsman upon a single institution.”⁷⁹⁴

⁷⁹³ Patrick Yu, the former Commissioner of RDC in Northern Ireland is fully in support of the dual-commissions model.

⁷⁹⁴ Best Practice at 4.

729. Given the relatively small population and territorial size of Hong Kong, it might be practical for Hong Kong to establish a single Human Rights Commission, under which both equality rights and freestanding human rights regime are put.
730. It may be feasible for the HKHRC to absorb the current Office of Ombudsmen. Some countries like Ghana and Kenya have adopted an integrated body mandated to protect and promote human rights and equality rights as well as to investigate maladministration and corruption.⁷⁹⁵
731. Nevertheless, if too much power is granted to a single commission, the commission will likely turn into a large, unwieldy and bureaucratic organization, allowing the commissioner(s) to abuse their powers and hinders the performance of such commission.
732. Thus, the transactional cost of communication among different strands or units incurred within the single-commission model may amount to or more than that of the dual-commission model.
733. To maximize the efficiency of the dual-commission model, arrangements for meaningful co-ordination between the HKHRC and the HKEOC should be established.⁷⁹⁶ Joint work could be successfully undertaken between the HKHRC and the HKEOC if the two commissions formulate and enforce a memorandum similar to that signed between the NIHRC and NIEC clarifying the remits of two commissions and laying down the principles of joint works.
734. It is submitted that the dual-commission model in which the HKHRC works with the HKEOC is the most effective model for human rights protection in Hong Kong. The dual-commission model will best ensure the equality agenda is not compromised by sensitive political issues. Additionally, the dual-commission model will provide a manageable remit for both commission and hence a reasonable transactional cost.

⁷⁹⁵ The Commission on Human Rights and Administrative Justice, Ghana, established in 1993, absorbed the position of the Ombudsman which had been created by the 1979 Constitution and in existence since 1980. The framers of the constitution chose to establish a single national institution to address all aspects of human rights and administrative justice. See *Commission on Human Rights and Administrative Justice, Ghana's website, "About CRHAJ,"* available at <http://www.chrajghana.org/index?articleId=1125665605933>

The Kenya Human Rights Commission, established in 1992, focuses on monitoring, documenting and publicizing violations of civil and political rights, and challenging a largely unaccountable executive in the first phase of its work (1992-1998). *Kenya Human Rights Commission's website, "KHRC Profile & History,"* available at <http://www.khrc.or.ke/subsection.asp?ID=2>

⁷⁹⁶ *JUSTICE (UK), "Submission of JUSTICE to the Joint Committee on Human Rights: A Human Rights Commission for the United Kingdom?,"* (July 2001), available at <http://www.justice.org.uk/images/pdfs/hrc.pdf> at 15.

Chapter V. The HKHRC in Operation

1. THE DIVISION OF WORK OF THE HKHRC AND THE HKEOC

735. It is submitted that the HKHRC should accord special attention and priorities to the following human rights issues. If the HKEOC is established, it should be mandated to promote and protect equality rights in areas concerning disability, race, and sex and gender. It is sufficient for the HKHRC to monitor the promotion and protection of equality rights at arm's length.

1.1. DISABILITY

736. Promotion of antidiscrimination on the ground of disability requires “a strong focus on promoting and advising on reasonable adjustment that is quite specific to this strand.”⁷⁹⁷ Disability is by itself a peculiar human rights violation and considerably different from promotional practice of discrimination on some the other grounds.”⁷⁹⁸ As such, specific focus and additional effort should be exerted in order to eliminate or to reduce discrimination on the ground of disability.

737. General Comment No. 5 of the Committee on Economic, Social and Cultural Rights states that the right to enjoy all the rights in the ICESCR without discrimination extends to discrimination on the basis of disability.

738. Article 25 of the Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and the Dignity of Persons with Disabilities requires the States Parties to “designate a focal point within Government” and to “maintain, strengthen, designate or establish at the national level a framework” to promote, protect and monitor implementation of the rights” of disabilities.⁷⁹⁹

739. Amnesty International further submitted that the “focal point” should consist of the government focal point, representatives from relevant government authorities, general or

⁷⁹⁷ UCL Survey at 11-12.

⁷⁹⁸ *Id.*

⁷⁹⁹ *United Nations*, Draft articles for a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Draft Article 25, Monitoring National Implementation Framework, paragraph 1. Final text compiled as adopted (CRP.4, plus CRP.4/Add.1, Add.2, Add.4 and Add.5).

specialized NHRIs, relevant NGOs representing the disabled.⁸⁰⁰ The Convention stresses the role of independent NHRIs or specialized human rights institutions for the protection of the rights of persons with disabilities within the national implementation framework.⁸⁰¹

740. In Hong Kong, the number of complaints received by the Equal Opportunities Commission on the grounds of disability has continuously constituted about half of the complaints which it receives. In 2006 (1 January- 31 August), 283 out of 494 complaints (57.3%) received concerned disability discrimination. The figures in 2005, 2004, 2003 and 2002 were 454/701 (64.8%), 360/595 (60.5%), 484/1032 (46.9%), and 356/785 (45.4%) respectively.⁸⁰²

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| 741. Hence, the HKHRC, if not the HKEOC should continue to put discrimination on the ground of disability at a top priority. |
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1.2. RACE

742. The Paris Principles require NHRIs “to publicize...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.”⁸⁰³
743. Best Practice suggests that NHRIs “should accord a high priority to addressing and preventing racism, xenophobia, and other forms of related intolerance,”⁸⁰⁴ including the promotion of legislation which deters and punishes criminal activities motivated by racism.⁸⁰⁵

⁸⁰⁰ Amnesty International, “Strengthening Implementation at the National Level, Discussion Paper on Article 25 of the Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities,” available at <http://www.un.org/esa/socdev/enab/rights/documents/ahc6amnestyda25.doc> at 2.

⁸⁰¹ Id, Amnesty International mentioned some necessary attributes of independent national institutions:-

“(1) the national institutions should be operating in accordance with the Paris Principles;
(2) they should be specifically mandated to monitor implementation of the new Convention, concluding observations and decisions of the international mechanism;
(3) they should be able to make recommendations as they deem appropriate to government authorities regarding legislation, practice or necessary policy changes;
(4) *they should be authorized to receive individual communications and bring cases on behalf of people with disabilities to domestic courts or – if there is no remedy on the national level – to relevant international bodies.*”

⁸⁰² Equal Opportunities Commission’s website (Hong Kong), “Statistics” (last accessed at 12 September 2006), available at <http://www.eoc.org.hk/EOC/GraphicsFolder/InforCenter/Papers/StatisticList.aspx>

⁸⁰³ Paris Principles, 3(g).

⁸⁰⁴ Best Practice at 34.

⁸⁰⁵ Id at 34.

744. At an international conference combating racial discrimination, the International Race Relations Round Table, held in Auckland in February 2004, the representatives from 15 nations concluded that NHRIs are “encouraged to have *race relations units or focal points*” to effectively engage on race issues through a rights-based approach.⁸⁰⁶ [emphasis added]

745. As to effective structures of combating racial discrimination, the Round Table recognized that many race organizations are the core part of NHRIs. Some countries establish race organizations specifically focused on race relations, while others spread the responsibilities over a number of separated organizations. The Round Table tended to favour the former approach. It said:-

*“The close links between human rights in general and race relations in particular argued for all NHRIs to have a focus on race relations.”*⁸⁰⁷

746. The Danish Institute for Human Rights, a research-based human rights center, established the Complaints Committee for Ethnic Equal Treatment in the middle of 2003 after the Institute had been authorized to consider complaints of differential treatment due to racial or ethnic origin and complaints of reprisals.⁸⁰⁸ In 2005, the Institute received 96 complaints.⁸⁰⁹

747. In Hong Kong, no specific legislation combating racial discrimination is currently in force, and the Race Discrimination Bill has been postponed for almost one decade. The Human Rights Committee, in its Concluding Observation 2006, urged “the HKSAR to adopt the necessary legislation in order to ensure full compliance with article 26 of the Covenant.”⁸¹⁰ The Committee on Children’s Rights agreed with this sentiment in its Concluding Observation in 2005.⁸¹¹

748. Given the severity of racial discrimination in Hong Kong, the HKEOC or the HKHRC should exert special effort to bring the international standard on racial discrimination into the jurisprudence of Hong Kong.

⁸⁰⁶ 15 nations, including Ecuador, Colombia and Mexico, Niger, Uganda and South Africa, Hungary, Romania, France, Sweden and the United Kingdom (Northern Ireland), India, and New Zealand, Australia and Fiji, participated in the International Race Relations Round Table 2004. *International Race Relations Round Table, “Race Relations in the Twenty First Century: The Role of Human Rights Institutions in the Elimination of Racial Discrimination,”* (2-5 February 2004), available at <http://www.NHRI.co.nz/NHRI/worddocs/99556%20Race%20Relations%20v1.pdf> at 15, point 3.

⁸⁰⁷ Id at 14.

⁸⁰⁸ Act No. 374 of 28 May 2003 on Equal Treatment irrespective of Ethnic Origin; Danish Institute for Human Rights, Annual Report 2003 at 15.

⁸⁰⁹ Id at 44.

⁸¹⁰ Hong Kong (CCPR/C/HKG/CO/2, 30 March 2006), paragraph 19.

⁸¹¹ Hong Kong (unedited version – CRC/C/15/Add.271, 30 September 2005), paragraph 33.

1.3. SEX AND GENDER

749. The Best Practice suggests that:-

“NHRIs should assume special responsibility in responding to human rights violations suffered on account of sex and gender.”⁸¹²

While some violations of these kinds cannot be remedied solely through a complaint’s process, the HKHRC should also “refer complainants to other human services agencies as necessary for assistance or treatment.”⁸¹³

750. Although the Sex Discrimination Ordinance is currently in force, still, sexual discriminations in employment, political arena, and domestic household, particularly against women from low-income strata, exist.
751. The Committee on Economic, Social and Cultural Rights, in its Concluding Observations of 2005, noted concerned that the wage disparity between men and women continued to be a problem and such situations violated the principle of equal pay for work of equal value.⁸¹⁴
752. The Committee on the Elimination of Discrimination against Women, in its Concluding Observations of 2006, was also concerned about the low level of political representation of women, including in the functional constituencies. “The electoral system of functional constituencies may constitute indirect discrimination against women, as it results in the unequal participation of women in political life.”⁸¹⁵
753. The Committee also expressed concern regarding the low prosecution rate of domestic violence in the HKSAR despite the “zero tolerance on domestic violence” adopted by the Government and the high report rate of such crime.⁸¹⁶
754. As such, the HKHRC, if not the HKEOC, should follow and maintain its predecessor’s effort in combating discrimination on the basis of sex in Hong Kong.

1.4. OTHER FORMS OF DISCRIMINATION AND A SINGLE EQUALITY LEGISLATION

⁸¹² Best Practice at 36.

⁸¹³ Id.

⁸¹⁴ People’s Republic of China (including Hong Kong and Macao),” (E/C.12/2005/SR.6-10, 25 April-13 May 2005), paragraph 81.

⁸¹⁵ People’s Republic of China (including Hong Kong and Macao), (CEDAW/C/CHN/CO/6, 25 August 2006), paragraph 39.

⁸¹⁶ Id, paragraph 35.

755. If possible, a comprehensive piece of legislation prohibiting discrimination on grounds not currently covered under HK law, such as race, age, sexual orientation and political orientation besides disability, sex and gender and family status should be enacted.

1.4.1. The advantages of single equality legislation

756. The advantage of the single statute method is the delivery of consistent legal treatment and procedures.⁸¹⁷ One piece of legislation that provides for equal treatment of complainants across different strands “minimize[s] hierarchical differences between the grounds, and enhance[s] understanding and appreciation of the underlying principle of equality law.”⁸¹⁸
757. Moreover, the UCL survey comments that a piece of single equality legislation can simplify the work of a single equality commission:-
- “The ability of a single commission to offer a cross-strand, one-stop shop, will be hampered by the confusion between the requirements imposed by different strands.”⁸¹⁹
758. Thereby, many jurisdictions for example Canada, and New Zealand have adopted a unified and single equality act, with slightly different approaches across the strands.⁸²⁰ All have comprehensive legislation extending to goods and services.⁸²¹
759. In the UK, there has been some support for enacting a single equality act. Lord Lester of Herne Hill and Kate Beattie commented that “the CEHR will not be able to operate effectively unless it is able to operate within a legal framework which provides equal protection from unlawful discrimination to all. There is an urgent need for a comprehensive, coherent and user-friendly Single Equality Act to replace tangled and incoherent mess of existing equality laws...”⁸²²
760. The JCHR recognizes the advantage of a single equality act, but accepts a deferral in drafting and implementing the single equality act due to a lack of political and other

⁸¹⁷ Ian Clyde and Simeon Beckett at 138.

⁸¹⁸ UCL Survey at 9.

⁸¹⁹ Id at 9.

⁸²⁰ Canadian Human Rights Act, Part I, Section 3(1); The Human Rights Act 1993 (New Zealand), Part II, Section 21.

⁸²¹ UCL Survey at 9-10.

⁸²² Lord Lester of Herne Hill and Kate Beattie at 207.

resources. The JCHR urges the administration to “address this issue before too long.”⁸²³
It said:-

“Almost every submission we received regretted the lack [of]... a single equality Act, and several argued that the decision to proceed with the new body before the legislation had been rationalised and consolidated was either wrong in principle or unworkable. We recognise that it is not always possible to find the political and other resources to secure a neatly rational approach to legislative and institutional change. Nonetheless, we would urge that the time is found to address this issue before too long. *We look forward not only to rationalisation of the existing equality legislation, but to the "levelling-up" of the laws relating to discrimination on all the grounds which are now identified, particularly by the extension of anti-discrimination provisions for the "new strands" beyond employment and training into the areas of the provision of education, goods and services and by the widening to all areas of discrimination of the concept of "positive duties" requiring public authorities to promote equality of opportunity and treatment. We recommend that legislation to accomplish this, preferably within a single Equality Act, be introduced and enacted with all deliberate speed.*”⁸²⁴ [emphasis added]

761. In addition, Amnesty International strongly endorses JCHR’s call for a Single Equality Act.⁸²⁵

762. The UK government, nevertheless, has rejected a single equality act without giving any substantial reason. It said:-

“We do not believe, however, that the complete legislative overhaul which the introduction of a Single Equality Act would require would be the best way forward at this stage. Experience has shown us that legislation alone will not deliver the changes necessary to promote equality and diversity in our society. We have, therefore, been working towards developing greater coherence within the legislative framework, via an incremental approach...”⁸²⁶

763. The Northern Ireland Equality Commission, in the absence of single equality legislation in the UK, have initially imposed differential treatment across the strands and experienced cost over-run difficulties in its legal work. While the Northern Ireland cannot

⁸²³ JCHR 11th Report, paragraph 46.

⁸²⁴ Id, paragraph 46.

⁸²⁵ Amnesty International UK, “Fairness for all: a new Commission for Equality and Human Rights,” (August 2004), available at http://www.womenandequalityunit.gov.uk/equality/project/consultations/amnesty_international_uk.doc

⁸²⁶ UK Government’s Response at 8.

enact single equality legislation on its own, its Equality Commission adopted *a common protocol for handling cases* following a report by an external consultant.⁸²⁷

1.4.2. According special attention on particular grounds

764. In a country where a specific ground of discrimination is of widespread concern and importance, the single equality legislation should accord special attention to such ground of discrimination by, for example, widening the scope of protection of victims being discriminated against, allocating more funding, or providing more protective remedies to the victims on such a ground.
765. In New Zealand, where the racial and ethnic discrimination between the white people and the local Indians is deeply rooted, the Human Rights Act 1993 has widened the scope of protection of victims being discriminated against on the ground of race.
766. The Human Rights Act 1993, in addition to prohibiting discrimination on the grounds of age, colour, disability, employment status, ethical belief, ethnic or national origins, family status, marital status, political opinion, race, religious belief, sex and sexual orientation⁸²⁸, regards racial harassment and the excitement of racial disharmony as particular types of discrimination that are unlawful.⁸²⁹ *Racial harassment* is the use of language, visual material or behaviour that is racist, hurtful or offensive to a person subjected to it, either repeated or significant enough to have a detrimental effect on the person subjected to it⁸³⁰. *Exciting racial disharmony* is distributing material that is, or using words that are, threatening, abusive or insulting and are likely to provoke hostility and contempt towards people because of their race, colour or ethnic or national origins.⁸³¹

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| <p>767. In Hong Kong, the course of restructuring the institutional framework provides an opportunity for the HKSAR Government to consider whether single equality legislation prohibiting discrimination, not exhaustively, on the grounds of disability, sex and gender, family status, race, and age should be introduced.</p> <p>768. The uniform approach provided by a single equality statute can simplify the casework of the HKEOC. In addition, the call against scattered pieces of antidiscrimination legislation</p> |
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⁸²⁷ *Equality Commission for Northern Ireland*, “Report on the Implementation of the Section 75 Equality and Good Relations Duties by public authorities,” (1 January 2000 - 31 March 2002), available at <http://www.equalityni.org/uploads/word/280503FinalFullS75Report.doc> at 56, paragraph 8.11.

⁸²⁸ The Human Rights Act 1993 (New Zealand), Part II, Section 21.

⁸²⁹ *Id.*, Sections 61-63.

⁸³⁰ *Id.*, Section 63.

⁸³¹ *Id.*, Section 61.

has been existed for a long time and the groundwork for such a reform has already been done: *see* the Human Rights and Equal Opportunity Commission Bill 1994 prepared by Ms. Anna Wu and Ms. Carole Peterson⁸³².

769. It is appreciated that determining the grounds of discrimination prohibited by the statute may require a period of consultation and deliberation with civil society as well as negotiation and compromises among the stakeholders. Regardless the possibly lengthy consultation period for the introduction of such single equality legislation should not delay the establishment of the HKHRC. As such, the Government should launch the campaign on the single equality legislation before or once the HKHRC and the HKEOC are in operation.
770. As Hong Kong has been long regarded as a diverse and multi-national community, there are seemingly no grounds of discrimination that would require special treatment under a single equality legislation.
771. If single equality legislation is delayed minimally, a *common protocol for handling cases* akin to that of the Northern Ireland Equality Commission should be implemented to simplify the work of the HKEOC during this interim period. Meanwhile, the HKHRC should advocate for the introduction of a piece of single equality legislation.

1.5. MIGRANTS AND REFUGEES

772. The Best Practice suggests NHRIs to “monitor a country’s compliance with treaty obligations related to migrant workers and refugees.”⁸³³
773. In the Conference called the Work and Co-operation of Ombudsman and National Human Rights Institutions hosted by the Danish Ministry of Foreign Affairs in Copenhagen in September 2001, more than 40 NHRIs in the Caribbean, the EU, and Latin America expressed their willingness to unite efforts in defending the rights of migrant workers.⁸³⁴ A working group discussing the role of NHRIs in protection of the economic, social and cultural rights of migrants concluded that establishing minimum standards for the treatment of migrants, for example the minimum wages and conditions for detention of migrants, are necessary to defend migrants rights. It was agreed that both

⁸³² See generally the Human Rights and Equal Opportunity Commission Bill 1994.

⁸³³ Best Practice at 35.

⁸³⁴ *Danish Ministry of Foreign Affairs*, “Conference on the Work and Co-operation of Ombudsman and National Human Rights Institutions,” (September 2001), available at <http://www.humanrights.dk/departments/International/con/ombud> at 10.

the Ombudsman in the country of origin as well as that in the receiving country should insist on the protection of the rights of the migrants.⁸³⁵

774. In Hong Kong, discrimination against migrant workers and new immigrants from mainland China is serious. Without a piece of legislation prohibiting racial discrimination, the problem has intensified.
775. The Committee on Economic, Social and Cultural Rights, in its Concluding Observation 2005, expressed its concern about “the particularly precarious situation of foreign domestic workers, a majority of whom are from South-East Asia, who are underpaid and are not entitled to social security.”⁸³⁶
776. The Committee on the Elimination of Discrimination against Women, in its Concluding Observation 2006, also voiced concern that female foreign domestic workers may be subject to double discrimination on the grounds of sex and ethnicity. The Committee commented that the “Two-Week Rule”, which requires foreign domestic workers to leave Hong Kong within two weeks after the expiration of their employment contract or premature termination, forced foreign domestic workers to accept new employment which may have unfair or abusive terms and conditions in order to be able to stay in Hong Kong. In addition, there was “reported abuse perpetrated by employment agencies against domestic workers, such as lower wages, fewer holidays and longer working hours than what is prescribed by law.”⁸³⁷
777. Moreover, the measures taken to facilitate the migrants from the Mainland and children of other foreign migrant workers to enrol in local schools in HKSAR are insufficient.⁸³⁸
778. No asylum seeker in Hong Kong has been protected by international laws, as the 1951 Convention Relating to the Status of Refugees has yet to be extended to Hong Kong. The Committee on Economic, Social and Cultural Rights, in its Concluding Observation 2005, concerned about that “HKSAR lacks a clear asylum policy and that the Convention relating to the Status of Refugees of 1951 and the Protocol thereto of 1967, to which China is a party, are not extended to the HKSAR.”⁸³⁹
779. The Committee on the Elimination of Discrimination against Women, in its Concluding Observation 2006, was also concerned that the HKSAR Government has no intention to extend the 1951 Convention Relating to the Status of Refugees to Hong Kong. The

⁸³⁵ Id.

⁸³⁶ People’s Republic of China (including Hong Kong and Macao), (E/C.12/2005/SR.6-10, 13 May 2005), paragraph 83.

⁸³⁷ People’s Republic of China (including Hong Kong and Macao), (CEDAW/C/CHN/CO/6, 25 August 2006), paragraph 41.

⁸³⁸ Id, paragraph 89.

⁸³⁹ People’s Republic of China (including Hong Kong and Macao), (E/C.12/2005/SR.6-10, 13 May 2005), paragraph 80.

Committee called on the HKSAR Government to do so to ensure that women asylum-seekers and refugees could fully benefit from its protection.⁸⁴⁰

780. The HKHRC should accord special concern to the rights of migrant workers, new immigrants, and asylum seekers. The victims need not be the citizens of Hong Kong or possess a permanent address in Hong Kong to be eligible to lodge a complaint.

1.6. PRIVACY

781. Although the Basic Law does not explicitly protect the right to privacy, the ICCPR, which acquires the same status as the Basic Law through Article 39, states that no person shall be subjected to “arbitrary or unlawful interference with his privacy, family, home or correspondence.”

782. Article 28 of the Basic Law provides that “arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited.” Article 29 supplements Article 28 by protecting any person against arbitrary or unlawful search from search of the body to search of or intrusion into the “home and other premises” of a resident.

783. However, the right to privacy in Hong Kong has been severely under-protected. There are few remedies available to any victims suffering from privacy intrusion.

784. First, Article 17 of the ICCPR and Article 14 of the Bills of Rights Ordinance which incorporates into the law of Hong Kong the provisions of the ICCPR, provides that:-

“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

However, the Bills of Rights Ordinance binds only the Government and public authorities.⁸⁴¹

785. Second, the Personal Data (Privacy) Ordinance aims to protect the privacy of individuals by regulating the collection, holding, processing and use of *personal data*, which is narrowly defined under Section 2(1) of the Ordinance.⁸⁴² The Personal Data (Privacy)

⁸⁴⁰ People’s Republic of China (including Hong Kong and Macao), (CEDAW/C/CHN/CO/6, 25 August 2006), paragraph 43.

⁸⁴¹ Bill of Rights Ordinance, Section 7.

⁸⁴² Personal Data (Privacy) Ordinance, Section 2(1). “Personal data” is defined as meaning any data:

“(a) relating directly or indirectly to a living individual;

Ordinance, and accordingly the Privacy Commissioner established under the Personal Data (Privacy) Ordinance do not aim to protect individuals from unwarranted privacy intrusion and have a very limited scope of operation.⁸⁴³ Even if the Office of the Privacy Commissioner is charged with a full mandate, it is unlikely to fully perform its role due to its budgetary constraint and understaffing problem.

786. Third, there is no common law tort of invasion of privacy in Hong Kong.

787. Even worse, the problem of unwarranted media intrusion and privacy violation has been widespread and serious. As the Law Reform Commission commented:-

“Since only a pressing social need would justify a curtailment of press freedom, we consider here whether the problem we identified ...remains as *serious*.”⁸⁴⁴

788. Recently, a famous singer, Mr. Leon Lai, was depicted as having undertaken vigorous sexual activities with his girlfriend at home continuously for 30 days.⁸⁴⁵ The photo was taken by telephoto camera, definitely with intention of privacy intrusion. Another example comes from Ms. Ling Cheung, the proposed wife of a deceased policeman engaged in a gun fire with Mr. Po-ko Tsui at Tsimshatsui, who complained that the “life-threatening” paparazzi had followed her to everywhere she had gone for one whole week.⁸⁴⁶

789. As such, there is, *prima facie*, a compelling need for the Government to address this legal lacuna and to guard against privacy intrusion.

790. It is submitted that the HKHRC should include the privacy protection in its policy agenda.

791. Although the Office of the Privacy Commissioner for Personal Data mandated to promote privacy and to enforce the Personal Data (Privacy) Ordinance is currently in operation,

(b) from whom it is practicable for the identity of the individual to be directly or indirectly ascertained; and
(c) in a form in which access to or processing of the data is [reasonably] practicable”.

⁸⁴³ Law Reform Commission, “Civil Liability for Invasion of Privacy,” (9 December 2004), available at <http://www.hkreform.gov.hk/en/publications/rprivacy.htm>, para 2.44.

⁸⁴⁴ Law Reform Commission, “Privacy and Media Intrusion,” (9 December 2004), available at <http://www.hkreform.gov.hk/en/publications/rmedia.htm>, para 4.1.

⁸⁴⁵ Ho Yi, “Pop Stop,” *Taipei Times* (3 March 2006), available at <http://www.taipeitimes.com/News/feat/archives/2006/03/03/2003295555/wiki>, at 14.

⁸⁴⁶ China Press, “The Protection of Privacy Creates Crisis for Paparazzi [港護私隱狗仔隊有難],” *Sina News’ website* (25 March 2006), available at <http://news.sina.com/chinapress/103-000-101-106/2006-03-25/2118757785.html>

the Office is of a small size and has been suffering from budgetary constraints. Therefore, it is unable to fully discharge its mandate.⁸⁴⁷

792. To avoid any duplication of jurisdiction between the existing Office of the Privacy Commissioner for Personal Data and the HKHRC, the current Office of the Privacy Commissioner for Personal Data should terminate its operations. The existing staff in the Office of the Privacy Commissioner will automatically be considered as candidates for the executive staff in the HKHRC, given their experience in handling human rights concerns in the area of personal data management and protection.

1.7. CHILDREN

793. There is no dispute that NHRIs should be mandated to promote and protect children, particular for the countries that have ratified the CRC. The General Comment No. 2 of the CRC said:-

“Article 4 of the Convention on the Rights of the Child obliges States parties to ‘undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention’. Independent national human rights institutions (NHRIs) are an important mechanism to promote and ensure the implementation of the Convention, and ... the establishment of such bodies to fall within the commitment made by States parties upon ratification to ensure the implementation of the Convention and advance the universal realization of children’s rights.”⁸⁴⁸

794. The Committee on the Rights of the Child has consistently encouraged all the States whose reports it examines to establish independent offices to promote the human rights of children.
795. For instance, the Committee on the Rights of the Child, in its Concluding Observations of 2003, expressed that Italy has “no central independent mechanism to monitor the implementation of the Convention which is empowered to receive and address individual complaints of children at the regional and national levels”. Therefore, the Committee recommends that Italy Government establish “a national independent ombudsman for children – if possible part of a National Independent Human Rights Institution” in accordance with the Paris Principles. Such institution should be “accessible to children, empowered to receive and investigate complaints of violations of child rights in a child-sensitive manner, and equipped with the means to address them effectively.”⁸⁴⁹

⁸⁴⁷ See para ... of this Report.

⁸⁴⁸ UNCRC, General Comment No. 2, paragraph 1.

⁸⁴⁹ Italy (CRC/C/15/Add.198, 31 January 2003), paragraph 14.

796. In Canada, the Standing Senate Committee on Human Rights in 2005 also recommended “the Parliament enact legislation to establish an independent Children’s Commissioner to monitor implementation of the Convention on the Rights of the Child, and protection of children’s rights.”⁸⁵⁰
797. In April 1999, the International Coordinating Committee on National Institutions recognized that promoting and protecting children’s rights should be a priority area in the work of NHRIs, *inter alia*, through the adoption of national legislation, ratification and implementation of international instruments, human rights education and promotion, and national economic policy.⁸⁵¹
798. Similarly, regional coordination arrangements like Asia Pacific Forum of National Human Rights Institution and the Council of Europe have promoted the establishment of independent institutions to improve children’s rights among their member states.⁸⁵²
799. In Latvia, the LNHRO Section for Protection of the Rights of the Child commenced its operation on 2 May 2003. Since 1997 the LNHRO is a full member of the International Ombudsmen Institute, while the Section for Protection of the Rights of the Child in October 2003 became a member of the European Network of Ombudsmen for Children.⁸⁵³

1.7.1. The separated children’s commission or a specialized unit under the HKHRC?

800. However, the question of whether a special unit on children’s right within the HKHRC or an independent children’s commission, which would operate outside the HKHRC is more appropriate for Hong Kong is controversial.
801. The Committee on Children’s Rights doesn’t expressly spell out its preference as to whether a state party should set up a stand-alone children’s rights commission, or build the children-focused institution into existing or a new general human rights commissions or general ombudsman offices. *The General Comment No. 2 of the CRC* said:-

⁸⁵⁰ *Standing Senate Committee on Human Rights*, Interim Report (19th Report), “Who’s In Charge Here? Effective Implementation of Canada’s Obligation with Respect to the Rights of Children,” (November 2005), available at <http://www.parl.gc.ca/38/1/parlbus/commbus/senate/Com-e/huma-e/rep-e/rep19nov05-e.htm>, at 96, recommendation 3 [hereinafter *Who’s In Charge Here*].

⁸⁵¹ *International Coordinating Committee on National Institutions*, “National institutions for the promotion and protection of human rights,” (A/RES/54/176, 15 February 2000) at 1.

⁸⁵² Fourth Annual Meeting of the Asia Pacific Forum of National Human Rights Institution in September 1999; *Council of Europe*, “Recommendation 1286 on a European Strategy for Children,” Luxembourg 28-01-2005 (CRC/C/15/Add.250, 24 January 1996), paragraph 15.

⁸⁵³ *The Republic of Latvia*, “Periodic Report on the Implementation of the UN 1989 Convention of the Rights of the Child by the Republic of Latvia During the Period From 2001 Until March 2004,” available at <http://www.bm.gov.lv/files/text/doc.doc>, paragraphs 28-9.

“While adults and children alike need independent NHRIs to protect their human rights, additional justifications exist for ensuring that children’s human rights are given special attention. These include the facts that *children’s developmental state makes them particularly vulnerable to human rights violations; their opinions are still rarely taken into account; most children have no vote and cannot play a meaningful role in the political process that determines Governments’ response to human rights; children encounter significant problems in using the judicial system to protect their rights or to seek remedies for violations of their rights; and children’s access to organizations that may protect their rights is generally limited.*⁸⁵⁴

“Specialist independent human rights institutions for children, ombudspersons or commissioners for children’s rights have been established in a growing number of States parties. Where resources are limited, consideration must be given to ensuring that the available resources are used most effectively for the promotion and protection of everyone’s human rights, including children’s, and in this context development of a broad-based NHRI that includes a specific focus on children is likely to constitute the best approach. A broad-based NHRI should include within its structure either an identifiable commissioner specifically responsible for children’s rights, or a specific section or division responsible for children’s rights.⁸⁵⁵

802. Nonetheless, it can be observed from the above passage that, a specialized children’s commission is in principal more preferable because a specialized commission can better represent children’s interest than a specific unit under the general human rights commission.
803. First, children are very different from adults in terms of vulnerability and their communication ability; and hence there needs “a child centered focus which is different an ombudsman perspective usually.”⁸⁵⁶ [I think this is a mis-quote.] An ombudsman or a human rights commission always performs as if it is neutral and fair, but in advocacy the responsible institution may need to take sides and to represent the views and interests of the child.⁸⁵⁷
804. Second, conflicts often arise between the rights of children and adults, particularly in respect of arrangements following divorce, use of physical punishment or arranged marriages. “A specialized institution would have a clear responsibility to promote

⁸⁵⁴ UNCRC, General Comment No.2, paragraph 5.

⁸⁵⁵ Id, paragraph 6.

⁸⁵⁶ Michele McBride, “Report on Child Advocacy and Complaint Resolution Process,” (April 2006), available at http://www.childyouthreview.ca/down/Child_Advocacy_and_Complaint_Resolution_Process.pdf at 48.

⁸⁵⁷ Id.

- children's rights in any such conflict. In an integrated body it may be difficult to ensure a dedicated focus on the rights of children, rather than the rights of adults."⁸⁵⁸
805. Thirdly, many abuses of child rights are perpetrated not by the state but by the adults who have responsibility for children, for example parents, teachers, residential workers. UNICEF observed that if an NHRI is primarily focused on abuse of adult rights by the state, it is often poorly equipped to protect children's rights.⁸⁵⁹
806. Fourthly, ombudsmen for children or children's commissions have been established in a large number of countries, for example, Australia, New Zealand, Norway and Sweden. The UNICEF also observed that there are to date more separate children's rights institutions than institutions subsumed under a general human rights commission.⁸⁶⁰ It's probably because of the fact that "traditionally children's rights have not been given distinct and appropriate attention within a "general" institution."⁸⁶¹
807. However, due care should be taken to avoid any duplication of jurisdiction if an independent Children's Commission is established. The Committee on the Rights of the Child in its concluding observations in 2003 was concerned about the *possibility of duplication of activities between the National Human Rights Commission and the Office of the Commissioner for Children* in New Zealand. The Committee recommends the Office of the Commissioner for Children and the National Human Rights Commission define the relationship between the two institutions, including a clear division of their respective activities.⁸⁶²
808. Strictly speaking, in a nation or a region with limited resources, a specialized unit on children's right established under a general human rights commission, or the appointment of an expert of children's rights can discharge the international obligations under the CRC.
809. The Committee on the Rights of the Child, in its concluding observations in 2005, recommended the Australian Government "create specialized sections within the offices of the various state and territory ombudsman to deal with issues relating to children."⁸⁶³
810. The Committee on the Rights of the Child, in its concluding observations in May 2003, while welcoming the establishment of the National Commission on Human Rights in Korea in 2001, expressed that the Commission has no specialization in children's rights. The Committee recommended that there should be "*at least one child rights expert*

⁸⁵⁸ UNICEF, "Independent Institutions Protecting Children's Rights," *Innocenti Digest No. 8*, (June 2001), available at <http://www.unicef-icdc.org/publications/pdf/digest8e.pdf> at 10.

⁸⁵⁹ *Id.*

⁸⁶⁰ UNICEF *Innocenti Research Centre*, "Study on the Impact of the Implementation of the Convention on the Rights of the Child," (2004), available at http://www.unicef.org/why/files/CRC_Impact_webversion.pdf at 20.

⁸⁶¹ *Id.*

⁸⁶² New Zealand (CRC/C/15/Add.216, 27 October 2003), paragraph 12.

⁸⁶³ Australia (CRC/C/15/Add.268, 20 October 2005), paragraph 16.

*amongst the Commissioners, or alternatively, that the Commission establish a subcommittee on children's rights".*⁸⁶⁴

811. It is submitted in Hong Kong where the territory and population are relatively small as compared to other commonwealth nations, it is feasible for the HKHRC to promote and enforce children's rights on par with other areas of concerns. In fortiori, if a HKEOC is established on par with the HKEOC, the establishment of an additional children's commission is bound to produce duplication of functions and jurisdiction.
812. Given the vulnerability and the low communication ability of children, the potential conflicts between the rights of adults and that of children, and expertise required to handle children abuse, a specialized unit on children's rights, or alternatively, a subcommittee on children's rights under the board of commissioners should be set up in the HKHRC to avoid any potential compromise and loss of sight on children's rights.

1.7.2. Listening to the children

813. In operation, the Children's unit within the HKHRC, or children's subcommittee of the board of commissioner, or an independent children's commission, if any, should make sure that the voices of children are heard directly, but not merely as the interpretation of adult wishes.
814. According to Article 12 of the Convention on the Rights of the Child, children have a right to express their views and to have their views taken seriously in all matters affecting them. As the Committee on the Rights of the Child stated, the Children's Commissioner should have direct contact with children and ensure that children are appropriately involved and consulted.⁸⁶⁵
815. General Comment No 5 of the CRC states that:-

“[I]n many cases, only children themselves are in a position to indicate whether their rights are being fully recognized and realized. *Interviewing children and using children as researchers* (with appropriate safeguards) is likely to be an important way of finding out, for example, to what extent their civil rights, including the crucial right set out in article 12, to have their views heard and given due consideration, are respected within the family, in schools and so on.”⁸⁶⁶

⁸⁶⁴ Republic of Korea (CRC/C/15/Add.197, 18 March 2003), paragraph 18.

⁸⁶⁵ UNCRC, General Comment No. 2, paragraph. 16.

⁸⁶⁶ *United Nations Committee on the Rights of the Child*, General Comment No. 5, “General measures of implementation of the Convention on the Rights of the Child,” (CRC/GC/2003/5, 3 October 2003), paragraph 120.

816. The Standing Senate Committee on Human Rights in Canada went as far as to suggest that the Children's Commissioner should have a statutory obligation to listen to and involve children meaningfully and effectively.⁸⁶⁷

1.7.3. Developing creative strategies

817. Sometimes, the NHRIs need to develop creative strategy in gathering opinion from the children and to promote the Convention.
818. For example, the New Zealand Children's Commissioner collects primary information from a young people's reference group, which provides the Office of with Children's Commissioner with representation and perspectives from children across the country.
819. The CRC recommended Latvia in 2001 "develop more creative methods to promote the Convention, including through audiovisual aids such as picture books and posters."⁸⁶⁸ Following the Committee Recommendations, in 2003 the SMSACFA received the UNICEF funding for translating and publishing the book entitled "Implementation Handbook for the Convention on the Rights of the Child".⁸⁶⁹ In 2004, the Latvia Government is planned to use the UNICEF funding to distribute "The Principal Positions Latvia Fit for Children" free of charge.⁸⁷⁰

820. Hence, the HKHRC, its specialized unit on children's rights, or subcommittee of the board of commissioners on children's rights, should listen to the children directly and should devise "specially tailored consultation programmes and imaginative communication strategies" to ensure adequate communication between the children and the institution.⁸⁷¹ It should "specifically direct age-appropriate information toward young people" and should communicate with child in person whenever possible.⁸⁷²

1.8. THE RIGHT TO INFORMATION

821. The UN has repeatedly emphasizes "the importance of a *"transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people"* as the foundation of good governance and the promotion of human rights..."⁸⁷³

1.9. ENVIRONMENT

⁸⁶⁷ Who's In Charge Here at 94.

⁸⁶⁸ Latvia, (CRC/C/15/Add.142, January 2001), recommendation 18.

⁸⁶⁹ Latvia, CRC/C/83/Add.16, 24 August 2005), paragraph 36.

⁸⁷⁰ Id, paragraph 37.

⁸⁷¹ UNCRC, General Comment No.2, paragraph 17.

⁸⁷² Best Practice at 37.

⁸⁷³ *Commission on Human Rights*, Resolution 2003/65, "The role of good governance in the promotion of human rights," adopted in 61st meeting (24 April 2003), Chap. XVII.- E/CN.4/2003/L.11/Add.6.

822. The Best Practice suggests that “a NHRI should recognise the importance of a clean and sustainable environment to the right of life, health and sustainable development.”⁸⁷⁴ As such, the HKHRC should investigate, monitor and report instances in which environmental degradation appears to be related [related to what?].⁸⁷⁵

823. To recap, it is submitted that, the HKEOC shall monitor the implementation and compliance of, at least the following international human rights instrument and domestic legislation concerning equality rights:-

- (a) International Convention on the Elimination of All Forms of Racial Discrimination;
- (b) Convention on the Elimination of All Forms of Discrimination against Women;
- (c) the Sex Discrimination Ordinance;
- (d) the Disability Discrimination Ordinance;
- (e) the Family Status Discrimination Ordinance; and
- (f) any other antidiscrimination legislation which would have been introduced.

824. The HKHRC shall monitor the implementation and compliance of, at least the following international human rights instrument and domestic legislation concerning other human rights at least, “human rights” should be defined with reference to the following six UN human rights treaties which currently apply to the HKSAR including: -

- (a) International Covenant on Economic, Social and Cultural Rights (ICESCR);
- (b) International Covenant on Civil and Political Rights (ICCPR);
- (c) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and
- (d) Convention on the Rights of the Child;
- (e) the Bills of Rights Ordinance; and
- (f) any other legislations which had incorporated any of the six human rights treaties as stated above.

⁸⁷⁴ Best Practice at 35.

⁸⁷⁵ Id.

[This box seems misplaced given we're in the Environment section.]
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2. ORGANIZATIONAL STRUCTURE OF THE HKHRC

825. Generally speaking, there are the two basic models for the allocation of functions within a NHRI — the strand-specific approach (race relations, gender issues, disability, human rights, etc.) or the functional approach (complaint handling, advice services, litigation, etc.). The third option is a mix of the strand-specific approach and the functional approach, whereby some strand-specific units would operate within a commission made up of mainly functional units.

2.1. THE STRAND-SPECIFIC APPROACH

826. The best illustration for the strand-specific approach is the Human Rights and Equal Opportunity Commission in Australia (the Australian HREOC). The Australian HREOC, established since 10 December 1986, is a body corporate comprised of a President and 5 specialist Commissioners supported by autonomous policy units which deal with specific domestic instrument(s). Usually a single commissioner has overall responsibility for administering a piece of legislation which includes the function of complaint handling, conciliation, education, promotion and legislative scrutiny.
827. The specialist Commissioners are the (i) Human Rights Commissioner, (ii) the Disability Discrimination Commissioner, (iii) the Sex Discrimination Commissioner, (iv) the Race Discrimination Commissioner, and (v) the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner. The five positions were currently taken up by three people. Mr. Graeme Innes is both the Human Rights Commissioner and Disability Discrimination Commissioner; while Mr. Tom Calma is both the Aboriginal and Torres Strait Islander Social Justice Commissioner and Acting Race Discrimination Commissioner.⁸⁷⁶

2.1.1. *The Strength*

828. Specialist commissioners can accord sufficient attention and resources onto specific area of human rights concerns. Each commissioner and his or her staff have been able to develop expertise in the special human rights issues impacting on part of the community. Distinct stakeholders who are particularly affected by violations of the particular human rights in questions have had a clearly identifiable officer to whom they can address their particular and unique concerns.

⁸⁷⁶ *Human Rights and Equal Opportunity Commission* (Australia), “President and Commissioners” (2006), available at http://www.hreoc.gov.au/about_the_commission/president_commissioners/index.html

829. The UCL survey found out that:-

“the strengths of the strand-specialist Australian model are that the specialist full-time commissioners (and their supporting policy units) ensure that a focus is kept on the core concerns of each strand. Specialist commissioners also have considerable ‘advocacy power’ in the Australian experience, providing a focal point for media interest and seen by the media and stakeholder groups as representative of stakeholder opinion within that strand. Professor Hilary Charlesworth in Australia has argued that the specialist commissioners, in particular the Disability and Aboriginal Justice Commissioners, have been vital in bringing these strands to the fore.”⁸⁷⁷

2.1.2. The Weakness

830. As discussed in Chapter III (paragraphs.....), the mutual competition among different strands can be fatal to the success of a single and integrated commission. As illustrated by the Australian experience, any attempt at prioritizing strategic cross-strand objectives over specific strand objectives can be difficult in a strand-specific commission. Whether different strands can cooperate well with each other depends heavily on the personality and strengths of the individual commissioners⁸⁷⁸, and of course their relationships.

831. In addition, the confusing lines of responsibility and the hierarchy among commissioners can be the source of tensions. The New Zealand Human Rights Commission requires the Race Relations and Equal Opportunities Commissioners to “lead” discussion on matters within their specialist areas of responsibility and for joint decision-making with the Chief Commissioner and such arrangement subsequently lead to chaos.⁸⁷⁹

2.1.3. The attempt to reform the strand-specific approach

832. In view of the above weakness of the strand-specific approach, the Australian Government and the New Zealand Governments have attempted to reform the strand-specific structure to the functional or a mixed structure.

833. In September 1997 and later in 1999, the Attorney-General announced the Australian Government’s intention to restructure the six-member-commission to a four-member commission in which “a President and three deputy presidents who would be responsible for the current five portfolio areas.”⁸⁸⁰

⁸⁷⁷ UCL Survey at 32.

⁸⁷⁸ Id at 33.

⁸⁷⁹ Id at 33.

⁸⁸⁰ *Human Rights and Equal Opportunity Commission (Australia)*, “Annual Report 1997-1998,” at 14; see also *Rights and Equal Opportunity Commission (Australia)*, “Annual report 1999-2000,” at 5.

834. The first step of the institutional reform was to transfer the complaint-handling powers vested in specialized commissioners to the President of the Commission. But the Race, Sex and Disability Discrimination Commissioners retained the role of *amicus curiae* in court proceedings that are before the Federal Court. These amendments, contained in the Human Rights Legislation Amendment Act No. 1, received royal assent in October 1999 and came into effect in April 2000.⁸⁸¹
835. Later on, the Australian Human Rights Commission Legislation Bill 2003 proposed to eliminate the five specialist commissioners in the present structure and to replace them with three generic human rights commissioners. The Bill also proposed to grant the Attorney General the power to appoint part-time complaints commissioners to assist the president of the Commission to undertake her complaint responsibilities⁸⁸², and included a duty to ensure that the Commission members “as a group have expertise in the variety of matters likely to come before the Commission”.⁸⁸³
836. However, the 2003 Bill was strongly opposed by the civil society and did not get support from majority in the Parliament. The Human Rights Council of Australia,⁸⁸⁴ the New South Wales Councils for Civil Liberties and the University New South Wales Councils for Civil Liberties⁸⁸⁵ strongly opposed the amendments on the grounds of transparency, simplicity, efficiency and plurality. The Human Rights Council of Australia, in addition, commented that the Government’s apparent concerns are the cost of the introducing new specialist commissioners:-
- “[The Australian Government] is considering at present the long overdue introduction of federal age discrimination legislation. There is also need for federal legislation to protect and promote children’s rights and the rights of gay men and lesbians and to make religious discrimination and vilification unlawful. Apparently the Government is concerned at the costs and practicality of establishing new positions of commissioner. This concern is of a far lesser order of importance than the benefits to be gained from the specialist commissioner positions.”⁸⁸⁶
837. At present, the Australian HREOC has a mixed functional and specialist structure, with three full-time stand-specific commissioners, which undertakes five portfolios under the

⁸⁸¹ *Human Rights and Equal Opportunity Commission (Australia)*, “Annual Report 1999 - 2000,” at 5.

⁸⁸² The Australian Human Rights Commission Legislation Bill 2003, the proposed new Section 42A of the Act.

⁸⁸³ *Id.*, the amendments to Section 8B.

⁸⁸⁴ *Human Rights Council of Australia*, “Submission to the Senate and Constitutional Committee on the Australian Human Rights Commission Legislation Bill 2003,” available at <http://www.hrca.org.au/hreoc%20sub.htm>

⁸⁸⁵ *New South Wales Councils for Civil Liberties and the University New South Wales Councils for Civil Liberties*, “Joint Submission to AHRC Bill Inquiry,” (April 2003), available at <http://www.nswccl.org.au/docs/pdf/CCL%20AHRC%20Bill%20Submission.pdf> at 12.

⁸⁸⁶ *Human Rights Council of Australia*, Senate and Constitutional Committee on the Australian Human Rights Commission Legislation Bill 2003.

overall direction of a Chief Commissioner.⁸⁸⁷ Functional units provide legal, public relations and corporate services support.

2.2. THE FUNCTIONAL APPROACH

838. Many human rights commissions have adopted the functional approach, including those in Northern Ireland, Canada, the Republic of Ireland, New Zealand, South Korea, Fiji, India, Indonesia and the Philippines.
839. Taking the Northern Ireland Human Rights Commission as example, the Commission is now structured along functional lines, consisting of Information, Education & Development Unit, Legal Services Unit, Policy & Research Unit, and Corporate Services Unit under the leadership of the Chief Executive. On top of the Chief Executives, a board consisting of one full-time chief commissioner and nine part-time general commissioners meets regularly and decides policy direction of the commission.⁸⁸⁸

2.2.1. The strength

840. The functional approach can prevent duplication of resources, allow for learning and knowledge-sharing across the equality grounds, permit the development of a cross-strand agenda across all functions of a single commission, and prevent the strands from operating in isolation.⁸⁸⁹ There is also a uniform and consistent mythology in dealing with different types of human rights violations.
841. The functional structure is found to reinforce the overall institutional corporate image of the commission, both internally from the staff of the commission and externally from the public. As evidenced by the UCL survey, the Irish Equality Authority's functional structure, shows that:-

“the expertise gained in one area can be transferred across to other areas, leading to fresh perspectives and greater ease in handling cases involving multiple grounds. Functional separation has also delivered benefits in terms of separating advice, promotion and enforcement internally, as discussed above,

⁸⁸⁷ *Human Rights and Equal Opportunity Commission (Australia)*, “Annual Report 2004-2005,” (Sydney: Human Rights and Equal Opportunity Commission, 2005), ISSN 1031-5098 at 9.

⁸⁸⁸ *Northern Ireland Human Rights Commission's website*, “About us,” available at http://www.nihrc.org/index.php?option=com_content&task=view&id=7&Itemid=12

⁸⁸⁹ UCL Survey at 31.

especially in handling the large number of cases that involve multiple grounds of discrimination.”⁸⁹⁰

2.2.2. *The weakness*

842. Alike to the two sides of a coin, the weakness of the functional approach is the perception that specific issues, particular those revealed widespread disquiet, are not dealt with sufficient attention.
843. To appease the public sentiment, specialized units which are usually mandated to handle a narrow issues, are sometimes established within a commission structured along functional lines. Examples are the Race and Ethnic Relations Team in the New Zealand Human Rights Commission.⁸⁹¹
844. The New Zealand Human Rights Commission has long been posited as a mix of functional and strand specific structure since 1977. On top of the executive branch, there is currently a board consisting of the Chief Commissioner, the Race Relations Commissioner, the Equal Employment Opportunities Commissioner and five other part-time Human Rights Commissioners, which in charge of the overall policy agenda of the Commission.⁸⁹²
845. There are five functional units, including the Disputes Resolution Team, the Services Team, the Communications Team, the Legal Counsel and the Research Team; while there are three specialized units, namely Human Rights Team which handles promotional, outreach and policy work in respect of New Zealand’s international human rights obligations, the Race and Ethnic Relations Team which provides education and information on race and ethnic relations and investigation of complaints, and the Equal Employment Opportunities Unit which provides advice and leads discussions on equal employment opportunities issues and monitor progress in equal employment opportunities practice respectively.⁸⁹³
846. Such a mixed structure is largely a political compromise between the Government and various stakeholders.⁸⁹⁴ In 2000, the Ministry of Justice in New Zealand recommended a merger of the office of the Race Relations Conciliator and the Human Rights Commission to reduce duplication of resources and to ensure a greater cross-strand, intersectional and holistic approach to the equality agenda.⁸⁹⁵ The New Zealand

⁸⁹⁰ Id at 31.

⁸⁹¹ *Human Rights Commission (New Zealand)*’s website, “Organisational Structure,” available at <http://www.hrc.co.nz/index.php?p=392>

⁸⁹² Human Rights Act (New Zealand), Section 7.

⁸⁹³ *Human Rights Commission (New Zealand)*’s website, Organisational Structure.

⁸⁹⁴ UCL Survey at 30.

⁸⁹⁵ *Ministry of Justice (New Zealand)*, Re-Evaluation of the Human Rights Protections in New Zealand.

Federation of Ethnic Councils strongly opposed such merger, fearing it would result in less emphasis on race relations and deprivation of the race relations office's reputation for proactive and independent action. As such, a specialized unit on race relations, the Race and Ethnic Relations Team, was established within the Human Rights Commission to pacify stakeholders.

2.2.3. *The general support for a functional structure from different nations*

847. As stated above, most of the existing NHRIs have generic members. In addition, NHRIs tend to evolve from the strand- specific structure to the functional structure over time.⁸⁹⁶
848. In the CHRA Review conducted in 2000 in Canada, the CHRA Review Panel first examined the structure of the Canadian Human Rights Commission at that time. The Panel found that the structure of the Canadian Human Rights Commission at that time, which was comprised of one *full-time* Commissioner and several *part-time* commissioners who meet several times a year to make decisions about individual complaints and policy direction, “permits regional representation through the part-time commission members but it does not permit any input by nongovernmental organizations.”⁸⁹⁷
849. On the other hand, the CHRA Review Panel found that the strand-specific approach was not altogether satisfactory. Although it could “increase the Commission’s responsiveness to community organizations and employers, employee organizations and service providers”, “an increase in the number of Commissioners for this purpose would make the organization more costly and less efficient.”⁸⁹⁸
850. Lastly, the CHRA Review Panel welcomed a model comprising three full-time Commissioners together with an Advisory Council that would meet with the Commissioners a number of times each year and advise the Commissioners on policy and objectives. “This option would overcome the rigidity of a [strand-specific] Commission described ... and offer savings in resources and the increased efficiency of a small, full-time body.”⁸⁹⁹
851. The Canadian Human Rights Commission is currently consists of a board with a total of five Commissioners and six functional divisions. These functional divisions are (i) Strategic Initiatives, (ii) Dispute Resolution, (iii) Discrimination Prevention, (iv)

⁸⁹⁶ JCHR 6th Report, paragraph 231.

⁸⁹⁷ CHRA Review at 94-5.

⁸⁹⁸ Id, at 95.

⁸⁹⁹ Id, at 2, Recommendation 1.

Knowledge Centre, (v) Learning and Professional Development, and (vi) Corporate Management Branch & Corporate Secretary.⁹⁰⁰

852. To allocate sufficient focus to specific human rights issues, specific units have been established within the CHRC. They are the Discrimination Prevention Branch that amalgamates the Employment Equity Compliance Program, a Prevention Initiatives and Liaison Division, Communications and Regional Offices which enables the Commission to focus on developing a more positive, productive relationship with employers while providing strategic advice and support, and a Strategic Initiatives Branch which responds to emerging issues and combats broader problems of a systemic nature.⁹⁰¹
853. The Irish Human Rights Commission, established in July 2001 as a direct result of the Good Friday Agreement, is also structured along functional lines. The Commission is made up of four functional units: (i) the Casework Office, (ii) the Legislation & Policy Review Office, (iii) the Human Rights Awareness Office and (iv) the Administrative Office.⁹⁰²
854. The Korean National Human Rights Commission, officially established on 25 November 2001, is comprised of eleven Commissioners including one President and three Senior Commissioners. The Commission has a Plenary Committee, a Standing Committee, and three Subcommittees. Subcommittee 1, 2 and 3 deliberate and resolve matters relating to the affairs under Articles 19(1), 19(8), and 19(9) of the Constitution; matters relating to human rights violation under Articles 19(2) and 30(1); and matters relating to discriminatory conducts amounting to equal right violations under Articles 19(3) and 30(1)(2) respectively. In addition, it has a Conciliation Committee for conciliation of petitioned cases and the Special Committee for handling urgent affairs. Working under the Plenary Committee, the Secretariat consists of the General Affairs Division, the Human Rights Policy Bureau, the Administrative Support Bureau, the Human Rights Violation Investigation Bureau, the Discrimination Investigation Bureau and the Education & Cooperation Bureau. The Public Information Officer, Inspector General, and Counselling Center are directly under the supervision of the Secretary General. The Human Rights Library is also attached to the Commission.⁹⁰³
855. In the UK, the JCHR was inclined to favour the “commissioners with designated functions” model (ie. functional approach), as it believed that “human rights do not belong especially to any particular group” and the strand-specific may produce a hierarchy of rights.⁹⁰⁴ The JCHR conceded that “it may be necessary to find a

⁹⁰⁰ Canadian Human Rights Commission, Annual Report 2005, at 45.

⁹⁰¹ *Id.*

⁹⁰² Irish Human Rights Commission’s website, “Organisational Structure,” available at http://www.ihrc.ie/about_us/structure.asp

⁹⁰³ National Human Rights Commission of Korea, “Annual Report 2002,” (31 July 2004), available at http://www.humanrights.go.kr/eng/information/materials/info03_view.jsp at 13-4.

⁹⁰⁴ JCHR 6th Report, paragraph 232.

compromise between these two models as an interim arrangement.”⁹⁰⁵ After all, the commission “should have as much freedom as possible in determining its own internal structure.”⁹⁰⁶

856. JUSTICE also preferred the functional approach rather the strand-specific approach. “This would have the merit of encouraging an integrated approach to the Commission’s work, wherein human rights and equalities issues are the domain and the concern of all, rather than different areas being viewed as the property of sectional interests.”⁹⁰⁷

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| 857. In view of the difficulties and the recent retreat from the strand-specific approach, as well as the advantages of the functional approach and the overwhelming support for it, the HKHRC should be structured along functional lines. In case of outbreak of severe and widespread human rights violations, the HKHRC should be able to, at its initiative, set up any specialized unit or ac hoc [should this be ad hoc?] group to handle that particular area of human rights concern. |
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2.3. What functional units?

858. As mentioned in Chapter II, the HKHRC needs a complaint-handling unit and a mediation and conciliation unit which is independent from other branches of the HKHRC.⁹⁰⁸
859. The Best Practice recommends a NHRI should have its own qualified legal unit to undertake the task to address complaints effectively.⁹⁰⁹
860. A research and advisory unit should be set up within the HKHRC in order to discharge its function of advising the Government and the private sectors.
861. An information unit should be established within the HKHRC as it can provide a clear entry point of the HKHRC for media, any organization or any individual who want to seek information or to lodge a complaint. Such unit should also assume the role of promoting a culture of respect for human rights among the community.
862. For instance, the Canadian Human Rights Commission has set up a Knowledge Centre which emphasizes policy development, research, legal advice, statistical analysis and knowledge to enhance the level of understanding of human rights within Canadian

⁹⁰⁵ Id, paragraph 232.

⁹⁰⁶ Id, paragraph 232.

⁹⁰⁷ Eric Metcalfe, paragraph 17.

⁹⁰⁸ See paragraph ... of this report.

⁹⁰⁹ Best Practice at 14.

society.⁹¹⁰ “The Centre conducts research, develops policy, provides internal legal advice, and gathers and analyzes statistics in support of research, policy development and management decision-making. It also assumes responsibility for regulatory affairs, which includes the development of regulations and guidelines related to both the *Canadian Human Rights Act* and the *Employment Equity Act*. The Commission’s library is part of the Knowledge Centre.”⁹¹¹

863. It is submitted that the Secretariat should consist of, at least, the following functional units: a complaint-handling unit, a mediation and conciliation unit, a legal unit, a research and advisory unit and an information unit.
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3. THE NUMBER OF COMMISSIONERS

3.1. THE TWO COMPETING CONSIDERATIONS: SCARCITY OF RESOURCES AND PLURALITY

864. With regard to the number of leading members, the amount of resources available for the commission has to be taken into consideration and in relation hereto the Paris Principles stress that:-

*“Governments experiencing severe economic difficulties may be forced to establish small institutions [...] because they are unable to afford larger ...ones”.*⁹¹²

865. The advantage to appointing a smaller number of commissioners is to free more funds for various projects and activities, and additional operating staff instead of the costly salaries of high profile commissioners. While the staffing levels must be able to adequately support the commissioners for an effective discharge of the full mandate of the NHRI,⁹¹³ the amount of money spent on the salary of the commissioners, the operating staff and the programmes of the Commission should be allocated in fair proportion.

866. On the other hand, the Paris Principles stress that the composition of the NHRIs should reflect the composition of the Community.⁹¹⁴ Nevertheless, appointment of too many commissioners, solely on the ground to guarantee an adequate and balance representation of vulnerable groups, with a deliberate blind eye as to whether the commissioners are appointed at the cost of effectiveness and working efficiency of the commission, is definitely unwarranted.

⁹¹⁰ Canadian Human Rights Commission, Annual Report 2005 at 45.

⁹¹¹ Id at 40.

⁹¹² Handbook, paragraph 123.

⁹¹³ Best Practice at 13.

⁹¹⁴ The Paris Principles, Article 4.

867. The difficulty of balancing this two competing consideration is best illustrated by the consultation on the Scottish Human Rights Commission. The structure and the number of commissioner was one of the areas of greatest dissent in the responses to the second consultation. In the second consultation on the Bill the Scottish Executive suggested that “‘broad representation of Scottish society as a whole’ should be *one of* the factors considered in making Commissioner appointments [emphasis in original]”⁹¹⁵; at the same time, “keeping numbers small and manageable makes sense both for ease of strategic control and decision making and to put less pressure on resources”. Hence, the Second Consultation recommended a Commission consisting of *three* or *four full-time commissioners*.⁹¹⁶
868. 15 out of 36 of respondent to the Second Consultation agreed with the proposal three or four full-time commissioners as it could ensure consistency among decisions; while another 15 respondents argued for more part time Commissioners on the ground that such a small commission is not adequately pluralistic; and the rest expressed no preference either way.⁹¹⁷
869. Later on in the revised proposal, Section 1 of the Scottish Commission for Human Rights Bill provides a model of *one single commissioner supported by two deputy commissioners*, either full or part-time if the Scottish Parliamentary Corporate Body agrees.⁹¹⁸ The Policy Memorandum states:-

“Ensuring broad representation of civil society among the commissioners is not necessarily an overriding priority in Scotland... *the SCHR is not being established as part of a wider initiatives to overcome deep discord between different communities, as in Northern Ireland or South Africa.*”⁹¹⁹

3.2. THE EXPERIENCE WORLDWIDE

870. The Best Practice sets forth the base line on the number of commissioners by suggesting that, at least *three* leading commissioners should serve on a *full time basis*.⁹²⁰

⁹¹⁵ *Scottish Executive*, “The Scottish Human Rights Commission,” (2003), available at <http://www.scotland.gov.uk/consultations/justice/shrs00.asp> at 38.

⁹¹⁶ *Id.*

⁹¹⁷ *Scottish Executive*, “The Scottish Human Rights Commission: Analysis of Consultation Responses,” (2004a) available at <http://www.scotland.gov.uk/library5/social/hrcacr00.asp>

⁹¹⁸ *Scottish Executive*, “Scottish Commissioner for Human Rights Bill: Policy Memorandum,” Session 2 (2005), SP Bill 48PM, available at <http://www.scottish.parliament.uk/business/bills/pdfs/b48s2introdpm.pdf>, paragraph 94.

⁹¹⁹ *Id.*, paragraph 99

⁹²⁰ Best Practice at 13.

871. The Canadian Human Rights Act maintains a fair degree of flexibility by adopting a provision prescribing that the Canadian Human Rights Commission should consist of “*not less than three and not exceed more than seven leading members*”.⁹²¹ The CHRC is currently made up of *one full-time Chief Commissioner* and *four part-time commissioners* appointed by the Governor in Council, for a total number of five commissioners. The Chief Commissioner is appointed for a term of up to seven years; and the other Commissioners, for terms of up to three years. The Chief Commissioner is responsible for the operations of the Commission and supported by the Secretary General.⁹²²
872. In 2002, the Canadian Human Rights Act Review Panel found that the structure of Canadian Human Rights Commission at that time, which comprising *one full-time Commissioner* and *several part-time commissioners* who meet several times a year to make decisions about individual complaints and policy direction, “permits regional representation through the part-time commission members”, but it could not “permit any input by nongovernmental organizations.”⁹²³
873. As such, the CHRA Review Panel put forward a model *comprising three full-time Commissioners* and *an Advisory Council* in order to strike a balance between the competing considerations of scarcity of resources and plurality of the composition.⁹²⁴ Hence, the advisory council guarantees the input to the Commission from civil society and the NGOs despite a small number of commissioners. However, the above recommendation was not endorsed.
874. In the Australian HREOC, there is one position of President and five positions of specialized commissioners, which count a total of *six* commissioners. It should be noted that the Australian Government has deliberately left two positions vacant in order to reduce mutual competition across strands. As such, there are actually only *four* commissioners in the board of the Australian HREOC.⁹²⁵
875. The Northern Ireland Human Rights Commission currently consists of *one full-time* chief commissioner and *nine part-time* general commissioners who meet regularly and decides policy direction of the commission.⁹²⁶

⁹²¹ Canadian Human Rights Act of 1985, Article 26 (1).

⁹²² Canadian Human Rights Commission’s website, “Who is the Commission?” available at <http://www.chrc-ccdp.ca/about/commissioners-en.asp>

⁹²³ CHRA Review at 94-5.

⁹²⁴ Id at 2, Recommendation 1.

⁹²⁵ Human Rights and Equal Opportunity Commission (Australia) ’s website, “President and Commissioners” (2006), available at http://www.hreoc.gov.au/about_the_commission/president_commissioners/index.html

⁹²⁶ Northern Ireland Human Rights Commission’s website, “About us,” available at http://www.nihrc.org/index.php?option=com_content&task=view&id=7&Itemid=12

876. The Irish Human Rights Commission has *one full-time* commissioner and *fifteen part-time* commissioners appointed by the Government for a period of 5 years. In accordance with the Human Rights Commission Acts 2000 and 2001 (Ireland), not less than seven of the members of the Irish Human Rights Commission should be female and not less than seven should be male.⁹²⁷
877. The JCHR in the UK considered that *nine* to *sixteen* commissioners would be appropriate⁹²⁸, while the UK Government announced that the CEHR board is going to be comprised of *ten* to *fifteen* members “to ensure a sufficient range of experience and expertise”.⁹²⁹
878. In Hong Kong, the human rights bill 1994 suggested a board with *one part-time chairman* and *five full-time specialized commissioners*, namely the Human Rights Commissioner, the Race Discrimination Commissioner, the Sex Discrimination Commissioner, the Disability Discrimination Commissioner and the Children’s Commissioner.⁹³⁰
879. However, it may be very difficult for a part-time chairperson to fully discharge the role of the chief commander of the HKHRC in terms of commitment and relationship to the administration of the Commission. The Canadian Human Rights Act Review Panel observed that part-time members might feel that they did not have enough access to resources to be effective Commissioners.⁹³¹ Hence, it is more important that the chief Commissioner of the HKHRC be appointed on a full-time basis.
880. This report submits that the number of lead commissioner shall strike a balance between a pluralistic composition and the availability of limited resources. There should be *three to seven general commissioners* in the board of the HKHRC, who decide on the policy agenda of the HKHRC and monitor the work of the entire Secretariat. In order to guarantee the public’s participation, an advisory council which reflects the composition of the community, or consists of the members of the community and relevant NGOs should be established to advise the board of the HKHRC on policy issues. The resolution of the advisory council, though not binding, should be highly persuasive and should be accorded with due weight when the Board is deciding issues concerning an area related to that Council’s resolution.

⁹²⁷ Irish Human Rights Commission’s website, “Commissioners,” available at http://www.ihrc.ie/about_us/commissioners.asp

⁹²⁸ JCHR 11th report, paragraph 107.

⁹²⁹ UK Government’s Response, paragraph 27.

⁹³⁰ The Human Rights and Equal Opportunities Commission Bill 1994, Section 7(1).

⁹³¹ CHRA Review at 94-5.

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| 881. | The Chief Commissioner of the HKHRC should be appointed on a full-time basis. Whether the other commissioners or what number of commissioners should be appointed on a part-time or full-time basis is an issue which requires further deliberation. In case where most of the general commissioners are appointed in a part-time basis, the number of the commissioners should increase accordingly in order to avoid overloading of the board of commissioners. |
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4. THE RELATIONSHIP OF HKHRC WITH OTHER INSTITUTIONS

882. To effectively discharge its mandate, the HKHRC must work in coalition and cooperation with the Ombudsman, the Courts, the Government and other legal and democratic institutions, if any.

4.1. THE HKHRC AND THE OMBUDSMAN

4.1.1. *Overlapping of jurisdiction*

883. The work of the Human Rights Commission and that of the Ombudsman are somewhat very similar. Basically, the only difference is the object of the complaints: the Ombudsman is restricted to the investigation of allegations of administrative malfeasance in government, statutory authorities; while the human rights commissions can address complaint against both public and private organizations.
884. As such, a human rights complaint against the public authorities may fall within the mandate of the HKHRC and that of an Ombudsman and resulting in a significant of overlap of jurisdiction.
885. In Latvia, the Expert Review Mission inquired as to the roles and legislation of other State and independent institutions working in the same spheres as the Latvian National Human Rights Office (LNHRO). The Mission concluded that, in some areas, there is clear fragmentation and overlap in the institutional framework for rights protection among Latvian institutions.⁹³²
886. One possible overlap arises between the LNHRO and the State Civil Service Administration Office (SCSA). The Mission declared that:-

⁹³² *Expert Review Mission on Latvian National Human Rights Office and Ombudsman Functions in Latvia*, “Considerations and Recommendations: Final Report” (22 May 2001), available at http://www.un.lv/download/undp_public/omb/omb_e.pdf at 8.

“While the mandate of the LNHRO is to review complaints involving allegations of human rights violations, one of the functions of the State Civil Service Administration is ‘to review complaints by physical and legal persons about the actions of civil servants.’ Theoretically, if a case involving rights issues and the actions of civil servants arises, both the LNHRO and the SCSA could be empowered to act. Interestingly, almost none of the persons whom the Mission met were aware of the SCSA Office as a complaint mechanism.”

The problem of institutional overlap is compounded by the fact that the directors of the two offices “enjoy minimal co-operation with one another and have very little communication.”⁹³³

4.1.2. Solution one—maintenance of effective collaboration between two separate institutions

887. In Australia, New Zealand and the Northern Ireland, the human rights commissions sit well together with the ombudsmen of their jurisdictions.
888. In New Zealand, when the Human Rights Commission Act 1977 first introduced, the Ombudsman was made a member of the Human Rights Commission. The Human Rights Act 1993 disestablished the right of the Ombudsman to act as a Commissioner. In Australia, no similar event has happened.
889. Satisfactory cooperating relationships and effective collaboration between the ombudsman and the human rights commission is unattainable, provided that there is constant and interactive communications between the two institutions.
890. Mr. Brian Burdekin, the former Human Rights Commissioner in the Australian HREOC, currently the visiting Professor at the Raoul Wallenberg Institute in Sweden and International Advisor to the National Human Rights Commission of Sri Lanka, during the opening ceremony of the Fiji Human Rights Commission, stated:-

“Fourteen years ago when the Attorney General, Lionel Bower, asked me to start drafting the Legislation for the Human Rights Commission in Australia I was really worried about whether the jurisdiction of the Commission would conflict with the role of other institutions such as the Ombudsman's office and so we did our best to ensure that a complainant could be referred to more appropriate bodies where there was overlapping jurisdiction. *However, in my eight years as a Human Rights Commissioner, we had no conflict of jurisdiction with the Ombudsman's office or any other institution. Establishing good relationships is the key. In*

⁹³³ Id at 9.

*practice, we never had any problems because we all took a common sense approach.*⁹³⁴

891. Emile Francis Short, the Chairperson of the Commission on Human Rights and Administrative Justice in Ghana 1993- 2004 also recognized the possibility of harmonious cooperation between the ombudsman and the human rights commission if the two commissions can develop guidelines determining which agency will handle what type of cases and the eligibility and procedures of referral. In drafting such guidelines, he recommended that:-

“[I]t is appropriate that complaints lodged with the Ombudsman against governmental officials or agencies alleging discrimination based on one of the well recognized prohibited grounds such as race, ethnic origin, gender, age, sexual orientation should be referred to the human rights commission because of the latter’s expertise in matters of anti-discrimination law and also because a number of NHRIs, unlike the Ombudsman, apply international standards of human rights as the explicit or implicit basis of their work. In such matters, NHRIs are in a much better position to handle and grant more effective remedies. Examples of such cases would include a situation where a female employee of a government agency is dismissed without adherence to the rules of natural justice because of her refusal to respond favourably to the sexual demands of her employer, or where an employee in a government agency is subject to a regime of racial insults or discriminatory practices.”⁹³⁵

4.1.3. *Solution two—appointment of same person as the ombudsman and the chief commissioner of the Human Rights Commission*

892. To deal with the potential problem caused the overlapping jurisdiction and to ensure a harmonious relationship between the two institutions, the Section 42 of the Constitution of Fiji provides for the establishment of a Human Rights Commission and the Ombudsman should automatically assume the position of Chairperson of the Human Rights Commission.
893. While some people doubt whether the wide gap between the jurisdiction of the Ombudsman and the Human Rights Commission would render the Ombudsman inappropriate for Chairperson, but in the Director of Public Prosecutions to London and the First Commissioner of the Human Rights Commission in Fiji, Justice Sailosi Kepa’s view, “the Ombudsman should feel comfortable in the role because the Human Rights

⁹³⁴ Brian Burdekin, “Applying International Human Rights Standards,” *Reports of the Workshop on the Importance of National Human Rights Institution*, (21 February 1998), available at <http://www.ccf.org.fj/publications/nhrights/11.htm>

⁹³⁵ Emile Francis Short at 128-9.

Commissioners will work in a field that the Ombudsman has had a great deal of experience in.” Justice Kepa also thought that the staff in the Ombudsman could usefully be employed in doing the Commission's investigatory work.⁹³⁶

4.1.4. Solution three—setting up the human rights commissions only

894. There is a recommendation to establish a single human rights commission and to transfer the role of the ombudsman to the human rights commission.
895. Expert Review Mission on Latvian National Human Rights Office and Ombudsman Functions in Latvia preferred an “accountability regime based on LNHRO”, where the legislative mandate of the LNHRO should be extended beyond human rights issues to include the full range of maladministration concerns. Under this approach, the LNHRO would act as an all-encompassing independent oversight mechanism for human rights and public accountability issues.⁹³⁷
896. Some other jurisdictions chose to establish either the human rights commission, or the hybrid of the human rights commission and the ombudsman, namely human rights ombudsman.
897. Ombudsmen have been encouraged to be entrusted with human rights matters for a long period of time. In Recommendation No. R(85)13 on the Institution of the Ombudsman, adopted on 23 September 1985 at the 388th meeting of the Ministers’ Deputies, the States of the Council of Europe encouraged its member to ‘consider empowering the Ombudsman, where this is not already the case, *to give particular consideration, within his general competence, to the human rights matters under his scrutiny and, if not incompatible with national legislation, to initiate investigations and to give opinions when questions of human rights are involved*’.⁹³⁸
898. Given the re-conceptualization of the role of the ombudsman institutions worldwide, Dejo Olowu, the lecturer of the School of Law at the University of the South Pacific, even called for an expansion of mandate of NHRIs to monitor socio-economic rights. He strongly considered that:-

⁹³⁶ Sailosi Kepa, “Human Rights Commission And Their Importance,” *Reports of the Workshop on the Importance of National Human Rights Institution*, (21 February 1998), available at <http://www.ccf.org.fj/publications/nhrights/9.htm>

⁹³⁷ Expert Review Mission on Latvian National Human Rights Office and Ombudsman Functions in Latvia at 17.

⁹³⁸ *Council of Europe*, “Recommendation No. R (85) 13 of the Committee of Ministers to Member States on the Institution of the Ombudsman,” available at [http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Recommendation\(85\)13.asp](http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Recommendation(85)13.asp)

*“Ombudsmanship has potential to be a veritable platform for addressing socio-economic rights and the core issues affecting millions of people daily. The reality demonstrated here, thus far, is that while there are indeed broad provisions for institutional intervention in the human development challenges confronting the diverse peoples of the newer states of the Commonwealth, these mechanisms have largely remained under-utilized.”*⁹³⁹

899. It is recognized that many of the NHRIs established in the past fifteen years are hybrids of the ombudsman and human rights commission, namely human rights ombudsman.⁹⁴⁰ Instead of opting for a framework which contains both an ombudsman and a human rights commission, many jurisdictions have chosen to establish human rights ombudsmen. [restates number 885].
900. Examples of the hybrids of the ombudsman and human rights commission include the office of Defensor del Pueblo in Colombia (1991), Argentina (1994), Peru (1993, commenced activities 1996), Panama (1997), Bolivia (1998), and Ecuador (1998); the Procurador para la Defensa de los Derechos Humanos of El Salvador (Attorney or Counsel for the Defense of Human Rights, 1992); and the Procurador de los Derechos Humanos of Guatemala (1987); Provedor de Justiça of Portugal in Portugal (1975), Defensor del Pueblo in Spain (1978), Commissioner for Civil Rights Protection in Poland (1987), National Ombudsman in Croatia (1992), Human Rights Ombudsman in Slovenia (1995), Federation Ombudsmen, Bosnia and Herzegovina Human Rights Ombudsman in Bosnia and Herzegovina (1995), Parliamentary Commissioner for Civil Rights and Parliamentary Commissioner for the Protection of National and Ethnic Minority Rights in Hungary (1995), Plenipotentiary for Human Rights in Russia (1997), Advocate of the People in Romania (1997), Parliamentary Advocates in Moldova, Public Defender in Georgia (1995, started operations in 1998), and People’s Advocate in Albania (1998, appointed in 2000); Ombudsman in Namibia (1990), Commissioner for Human Rights and Administrative Justice in Ghana (1993), and the Ombudsman in the Seychelles (1994), Commissioner for Administration in Cyprus (1991) and Palestinian Citizens’ Rights Commission in Palestine (1993).⁹⁴¹
901. The establishment of human rights ombudsman is a less desirable alternative to the HKHRC (further disussion in Chapter IV).
902. In Hong Kong, the existing Office of Ombudsman has attempted to expand its jurisdiction several times. The former head of the Ombudsman, Mr. Andrew So explored a possible expansion to the Ombudsman’s jurisdiction and the Government’s reply in an

⁹³⁹ Dejo Olowu, “Comparagraphptive Constitutionalism and Rights: Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees,” (2006) 69 *Saskatchewan Law Review* 39 at 76.

⁹⁴⁰ Linda C. Reif at 11-2.

⁹⁴¹ Id.

Ombudsman Paper in 1998.⁹⁴² The report also suggested the removal of certain limitations on the Ombudsman's jurisdiction and investigatory powers.⁹⁴³

903. In July 2006, the Ombudsman, Alice Tai Yuen-ying, considered the proposal to expand the Ombudsmen's role to encompass complaints against the police and the ICAC.⁹⁴⁴ But there were concerns from local politicians as to whether such expansion is necessary and whether it would render duplication of resources.⁹⁴⁵ In January 2007, Ms. Tai considered that proposal inappropriate.

904. As such, the HKHRC and the existing Office of Ombudsman would probably experience the problem where the remits of the two institutions duplicate with each other. Such tension would be more acute if the attempts of the Ombudsman to expand its jurisdiction were realized. Solution one and two can facilitate a cooperative and harmonious relationship between the human rights commission and the ombudsman; yet, they fail to reduce the resources wasted in setting up two separate institutional structure and establishment. Comparatively, solution three is the simplest and the most cost-effective solution.

905. While Hong Kong has a relatively small population and small territorial jurisdiction, it is comparatively unfavorable for Hong Kong to have the ombudsman and the HKHRC co-exist with each other in the institutional framework. The resources lost in establishing the institutional structure will constitute a huge percentage of total resources available, whereby freeing more resources for human rights programmes and campaigns may be more preferable. There may also be a lack of personnel to run so many institutions.

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

907. Thereby, it is submitted that the existing Office of the Ombudsman should terminate its operation after the opening of the HKHRC. The role of the existing Office of the Ombudsman of handling complaints against maladministration should be absorbed by the HKHRC. The standard operating procedures, internal guidelines as well as staff should

⁹⁴² *Office of the Ombudsman (Hong Kong)*, "The Ombudsman and the Protection of Human Rights in Hong Kong," January 1998), available at www.ombudsman.gov.hk/english/09_publications/18_human_right/index.htm, especially paragraphs 35 and 43.

⁹⁴³ *Id.*

⁹⁴⁴ *Office of the Ombudsman (Hong Kong)*, "Annual Report 2006" (June 2006), available at http://www.ombudsman.gov.hk/english/link_09_publication.html at 5.

⁹⁴⁵ Song Li-Gong (宋立功), *Metro Hong Kong* (6 July 2006), P02.

be transferred to the HKHRC to facilitate the HKHRC in discharging its mandate in a timely and effective manner.

4.2. THE HKHRC AND COURTS

908. As the Best Practice point out:-

“While NHRIs are not courts, it is nevertheless critical that there be appropriate sanctions for failure to co-operate with the NHRI in the conduct of its investigations and inquiries. Accordingly, a mechanism for the enforcement of NHRI decisions by the courts should be provided.”⁹⁴⁶

909. As such, the courts can provide enforcement mechanism for the determinations made by the NHRIs; at the same time, the courts should be able to conduct judicial review on the HKHRC’s decisions and revoke its decisions on the grounds of procedural fairness, fundamental omission, legal error and capricious or unreasonable decisions.⁹⁴⁷

910. The functions of the NHRIs and that of the courts are complementary to each other. It is equally important to appreciate that NHRIs are not courts; nor are they substitutes for courts.

911. It is of no dispute that an NHRI in compliance with the Paris Principles cannot be a substitute for an independent and impartial judiciary.⁹⁴⁸ As such, NHRIs should not usurp the functions of the court without express constitutional or statutory authority. The courts should guard seriously their independence and jurisdiction.

912. Moreover, according to the Best Practice, “individuals should be able to access the court system directly to seek a remedy for a human rights violation and should not be required to first file a complaint with the NHRI.”⁹⁴⁹ As such, claimants should have the right to bring their cases directly to the courts and apply for public legal assistance without a prior mandatory requirement to go through the compliant handling system of NHRIs.⁹⁵⁰

⁹⁴⁶ Best Practice at 30.

⁹⁴⁷ *Canadian Human Rights Tribunal*, “Legal Report 2001” (15 March 2002), available at http://www.chrc-ccdp.ca/publications/2001_lr/introduction-en.asp at 50-8.

⁹⁴⁸ Asian Human Rights Commission, “Lesson series 17: A Review of the Functions of the National Human Rights Institutions,” *Human Rights Correspondence School Teaching Modules* (September 2001), available at <http://www.hrschool.org/doc/mainfile.php/lesson17>

⁹⁴⁹ Best Practice at 29.

⁹⁵⁰ CHRA Review at 5, Recommendation 28.

4.2.1. Clear definition of jurisdiction

913. The HKHRC should establish a cooperative relationship with the courts.⁹⁵¹ In addition, any conflict of jurisdiction should be avoided so the HKHRC should not commence investigation into matters already pending before the court unless required as part of the duty of NHRIs⁹⁵² Although the HKHRC should not commence investigation in these cases, the Commission should always be free to intervene as *amicus curiae* before the courts, and preferably should actively exercise such power.
914. The significance of a clear division of work between the NHRIs and the courts can be illustrated by the National Human Rights Commission in India. Under Section 30 of the Protection of Human Rights Act, 1993, for the purpose of providing speedy trial of violation of human rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification specify for each district a Court of Session to be a Human Rights Court to try the said offences. “While a number of States have notified such Courts, a lack of clarity has persisted as to what offences, precisely, can be classified as human rights offences.”⁹⁵³ So far, the Courts have not been able to adequately discharge the purpose for which they were designated.
915. In cases where both the HKHRC and the court are dealing or will be dealing with the same case, the court should immediately be sent a form filled in by the HKHRC concerning the prior involvement of the HKHRC in that case, as well as the role which the HKHRC would like to undertake in the legal proceedings in that case. The form should be designed by the courts or the tribunal as “its members would be in the best position to establish what should be included.”⁹⁵⁴

4.2.2. Human Rights Tribunal

916. In some jurisdictions like India, New Zealand, and Canada special human rights tribunals have been established to adjudicate human rights complaints that are normally referred to them by human rights commissions, whose mandate is then restricted to preliminary investigation of such complaints.

⁹⁵¹ Best Practice at 29.

⁹⁵² Id at 29.

⁹⁵³ Sardar Patel Bhawan and Sansad Marg, “National Human Rights Commission, New Delhi, India: Annual Report 2002-2003,” *National Human Rights Commission (India)*, (2003), available at <http://nhrc.nic.in/Documents/AR/AR02-03ENG.pdf> at 166, paragraph 12.6.

Such observation recurred at Faridkot House, Copernicus Marg, “National Human Rights Commission, New Delhi, India, Annual Report 2003-2004,” *National Human Rights Commission (India)*, (2004), available at <http://nhrc.nic.in/Documents/AR/AR03-04ENG.pdf> at 174, paragraph 14.6.

⁹⁵⁴ CHRA Review at 6, Recommendations 32 and 33.

917. For instance, the Protection of Human Rights Act, 1993 in India also provides for the establishment of States Human Rights Commissions and the Human Rights Courts at the district level in each state.⁹⁵⁵
918. Although an independent judiciary can provide a powerful enforcement mechanism and a review procedure to the decisions of the human rights commissions, the establishment of a tribunal independent of the human rights commissions has the following advantages.
919. First, the power to undertake investigation, to conduct mediation and sometimes, to make enforceable decision means that NHRIs sometimes act as investigators, prosecutors, and judges in the same case. This has led to the criticism that the investigatory and adjudicating procedure amount to a violation of rules of natural justice. On the other hand, the enforcement by a Human Rights Tribunal can ensure the independence of the adjudicating body and the fairness of the adjudicating process.
920. Second, a human rights tribunal can also help to bring about structural changes on human rights protection. In 1995, a Canadian Human Rights Tribunal ruled that a federal department discriminated against two Asian scientists who applied for positions as drug evaluators on the ground of race.⁹⁵⁶ The two complainants were awarded lost wages and were required to be given the first available jobs as drug evaluators.⁹⁵⁷ In 1997, the Human Rights Tribunal's decision "found evidence of systemic discrimination in one federal department."⁹⁵⁸ The Commission "expect[ed] to see improvements in the government's record, particularly in light of the new Employment Equity Act."⁹⁵⁹

4.2.2.1. New Zealand Experience

921. In New Zealand, the Human Rights Review Tribunal was originally established in 1977 under the Human Rights Commission Act.⁹⁶⁰ The Tribunal deals with cases that are brought under the Privacy Act 1993, the Health and Disability Commissioner Act 1994 and the Human Rights Act 1993. In case of contravention, the Tribunal can make formal declarations of contravention, award compensatory damages for actual losses suffered by the plaintiffs, punitive damages, injunctions, and legal cost involve, depending on which

⁹⁵⁵ Protection of Human Rights Act, 1993 (India), Sections 12(a), 21 and 30. The discretion to establish human rights commissions and human rights courts at the state level rests with each state of the Indian Union or Federation.

⁹⁵⁶ Human Rights and the Canadian Human Rights Commission, Equality, 1996, at 16.

⁹⁵⁷ *Id.*

⁹⁵⁸ Michelle Falardeau-Ramsay, "Celebrating our Progress, Facing our Future," (Ottawa: Canadian Human Rights Commission, 1998) at 3.

⁹⁵⁹ *Id.*

⁹⁶⁰ Its name was changed to the Complaints Review Tribunal in 1993, and then it was changed again to become the Human Rights Review Tribunal in 2002 upon the passage of the Human Rights Amendment Act 2001.

- legislation the claim is based on.⁹⁶¹ Decisions of the Human Rights Review Tribunal may be appealed to the High Court whose decision is final, or to the Court of Appeal on a point of law.
922. Since 1 January 2002 the Human Rights Review Tribunal has had the power to declare acts or omissions of the legislative, executive or judicial branches of government, or a person or body in the performance of any public function to be inconsistent with the right to freedom from discrimination affirmed by Section 19 of the New Zealand Bill of Rights Act 1990.
923. In each hearing the Tribunal is made up of the Chairperson and two other members, selected on the basis of geographic location, availability, and experience with the issues in the particular case.
924. There were roughly about 50 new cases filed before the Tribunal each year. About 50% of cases come under the Privacy Act, while about 10% of cases were brought under the Health & Disability Commissioner Act. The other 40% are complaints lodged under the Human Rights Act.⁹⁶²
925. A case under the Privacy Act or the Health & Disability Commissioner Act cannot come to the Tribunal until it has been evaluated by the Privacy Commissioner or the Health and Disability Commissioner respectively and considered to be substantive. For complaints lodged under the Human Rights Act though, anyone who has complained to the Human Rights Commission can then initiate proceedings in the Tribunal. The majority of claims have been brought by the Director of Human Rights Proceedings so far.⁹⁶³

4.2.2.2. Canadian Experience

926. The Canadian Human Rights Tribunal, a quasi-judicial body created by the Parliament in 1977 through the Canadian Human Rights Act,⁹⁶⁴ is mandated to inquire into complaints of discrimination prohibited under the CHRA and other complaints prohibited under the *Employment Equity Act* 1996 only.⁹⁶⁵ The CHRA makes it an offence for anyone to discriminate against any individual or group on eleven grounds, including race, national

⁹⁶¹ “The Human Rights Review Tribunal (New Zealand),” *The Ministry of Justice (New Zealand)’s website*, available at <http://www.justice.govt.nz/human-rights-review-tribunal/index.html>

⁹⁶² R D C Hindle, “The Human Rights Review Tribunal (New Zealand),” (7 October 2005), available at http://www.coat.gov.au/word/nz_chapter_word_docs/HumanRightsReviewTribunal.doc

⁹⁶³ *Id.*

⁹⁶⁴ The Canadian Human Rights Act, RSC., 1985, c. H-6, June 1998, Article 48 (1).

⁹⁶⁵ *Canadian Human Rights Tribunal’s website*, “About CHRT: Jurisdiction,” (6 January 2005), available at http://www.chrt-tcdp.gc.ca/about/jurisdiction_e.asp

- or ethnic origin, colour, religion, age, sex, marital status, family status and sexual orientation.⁹⁶⁶
927. The Tribunal holds public hearings to inquire into complaints of discrimination and subsequently determines whether discrimination in contravention of the CHRA has occurred. If it has, the Tribunal determines the appropriate remedy and policy adjustments necessary to prevent future discrimination.⁹⁶⁷
928. Currently, the Tribunal “may only inquire into complaints referred to it by the Canadian Human Rights Commission, usually after a full investigation by the Commission.”⁹⁶⁸ Most cases have been resolved by the Commission without the Tribunal’s intervention. Only cases involving complicated legal issues, new human rights issues, unexplored areas of discrimination or multifaceted evidentiary complaints with conflicting evidence, where issues of credibility are central are referred to the Tribunal.⁹⁶⁹
929. The tribunal is currently made up of fifteen Tribunal members: one full-time Chairperson, one Vice-Chairperson and thirteen full- or part-time members from across Canada.⁹⁷⁰
930. The cases referred to the Tribunal by the CHRC for determination has been increasing throughout years in terms actual number and the percentage of cases that the CHRC has handled. In 2005, in the 863 cases which the Canadian Human Rights Commission dealt with, a total of 119 (14%) cases were referred to the Human Rights Tribunal, as compared to 109/1224 (12%) in 2004⁹⁷¹, 158/1037 (12%) in 2003, 70/729 (10%) in 2002⁹⁷², 85/262 (12%) in 2001, 123/820 (15%) in 2000, and 52/661 (8%) in 1999.⁹⁷³
931. With the increasing caseload, the Tribunal now endeavours to improve its case management. In 2004, is reported that the tone of hearings before the Tribunal “has become more adversarial” and “the hearing process more frequently subjected to motions and objections”.⁹⁷⁴ This has led to additional hearing days and hence unnecessary expense to the parties, to the Tribunal and the public in general as well. To address the challenge, the Tribunal implemented an active case management process in 2005 by “conducting case conferences with the parties at strategic points throughout the pre-

⁹⁶⁶ Canadian Human Rights Act, RSC., 1985, c. H-6, June 1998, Section 3(1).

⁹⁶⁷ Id.

⁹⁶⁸ Canadian Human Rights Tribunal’s website, Jurisdiction.

⁹⁶⁹ *Canadian Human Rights Tribunal’s website*, “About CHRT: Operations,” (6 January 2005), available at http://www.chrt-tcdp.gc.ca/about/operations_e.asp

⁹⁷⁰ Id.

⁹⁷¹ Canadian Human Rights Commission, Annual Report 2005 at 17-8, Figure 6, *supra* note 329.

⁹⁷² Annual Report 2003 at 8, Table 1.

⁹⁷³ *Canadian Human Rights Commission*, “Annual Report 2001,” (Ottawa: Minister of Public Works and Government Services, 2002) ISBN 0-662-66352-7 at 32, Table 6.

⁹⁷⁴ *Canadian Human Rights Tribunal*, “Annual Report 2004,” available at <http://www.chrt-tcdp.gc.ca/pdf/annual04-e.pdf> at 6.

hearing stage of the inquiry.”⁹⁷⁵ The Tribunal plays an active role in guiding the parties toward a streamlined and fair approach to the conduct of cases.

932. In June 2000, the Canadian Human Rights Act Review Panel recommended that the CHRC should not investigate individual complaint anymore. Instead, the complaints should be directed to the Human Rights Tribunal without the need for the complainant to first lodge a complaint before the CHRC and to wait until the CHRC conducts the investigation. Under the proposal, the CHRC can advise on all cases and can intervene in the cases as it deems appropriate.⁹⁷⁶ The CHRA Review Panel said:-

“The Panel considered whether an equality claim should be filed first with the Commission or with the Tribunal. We decided that the benefits of filing directly with the Tribunal outweigh the advantages of the Commission retaining some type of early complaint processing function. *Even if the Commission were to make only preliminary-type decisions, there would still be the appearance of a conflict in roles. This apparent conflict would have a chilling effect on the Commission’s ability to carry out promotional activities. As well, there would be delays inherent in any type of investigation function necessary for the Commission to make a preliminary decision. Any time saved in having a review of claims by the Commission would carry with it most of the disadvantages of the current system.*

In the Panel’s view, it would be preferable to have the impartial decision-making body already established under the Act make these decisions rather than to expect the Commission to perform a decision-making function...”⁹⁷⁷

933. However, there have been no substantive measures taken to implement the above recommendation. As states above the Tribunal currently inquires into complaints referred to it by the Canadian Human Rights Commission, often after a full investigation by the Commission.
934. The Canadian Human Rights Tribunal commented that the above recommendation to “would dramatically transform the structure and function of the Tribunal.”⁹⁷⁸ The Tribunal would need to appoint more members to cope with the larger caseload necessitated; to increase its research and administrative capacity; and to develop new

⁹⁷⁵ Canadian Human Rights Tribunal, “Annual Report 2005,” available at <http://www.chrt-tcdp.gc.ca/pdf/annual05-e.pdf> at 6.

⁹⁷⁶ CHRA Review at 6.

⁹⁷⁷ CHRA Review, at 6 Recommendations 32 and 33, *supra* note 154.

⁹⁷⁸ Canadian Human Rights Tribunal, “2004–2005 Estimates, Part III — Report on Plans and Priorities,” available at <http://www.chrt-tcdp.gc.ca/pdf/rpp04-05efinal.pdf>, Section 3, At 8.

methods of operation, including a new system of case management. But the Tribunal said it is ready for any reforms forthcoming.⁹⁷⁹

935. In May 2002, the Minister of Justice announced his intention to introduce amendments to the Act that coming fall. However, such amendments have not yet been introduced.⁹⁸⁰
936. Professor Martha Jackman of the Faculty of Law in the University of Ottawa, while proposed the expansion of the mandate of CHRA to social, economic and cultural rights, went so far to recommend the establishment of a *specialized social rights tribunal* “to receive and to hear complaints with respect to the ‘progressive realization’ of these rights.”⁹⁸¹ Under her proposal, “the [social rights] tribunal would have broad remedial powers, but its orders would not come into effect until the House of Commons had sat for at least eight weeks, during which time the order could be overridden by a simple majority vote of Parliament.”⁹⁸² This recommendation is yet to be accepted.

4.2.2.3. Does Hong Kong need a Human Rights Tribunal?

937. Although an independent judiciary can provide a powerful enforcement mechanism and a review procedure to the decisions of the HKHRC, the establishment of a Hong Kong Human Rights Tribunal (HKHRT) is highly recommended.
938. As stated above, an independent Human Rights Tribunal can ensure the independence of the adjudicating body and the fairness of the adjudicating process. Second, a human rights tribunal can help to bring about structural changes in both public and private institutional practices that undermine human rights protection. Thirdly, the Human Rights Tribunal can accord more time and concern to Human Rights issues as compared with courts which are usually pre-occupied with a huge number of other cases.
939. Had the Human Rights and Equal Opportunities Bill 1994 in Hong Kong been passed by the pre-1997 Legislative Council, it would have provided for the establishment of a Human Rights Tribunal consisting of a President and two or more members with appointment by the Governor for terms up to five years with the possibility of reappointment.⁹⁸³

⁹⁷⁹ Canadian Human Rights Tribunal, “2004–2005 Estimates, Part III — Report on Plans and Priorities,” available at <http://www.chrt-tcdp.gc.ca/pdf/rpp04-05efinal.pdf>, Section 3, At 8-9

⁹⁸⁰ Id, Section 3, at 9.

⁹⁸¹ Martha Jackman and Bruce Porter at 46.

⁹⁸² Id.

⁹⁸³ The Human Rights and Equal Opportunities Commission Bill 1994 (Hong Kong), Sections 62 & 63.

940. Under the Bill, the President must be a legal practitioner for at least seven years while other members should also have legal expertise or relevant duties. The Tribunal was designed to sit as a panel of three, comprising the President and two other members.⁹⁸⁴
941. The powers and procedures of the proposed Human Rights Tribunal would be those of the District Court.⁹⁸⁵ The Tribunal would have had the power to make any appropriate order, including the reinstatement of a complainant, the payment of compensatory, punitive and exemplary damages, or a declaration that certain laws and administrative procedures are inconsistent with the BORO.⁹⁸⁶ Damages would not be subject to the cap applicable in the District Court.⁹⁸⁷ The parties might appeal the ruling of the Tribunal to the Court of Appeal on a point of law.⁹⁸⁸
942. At its best, the Hong Kong Human Rights Tribunal (HKHRT) should be established on par with the HKHRC, although the HKHRC would still be able to perform its role effectively and efficiently in the absence of a Human Rights Tribunal, given that the HKHRC can cooperate well with the existing courts.

943. The HKHRT should be able to adjudicate complaints of human rights violations, at least, lodged under the existing antidiscrimination ordinances, the Bills of Rights Ordinance, the Personal Data (Privacy) Ordinance and any other legislation which protected human rights enshrined under the Basic Law, the ICCPR and the ICESCR.

4.3. THE HKHRC AND THE GOVERNMENT

944. NHRIs can never work in isolation. The effective functioning of the HKHRC requires genuine commitment from the Government to such arrangements from the public sectors. The legislature and executive have equally important roles to play if the HKHRC is to effectively discharge its mandate.
945. Firstly, the provision of adequate resources can be a basic indicator of political will. Without adequate political commitment, the Government can effectively undermine the goals and work of NHRIs by curbing the budget of the Commission.
946. Secondly, whether the Commission will be perceived as an effective institution will largely depend on what enforcement powers it has, what kind of recommendations it

⁹⁸⁴ Id, Section 73(2).

⁹⁸⁵ Id, Section 72(1).

⁹⁸⁶ Id, Sections 93(1) and 93(2).

⁹⁸⁷ Id, Section 93(3).

⁹⁸⁸ Id, Section 100.

makes, and how far and how much the HKSAR Government takes seriously, and respects, the Commission's views and recommendations. If the Government always ignores the Commission's advice and recommendations, then the Commission is bound to have a low level of legitimacy.

947. As such, the HKSAR Government must genuinely support the work of the HKHRC by allocating it with sufficient funds and implementing the recommendations of the HKHRC.

Part VI. The Alternatives to the HKHRC and the Roadmap to enhance Human Rights Promotion and Protection in Hong Kong

1. THE ALTERNATIVES TO THE HKHRC

948. In case the proposal of the establishment of the HKHRC is rejected, there are still four feasible alternatives to the establishment of the HKHRC. The alternatives are activating the existing Office of Ombudsman without amending its mandate, expanding the jurisdiction of the existing Office of Ombudsman, establishing a researched based human rights institute, or establishing an advisory committee under the Legislative Council or the Panel of Home Affairs, or alternatively, under the Chief Executive.
949. Definitely, these four alternatives are less effective and efficient for the promotion and protection of human rights as compared to the proposal of the dual-commission model as advocated in this report.

1.1. AN ACTIVATED OFFICE OF OMBUDSMAN

950. In the absence of explicit human rights mandate, a classical ombudsman can involve international human rights laws by actively interpreting her mandate to take into consideration the human rights laws in processing investigations.
951. The first ombudsman institution was established in Sweden, and many other countries have followed suit since. As Sir Guy Powles, a former Chief Ombudsman of New Zealand noted, people got to like the institution and found them useful in dealing with “powerful engines of authority” and as a result there was an “ombudsman explosion”.⁹⁸⁹

1.1.1. The Norwegian Experience

952. In Norway, the Parliamentary Ombudsman for Public Administration (*Sivilombudsmannen*) is mandated “to supervise the public administration and all who work in its service, to assure that no injustice is done against the individual citizen” under the Constitution⁹⁹⁰, and “to ensure that injustice is not committed against the individual

⁹⁸⁹ John Hatchard at 7.

⁹⁹⁰ Constitution of the Kingdom of Norway, Article 75.

citizen by the public administration” under the Act concerning the Storting’s Ombudsman for Public Administration of 22 June 1962 and Directive to the Storting’s Ombudsman for Public Administration.⁹⁹¹ As such, the Ombudsman in Norway is a classical ombudsman whose main activity is to oversee the fairness and legality of public administration.

953. The Norwegian Ombudsman has “access to places of work, offices and other premises of any administrative agency and any enterprise which come under the scope of his powers”⁹⁹² and “may deal with matters either following a complaint or on his own initiative.”⁹⁹³ In 2004, the Ombudsman dealt with 18 cases on his own initiative.⁹⁹⁴

954. Despite the fact that its mandate is limited to “supervise fairness of public administration”, the Norwegian Ombudsman, Mr. Arne Fliflet, stated that the Ombudsman should play an active role in ensuring that Norway’s obligations under the European Convention on Human Rights and other human rights treaties to which Norway is a party. He stated that:

“In practice, when investigating the individual cases, I will also verify that the public administration has taken due account of any international human rights obligations by which Norway might be bound... Furthermore, ... I will draw the attention of the Storting and the public administration to any discrepancies that I might discover between conventions and Norwegian laws and regulations.”⁹⁹⁵

955. The Annual Report 2001 of the Ombudsman of Norway stated that “human rights are invoked relatively often in complaints filed with the Ombudsman.”⁹⁹⁶ In 2001, the Ombudsman of Norway has dealt with a few cases expressly involving human rights enshrined under *European Convention on Human Rights*, including the right against torture or gruesome, inhumane or degrading treatment or punishment (ECHR, Article 3), the right to family life (ECHR, Article 8), the right to a fair trial, (ECHR, Article 6), the right to receive a decision within a reasonable period of time (ECHR, Article 6) and freedom of expression (ECHR, Article 10).⁹⁹⁷ In 2002, the Ombudsman of Norway dealt with a few cases involving right to respect for one’s “private and family life” (ECHR,

⁹⁹¹ Act concerning the Storting’s Ombudsman for Public Administration of 22 June 1962, Section 3; Directive to the Storting’s Ombudsman for Public Administration (Norway), Section 1.

⁹⁹² Act concerning the Storting’s Ombudsman for Public Administration of 22 June 1962 (Norway), Section 8.

⁹⁹³ Act concerning the Storting’s Ombudsman for Public Administration of 22 June 1962 (Norway), Section 5; Directive to the Storting’s Ombudsman for Public Administration (Norway), Section 8.

⁹⁹⁴ *The Parliamentary Ombudsman for Public Administration (Norway)*, “Annual Report 2004,” available at <http://www.sivilombudsmannen.no/eng/files/AnnualReport2004.pdf> at 9.

⁹⁹⁵ *The Parliamentary Ombudsman for Public Administration (Norway)*, “Annual Report 1990,” at 22-23.

⁹⁹⁶ *The Parliamentary Ombudsman for Public Administration (Norway)*, “Annual Report 2001,” available at <http://www.sivilombudsmannen.no/eng/files/Annual%20Report%202001.pdf> at 20.

⁹⁹⁷ *Id* at 20-1.

Article 8) and the right to a fair trial (ECHR, Article 6).⁹⁹⁸

956. The Parliamentary Ombudsman for Public Administration in Norway scores very well on overall effectiveness in monitoring the Government and the building of good governance among the civil servants.⁹⁹⁹

1.1.2. The Experience in the Netherlands

957. In the Netherlands, the National Ombudsman of the Netherlands (*de nationale ombudsman*), created in 1981 under the Constitution, does not possess a human rights mandate.¹⁰⁰⁰ Article 78a of the Constitution in the Netherlands provides that “the National Ombudsman shall investigate, on request or of his own accord, actions taken by central government administrative authorities and other administrative authorities designated by or pursuant to Act of Parliament.”
958. The National Ombudsman in the Netherlands may institute an on-site investigation “as reasonably necessary for the performance of his duties.”¹⁰⁰¹ The National Ombudsman may also institute an investigation on his own initiative if there are indications of the existence of structural problems in the practices of a particular administrative authority.¹⁰⁰² In 2004, twelve investigations of this kind were concluded. Five investigations of this kind were launched and eleven current investigations on request were extended to include an investigation instituted on the initiative of the National Ombudsman.¹⁰⁰³
959. While the National Ombudsman of the Netherlands has jurisdiction over the police and the security service¹⁰⁰⁴ and it is free to use international human rights norms as orientation criteria in assessment of the administrative conduct in question¹⁰⁰⁵, it is able to

⁹⁹⁸ *The Parliamentary Ombudsman for Public Administration (Norway)*, “Annual Report 2002,” available at <http://www.sivilombudsmannen.no/eng/files/Annual%20Report%202002.pdf> at 31-33, Case 2002–1655) (Case 2002–0726, Case 2001–0150).

⁹⁹⁹ Linda C. Reif at 32.

¹⁰⁰⁰ Constitution (Netherlands), Chapter 4, Article 78a; see also National Ombudsman Act (Act of 4 February 1981), preamble.

¹⁰⁰¹ General Administrative Act (*Algemene Wet Bestuursrecht*) (the Netherlands), Chapter 9, title 9.2, Section 9:34.

¹⁰⁰² General Administrative Act (*Algemene Wet Bestuursrecht*) (the Netherlands), Chapter 9, title 9.2, Section 9: 26.

¹⁰⁰³ *The National Ombudsman of the Netherlands*, “Annual Report 2004, Summary,” (March 2005), available at http://www.ombudsman.nl/english/ombudsman/annual_report/2004/jvsENG2004def.pdf at 16.

¹⁰⁰⁴ National Ombudsman Act (Netherlands), Section 1a.

¹⁰⁰⁵ General Administrative Act (*Algemene Wet Bestuursrecht*) (the Netherlands), Chapter 9, title 9.2, Section 9: 27(2), provides that “If a *judicial body* has given judgment in respect of the action to which the Ombudsman's investigation relates, the Ombudsman shall take into account the legal grounds on which the judgment was partly or wholly based.” It doesn't disqualify the legal norms set along by international court and conventions.

enforce the international human rights obligations of the Netherlands. There are also a few investigations involving human rights violations committed by the police, wherein the National Ombudsman makes direct use of human rights norms found in the Constitution and other sources.¹⁰⁰⁶

960. However, the National Ombudsman in the Netherlands is less effective in terms of initiating structural changes because its decisions are not legally enforceable. It is up to the administrative authority to decide what action, if any, should be taken in the light of the report. Therefore, “it is vital...not only that the investigation of the facts should be carried out conscientiously, but also that it should produce conclusions that are beyond dispute, and that the decision and any recommendation are persuasive”, where “the persuasiveness of the decision and any recommendation will depend in particular on the quality of the reasons given for the decision.”¹⁰⁰⁷

1.1.3. Assessment

961. Without explicit human rights mandate in the enabling legislation, the extent to which the National Ombudsman in Norway and the Netherlands effectively promote and protect human rights is highly dependent on the human rights knowledge and the political orientation of the Ombudsman. There lacks institutional guarantee that the Ombudsman will pursue the promotion and protection in pure human rights cases in the absence of explicit human rights mandate.
962. This alternative to activate the existing Office of the Ombudsman is the most conservative alternative because it involves no institutional improvement. As such, such alternative is not very desirable in Hong Kong given the frequent appointment scandals whereby the Government has been suspected to control the orientation of the independent statutory committees through appointing pro-government and conservative commissioners.

1.2. ENLARGING THE JURISDICTION OF THE CURRENT OFFICE OF OMBUDSMAN

963. Ombudsmen has been encouraged to be entrusted with human rights matters by the Council of Europe and various academics for long, as shown in Chapter V above.

¹⁰⁰⁶ Marten Oosting, “The National Ombudsman of the Netherlands and Human Rights,” (1994) 12 *The International Ombudsman Journal* 1, at 318, 320-23, and 323.

¹⁰⁰⁷ *The National Ombudsman of the Netherlands’* website, “Status of the Decisions,” available at http://www.ombudsman.nl/english/ombudsman/decision/status_of_the_decision.asp

964. Responding to such recommendation, the remit of the existing Offices of Ombudsman in Hong Kong can be extended to complaints on the ground of human rights violation against public authorities. As such, the Ombudsman can reveal the remit of the conducts and decision of the Government, but not only whether the authorities follow due procedure as at present.

1.2.1. The experience in Finland

965. The Parliamentary Ombudsman in Finland illustrates the expansion of a classical ombudsman to a human rights ombudsman that monitors the implementation of the state's international human rights obligations. The Ombudsman in Finland established in 1919, did not address human rights matters within its original mandate. The Finnish Ombudsman was originally empowered to review the legality of public administration and to bring criminal charges against public officials and judges although this is rarely used.¹⁰⁰⁸
966. The Ombudsman of Finland can also initiate investigation and is reported to have launched some 30 to 40 investigations on her own initiative each year.¹⁰⁰⁹ The Ombudsman also conducts on-site investigations in public offices and institutions. She has a special duty to make regular inspection visits to prisons and other institutions, such as psychiatric hospitals, in which persons can be confined against their will. Other places visited are units of the Defence Forces and Border Guard.¹⁰¹⁰ The Ombudsman and the Deputy-Ombudsmen conducted 76 on-site inspections in 2005. Inspection days totalled 45.¹⁰¹¹
967. Since 1995, to fulfill the human rights obligation under the ECHR, the Ombudsman has been given the express and additional duty to monitor the realization of basic rights and human rights.¹⁰¹² Article 49 of the Constitution Act of Finland now provides that:-

“In discharging his or her functions the Parliamentary Ombudsman shall also oversee the implementation of fundamental rights and human rights.”¹⁰¹³

¹⁰⁰⁸ Constitution Act of Finland, Article 59; The Regulation of the Parliamentary Ombudsman, Sections 2-6.

¹⁰⁰⁹ *Parliamentary Ombudsman of Finland*'s website, “The Work of the Ombudsman: Investigations on the Ombudsman's Own Initiatives,” available at <http://www.oikeusasiamies.fi/Resource.phx/ea/english/ombudsman/work/investigations.htm>

¹⁰¹⁰ Parliamentary Ombudsman of Finland's website, The Work of the Ombudsman.

¹⁰¹¹ Id, “Inspections,” at <http://www.oikeusasiamies.fi/Resource.phx/ea/english/ombudsman/work/inspections.htm>

¹⁰¹² *Parliamentary Ombudsman of Finland*'s website, “The tasks of the Ombudsman: Fundamental and Human Rights,” available at <http://www.oikeusasiamies.fi/Resource.phx/ea/english/ombudsman/tasks/fundamental.htm>

¹⁰¹³ As amended by Constitutional Act 969/95 issued on 17 July 1995, replacing Constitutional Act of Finland, Article 49(2).

Under the revised constitution, human rights obligations of the Finland Government include civil, political, economic, social, cultural, and environmental rights.¹⁰¹⁴

968. The 1995 amendment to the Ombudsman's remit introduced a human rights perspective into the Ombudsman's work: while the Ombudsman oversees the legality of actions of the public authorities, she also has to ensure those public authorities respect fundamental and human rights in their work.¹⁰¹⁵
969. Since 1995, the Ombudsman's annual report has contained a section setting forth the positions adopted by the Ombudsman in relation to fundamental and human rights.¹⁰¹⁶
970. Accordingly, the Parliamentary Ombudsman of Finland has evaluated the right to indispensable subsistence and care, the right to adequate social welfare and health services in recent years.¹⁰¹⁷ The reorientation of the Ombudsman from maladministration to human rights protection is also reflected by its active involvement in promoting fundamental and human rights. The Finnish Ombudsman has adopted a strategy which actively discussed human rights issues with key NGOs.¹⁰¹⁸ The aim of these discussions was "to hear the organisations' views on the functioning of public administration and any problems relating to fundamental and human rights of which they have become aware."¹⁰¹⁹
971. The Parliamentary Ombudsman of Finland has received various human rights cases, including complaints against police conduct. In 2005, the overwhelming majority of complaints against the police concerned criminal investigations and the use of coercive measures related to home searches or various forms of loss of liberty.¹⁰²⁰ The Finnish Ombudsman has also conducted on-site inspections in closed institutions, such as prisons regularly and regards on-site inspection as "a central task" of the Ombudsman.¹⁰²¹

1.2.2. The experience in Spain

972. In Spain, as the first human rights ombudsman (a hybrid of ombudsman and human rights

¹⁰¹⁴ Constitution Act of Finland, Chapter 2, Sections 6-23; replacing Constitutional Act of Finland, Chapter II, Articles 5-16a).

¹⁰¹⁵ Parliamentary Ombudsman of Finland's website, The Tasks of the Ombudsman: Fundamental and Human Rights.

¹⁰¹⁶ Id.

¹⁰¹⁷ *Parliamentary Ombudsman of Finland*, "Summary of the Annual Report 2005," (April 2006), available at <http://www.oikeusasiamies.fi/dman/Document.phx/ea/english/annualreports/2005en?folderId=ea%2Fenglish%2Fannualreports&cmd=download> at 22.

¹⁰¹⁸ Id.

¹⁰¹⁹ Id at 28.

¹⁰²⁰ Id at 30.

¹⁰²¹ Id at 34.

commission), the People's Defender (*Defensor del Pueblo*) was established in 1978 by Article 54 of the Constitution of Spain of 1978 and the Organic Act concerning the Defender of the People (*Defensor del Pueblo*) of 1981. Article 54 of the Constitution of Spain provides that:-

“...the office of the Defender of the People, as the high commissioner of the Cortes Generales, appointed by the latter *to defend the rights included in this part of the Constitution*, for which purpose he may supervise the activity of the Administration, reporting to the Cortes Generales.”

973. As such, the People's Defender, as a high parliamentary commissioner, is expressly in charge of defending the citizens' fundamental rights and public liberties enshrined under the Constitution of Spain.¹⁰²²
974. In Spain, the People's Defender can also initiate investigation¹⁰²³ The Ombudsman has the authority to investigate the activities of the Ministers, administrative authorities, civil servants and any person acting in the service of the Public Administration¹⁰²⁴ and exercise liability action against all the authorities aforesaid.¹⁰²⁵ The People's Defender may appeal to the Constitutional Court with regard to the issue of conformity between the Constitution and the laws and may lodge a complaint against the violation of the basic civil rights before it.¹⁰²⁶
975. The Ombudsman is assisted by two Deputy Ombudsmen to whom he may delegate some of his duties.¹⁰²⁷ One Deputy Ombudsman is responsible for defence and internal affairs, domestic violence, economic affairs, and immigration and foreign affairs. The other Ombudsman is responsible for function and public employment, territory regulation, health and social policy, and educational and cultural affairs.¹⁰²⁸
976. As far as building respect for human rights culture among the public authorities is concerned, the People's Defender in Spain is powerful and effective. In 2004, out of the 1,010 complaints against the public administration, the Administration has acted in accordance with the existing rules following the investigation made by the Ombudsman in 635 incidents and the Administration has modified an incorrect behaviour following

¹⁰²² See also Organic Act concerning the Defender of the People (Spain), Article 1 provides that:- “The Defender of the People is the high commissioner of the Cortes Generales, appointed by the latter to defend the rights included in Part 1 of the Constitution, for which purpose he may supervise the activity of the Administration, reporting to the Cortes Generales. He shall exercise the functions entrusted to him by the Constitution and this Act.”

¹⁰²³ Organic Act concerning the Defender of the People (Spain), Article 9(2).

¹⁰²⁴ Id, Article 9(2).

¹⁰²⁵ Id, Article 26.

¹⁰²⁶ Id, Article 29.

¹⁰²⁷ Id, Article 8(1).

¹⁰²⁸ *The People's Defender's (Spain)* website, “About the Ombudsman: The Organizational Chart,” available at http://www.defensordelpueblo.es/web_ingles/index.asp?destino=todoorganigrama.asp

the intervention of then Ombudsman in the other 337 incidents. The Administration maintains its incorrect behaviour or behaviour which does not accord with the regulations in nine incidents only.¹⁰²⁹

1.2.3. Assessment

977. A human rights ombudsman enhanced by legislation amendment to cover human rights matters provides a structural guarantee to the protection of human rights. This alternative is more secure than simple activation of the existing Ombudsman without enlarging its scope of work.
978. 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.
979. Second, the core business of the office of ombudsman is the pursuit of administrative justice and to provide people with an opportunity to complain about “maladministration” by public officials. As a result, the human rights performances of private sector do not receive the attention that they deserve.
980. To make matters worse, the impact of privatisation has significantly affected the work of the ombudsman in the sense that increasing amount of Government’s work is and will continue to be out of the scope of the Ombudsmen.¹⁰³⁰ That means an increasing area of public administration will not be encompassed by the Ombudsman.
981. One possible solution to the difficulty caused by privatization is to expand the jurisdiction of existing office of the Ombudsman to cover the private sector.¹⁰³¹ A human rights Ombudsman with its remit reaching the private sector doesn’t differ from the proposed HKHRC as such in terms of its scope of operation.
982. Nevertheless, if the HKSAR Government remains reluctant to the establish the HKHRC or any similar institution. Thus, extending the remit of the Ombudsman to human rights matters may be the only acceptable alternative to the HKHRC according to the Government at the moment. As such, expanding the current Ombudsman to a human rights ombudsman could be an interim measures until the full establishment of the HKHRC in long run.

¹⁰²⁹ *The People’s Defender (Spain)*, “Summary of the report to Parliament for 2004,” (April 2005), available at http://www.defensordelpueblo.es/web_ingles/index.asp?destino=informes1_ingles.asp at 9.

¹⁰³⁰ John Hatchard at 12.

¹⁰³¹ Such as in the case of Namibia where the Ombudsman has the “duty to investigate practices and actions by persons, enterprises and other private institutions where such complaints allege that violations of fundamental rights and freedoms under this Constitution have taken place”. Namibian Constitution, Article 91(d).

983. There has been experience which human rights Ombudsmen act as an interim human rights body in the absence of human rights commission. In Papua New Guinea, while the establishment of a NHRI is pending, the Ombudsman Commission operates as a de facto human rights body in Papua New Guinea in addition to its traditional ombudsman role.¹⁰³²
984. Thereby, as a more implementalistic approach, extending the remit of the existing Ombudsman to human rights matters can allow more time for the public authorities and the public to adapt to the new institutional monitoring mechanism and promote a culture of respect for human rights. After the public and the public authorities become familiar with the interim measures and the benefits brought by the culture of respect for human rights, they will willingly advocate and support for the establishment of NHRIs.

1.3. RESEARCH BASED NATIONAL HUMAN RIGHTS CENTERS

985. The third alternative is to set up a research based human rights center. National human rights centers usually consist of a diverse and large number of members, are research-based, and do not deal with individual complaints. This type of commission has been widely developed in Northern Europe where strong ombudsmen are also present to deal with individual complaints against public authorities. For example, these centers exist in Denmark, Germany and Norway.

1.3.1. The experience in Denmark

986. The Danish Institute for Human Rights, the NHRI in Denmark, was originally established as the Danish Centre for Human Rights by a parliamentary decision on 5 May 1987. It became part of the Danish Centre for International Studies and Human Rights on 1 January 2003, following the passage of the Act No. 411 of 6 June 2002.
987. 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.¹⁰³³ Its mandate covers “*human rights recognised at any given time by the international society*”, including in particular those laid down in the United Nations Universal Declaration, conventions adopted by the

¹⁰³² Stephanie Aiyagari, “CHRI expresses concerns about powers of Northern Ireland Human Rights Commission,” (March 2006), available at www.commonwealth.sas.ac.uk/resource/Commonwealth%20Matters%200601.pdf at 14-15.

¹⁰³³ Act Governing the Establishment of the Danish Centre for International Studies and Human Rights (Act No. 411 of 06/06/2002), Chapter 1, Sections 1 and 2(2); *Danish Institute for Human Rights*’ website, “About us,” (May 2004), available at <http://www.humanrights.dk/departments>

- United Nations and the Council of Europe, and the civil rights contained in the Danish Constitution.”¹⁰³⁴
988. The Council for Human Rights, an independent council from the Danish Institute for Human Rights, discusses the overall principles guiding the activities of the Institute and ensures that the activities of the Institute are set in accordance with its objective as laid down by the enabling legislation. The Council for Human Rights is currently made up of seventy-nine representatives of NGOs, ministries, political parties and individuals.¹⁰³⁵
989. The Board of the Danish Institute for Human Rights, consisting of thirteen members, is responsible for all matters relating to professional issues, including research and strategy.¹⁰³⁶ These thirteen members are appointed by various entities, including the Council for Human Rights, the Rector of Copenhagen University, the Rector of Aarhus University, the Danish Rectors’ Conference and the staff of the Institute.^{1037 1038}
990. The secretariat includes the International Department, Research Department, National Department, Information and Education Department, and Complaints Committee for Ethnic Equal Treatment.¹⁰³⁹ These five departments work together to implement the decisions made and the policy agenda set forth by the Board.
991. The Danish Institute for Human Rights has been accredited an “A” by the International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights.¹⁰⁴⁰
992. Moreover, the Danish Institute for Human Rights was the first national human rights center to receive an expanded mandate to offer individual advice to victims of racial discrimination and carry out mediation between conflicting parties. Act No. 374 of 28 May 2003 on Equal Treatment irrespective of Ethnic Origin and Act No. 253 of 7 April 2004 amending the Act on Prohibition against Differential Treatment on the Labour Market authorizes the Danish Institute for Human Rights to consider complaints of differential treatment due to racial or ethnic origin and of reprisals in a number of fields including the labour market. The Complaints Committee for Ethnic Equal Treatment was set up by the Board of the Danish Institute for Human Rights in June 2003 later on. In 2003, the Complaints Committee received 15 complaints and started one case on its own

¹⁰³⁴ Act Governing the Establishment of the Danish Centre for International Studies and Human Rights (Act No. 411 of 06/06/2002), Chapter 2, Section 2(2).

¹⁰³⁵ Act Governing the Establishment of the Danish Centre for International Studies and Human Rights (Act No. 411 of 06/06/2002), Chapter 2, Sections 7(5) and 7(6); Danish Institute for Human Rights, Annual Report 2005 at 44.

¹⁰³⁶ Act Governing the Establishment of the Danish Centre for International Studies and Human Rights (Act No. 411 of 06/06/2002), Chapter 2, Sections 5(2) and 7.

¹⁰³⁷ Id, Section 7(1).

¹⁰³⁸ Power and Functions, Chapter 3 at 64.

¹⁰³⁹ *Danish Institute for Human Rights’* website, “Organisation,” (May 2004), available at <http://www.humanrights.dk/departments>

¹⁰⁴⁰ <http://www.nhri.net/NationalDataList.asp?MODE=1&ID=1>

initiative. In 2004, the number of complaints significantly increased to 67, with 8 cases started on its own initiative.¹⁰⁴¹

1.3.2. The experience in Greece

993. The Greek National Commission for Human Rights was founded by Law 2667/1998 and inaugurated on 10 January 2000.¹⁰⁴² As a consultative commission, the Greek National Commission for Human Rights is a NHRI and has consultative status with the Greek State on issues of human rights protection and promotion. It is mandated “to monitor developments regarding human rights protection on the *domestic* and *international* plane, to inform Greek public opinion about human rights related issues and, above all, to *provide guidelines to the Greek State* aimed at the establishment of a modern, principled policy of human rights protection.”¹⁰⁴³
994. The Greek National Commission for Human Rights is merely a research based consultative institute. According to Law 2667/1998, the Greek National Commission for Human Rights
- (a) studies human rights issues raised by the government, by the Convention of the Presidents of the Greek Parliament, by NCHR members or by NGOs;
 - (b) submits proposals and reports to legislative and administration on issues which may lead to the amelioration of human rights protection; develop initiatives for the sensitization of the public opinion and the mass media on human rights issues; cultivate respect for human rights in the context of the national educational system;
 - (c) maintains permanent contacts and co-operation with international organizations; submit consultative opinions regarding human rights-related reports to international organizations;
 - (d) publishes NCHR positions in any appropriate manner;
 - (e) drafts of an annual report on human rights protection in Greece;
 - (f) organizes a Human Rights Documentation Centre; and

¹⁰⁴¹ Danish Institute for Human Rights, “Annual Report 2004 At 18

http://www.humanrights.dk/upload/application/29ed4a34/2004_uk_final.pdf

¹⁰⁴² Greek National Commission for Human Rights’ website, “About NCHR,” available at http://www.nchr.gr/category.php?category_id=28

¹⁰⁴³ National Commission for Human Rights (Hellenic Republic), Annual Report 2004, at 26.

- (g) examines how the Greek legislation should be harmonized with the international law standards on human rights protection.
995. Similar to other consultative commissions, the Greek National Commission for Human Rights has a wide and diverse membership. The board is currently composed of the President, eight representatives of specified labour unions and NGOs, three Professors or Associate Professors of Public Law or Public International Law, three representatives of the political parties represented in the Greek Parliament, one member each from the Greek Ombudsman, the Authority for the Protection of Personal Data, the National Radio and Television Council, the National Commission for Bioethics, the Ministry of Interior, Public Administration and Decentralisation, the Ministry of National Education and Religion, the Ministry of Labour and Social Security and Ministry of the Press and Mass Media.¹⁰⁴⁴
996. There are five Sub-Commissions in the Greek National Commission for Human Rights: the Sub-Commission for Civil and Political Rights, the Sub-Commission for Social, Economic and Cultural Rights, the Sub-Commission for the Application of Human Rights to Aliens, the Sub-Commission for the Promotion of Human Rights, the Sub-Commission for International Communication and Cooperation.¹⁰⁴⁵
997. According to Law 2667/1998, the GNCHR must be consulted prior to the submission of any draft law to the Parliament, if the draft law concerns, directly or indirectly, human rights. The GNCHR systematically verifies whether the draft law is in conformity with the Constitution and the international obligations of Greece in the field of human rights.
998. As such, the Greek National Commission for Human Rights has been regarded as in compliance with the Paris Principles and has been accredited an “A” by the International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights.¹⁰⁴⁶

1.3.3. Assessment

999. The weakness of research based human rights centers is that they lack complaint-handling power and enforcement power. These centers do not possess the legal power to force the Government and private entities to comply with either domestic or international human rights laws in short term. Nevertheless, in long run, research based human rights centers can still impact public policy by arousing public concern through publication of in-depth research in particular human rights areas.

¹⁰⁴⁴ Id at 27.

¹⁰⁴⁵ Id at 28.

¹⁰⁴⁶ <http://www.nhri.net/NationalDataList.asp?MODE=1&ID=1> (repeated)

1000. Whether the recommendation to form a research based human rights center would be adopted and implemented depends heavily on the commitment to human rights protection on the part of the Government. Although the culture of respect for human rights is a new concept to the entire community in Hong Kong and hence remains weak, enforcement power of NHRIs is essential to spark the awareness of protection for human rights in the community. As such, this alternative is less desirable as compared to the human rights ombudsman above.
1001. It should be noted that in many countries including Norway, Denmark, Germany (The German Institute for Human Rights), France (National Consultative Commission of Human Rights), Greece (Greek National Commission for Human Rights), Luxembourg (Consultative Commission of Human Rights) and Moldova (The Centre for Human Rights of Moldova), both a human rights ombudsman and a research based human rights center have been established and the two organizations supplement each other.
1002. For instance, in Norway, the institutional framework consists of the Norwegian Ombudsman and the Norwegian Centre for Human Rights.
1003. The Norwegian Centre for Human Rights (called the Norwegian Institute of Human Rights initially), established by the Norwegian Government through a Royal Decree on 21 September 2001, is organized as a multidisciplinary centre under the Faculty of Law at the University of Oslo. The Centre is funded by a basic grant from the University of Oslo as well as some external sources.¹⁰⁴⁷
1004. The purpose of the Norwegian Centre for Human Rights is “to promote the practice of internationally adopted human rights by means of scientific research and assessment, training, counselling/guidance, information and documentation.”¹⁰⁴⁸ As such, international human rights “form the focus of the research at NCHR.”¹⁰⁴⁹
1005. The Norwegian Centre for Human Rights has been accredited an “A” by the International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights.¹⁰⁵⁰
1006. In 2003, there were comprehensive internal discussions within Norwegian Centre for Human Rights regarding the status of the Center, in particular whether the Center should handle human rights complaints. A special strategy conference for the staff was held. The result of the meeting was the 20 March 2004 strategy document on the Norwegian Centre for Human Rights that affirmed the activities of the Norwegian Centre for Human Rights

¹⁰⁴⁷ Statutes of The Norwegian Centre for Human Rights, Section 2.

¹⁰⁴⁸ Statutes of The Norwegian Centre for Human Rights, Section 1(1).

¹⁰⁴⁹ *University of Oslo*, “Research Strategy 2005-2009, Thematic Areas of Priority for the Norwegian Centre for Human Rights (NCHR),” (2 December 2004), available at <http://www.humanrights.uio.no/english/research/strategy.html>

¹⁰⁵⁰ *National Human Rights Institutions Forum*, “National: List of Institutions,” available at <http://www.nhri.net/NationalDataList.asp?MODE=1&ID=2>

remains to be research-based and is not allowed to deal with individual complaints. Its functions are to be exercised through involvement in research, monitoring, advice, education, information and networking.¹⁰⁵¹

1007. A special committee, the NI Committee, has been appointed to handle the practical co-ordination of NI-related work. This standing committee consists of four legal advisers and holds weekly meetings. A main task for the committee in 2004 was the development and consolidation of NI activity.¹⁰⁵²

1.4. AN ADVISORY PANEL OR COMMITTEE UNDER THE LEGISLATURE OR UNDER THE CHIEF EXECUTIVE

1008. As an interim arrangement to the establishment of the HKHRC, an advisory working group can be set up under the Legislative Council or the Panel of Home Affairs, or alternatively, directly under the Chief Executive.

1.4.1. The experience in the UK

1009. The JCHR in the UK, in full operation since 2001, is currently chaired by Andrew Dismore MP and is consisted of twelve members from the House of Commons and the House of Lords. The Committee is charged with considering human rights issues in the UK.¹⁰⁵³ But it cannot receive individual's complaint.
1010. A major aspect of the Joint Committee's work is to scrutinize bills passing through Parliament for compatibility with the rights defined in the European Convention on Human Rights and the Human Rights Act 1998, as well as other international human rights instruments to which the UK is a party. The Committee aims to report on the majority of bills before their second reading in the second House. For a bill which starts in the House of Commons, the Committee would aim to report in time for the Second Reading debate in the House of Lords.¹⁰⁵⁴
1011. To examine the bills' compatibility with domestic human rights laws and international human rights instruments, the JCHR calls for evidence from any outside organizations

¹⁰⁵¹ *Norwegian Centre for Human Rights*, Annual Report 2004, at 10.

¹⁰⁵² *Id* at 13-4.

¹⁰⁵³ *Joint Committee on Human Rights'* website, "Terms of Reference of the JCHR," available at http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchrabout.cfm

¹⁰⁵⁴ *Joint Committee on Human Rights*, "Legislative Scrutiny; Equality Bill," 4th Report, HL Paper 89 HC 766, (7 December 2005), available at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/89/89.pdf>

and individuals and conducts inquiry into the relevant public authorities for each bill it examines¹⁰⁵⁵.

1012. The House of Commons and the House of Lords appoints its members to the JCHR every year. The current Committee can arrive at different conclusions regarding Bills considered by the previous Committee.¹⁰⁵⁶
1013. So far, the JCHR has issued 25 reports concerning the human rights implication of the bills on the table. The JCHR has done noteworthy and innovative work in responding to United Nations treaty scrutiny reports and to the government's own submissions to such bodies. More importantly, the JCHR has willingly adopted the right based approach and a critical attitude in reviewing the bills. At the very least, it initiates public deliberation and arouses public concern on the ignorance of human rights protection and plant the seed of the culture of respect for human rights.

1.4.2. The experience in Taiwan

1014. Prior to the establishment of the National Human Rights Commission, the Taiwanese Government created two interim mechanisms to deliberate, coordinate and promote human rights related policies and legislation. These two interim advisory bodies were established under the executive branch.
1015. The first, the inter-ministerial Human Rights Protection and Promotion Committee, is responsible for policymaking and coordinating and supervising various agencies. Established in July 2001 by the Executive Yuan, members of the Committee include the Secretary-General of the Executive Yuan, the Minister of the Interior, the Minister of Foreign Affairs, the Minister of Defense, the Minister of Education, the Minister of Justice, the Director-General of the Government Information Office, the Director-General of the Department of Health, the Administrator of the Environmental Protection Administration, the Chairman of the Council of Labor Affairs, and the Chairman of the Council of Indigenous Peoples' Affairs, as well as thirteen scholars and experts from the private sector. An advisory committee composed of additional scholars and experts was also established under the Committee to broaden its sources of information.
1016. The second interim mechanism is the Human Rights Advisory Group and serves as an advisor to the President on Human Rights issues.¹⁰⁵⁷ Established on 24 October 2000 by

¹⁰⁵⁵ Joint Committee on Human Rights, "JCHR Announces It Will Scrutinise Human Rights Implications of Bills and Draft Bills- Call for Evidence," *Press Notice No. 2* (20 July 2005), available at http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchr_press_notice_05_06_no_02.cfm

¹⁰⁵⁶ Id.

the Presidential Office, the Group consists of twenty-one scholars and experts and has organized six working groups, focusing on different areas including domestication of the International Bill of Rights, the establishment of the National Human Rights Commission, human rights policies, international human rights activities, human rights consciousness and education, and evaluation of current human rights conditions.¹⁰⁵⁸

1.4.3. The experience in the Northern Ireland

1017. In Northern Ireland before the establishment of the Human Rights Commission and the Equality Commission, the Standing Advisory Commission on Human Rights was responsible for advising the Secretary of State on the adequacy and effectiveness of the antidiscrimination law in force, and informing the Secretary of State on the performance of the public authorities in providing redress for persons aggrieved by discrimination.¹⁰⁵⁹
1018. Without enforcement power, the Standing Advisory Commission on Human Rights has had long been criticized for its limited powers, limited resources, and limited influence on policymaking and implementation as regards the protection of human rights in Northern Ireland.¹⁰⁶⁰

1.4.4. Assessment

1019. The expansion of the jurisdiction of the existing Office of Ombudsman to human rights violation, accompanied with the establishment of an advisory working group under the Legislative Council or under the Chief Executive can also facilitate the introduction of the culture of respect for human rights. However, compared to the institutional framework of a human rights ombudsman and a research based human rights center, the institutional framework of an advisory working group is less active and preventative in nature because it can only examine bills on the table put forward by the Government or the private members of the Legislative Council. A research based human rights center on the other hand, can set its own agenda and explore various areas of human rights concerns in its own initiative.
1020. Comparing between an advisory working group set up under the Legislature and one set up under the Chief Executive, the advisory working group under the Legislature is more preferable because the working group will usually have a higher level of transparency. As a result, the civil society can more easily access the working group and express its

¹⁰⁵⁷ The main function of the Group is “to provide advice and recommendations to the President at appropriate times ... in order to protect and improve the domestic human rights conditions, promote participation in international human rights activities, propagate human rights consciousness....” The Guidelines for the Establishment of the Presidential Human Rights Advisory Group, Article 1.

¹⁰⁵⁸ Human Rights Policy White Paper (Taiwan), Chapter 9.

¹⁰⁵⁹ Northern Ireland Constitution Act 1973, Section 20(1).

¹⁰⁶⁰ Stephen Livingstone, “Dedicated to George J. Mitchell, David Trimble, and John Hume: Analysis of the Northern Ireland Peace Agreement Academic Viewpoints: The Northern Ireland and Human Rights Commission,” (1999) 22 *Fordham International Law Journal* 1465 at 1474.

opinion. Open meetings of the working group would also allow information to be released to the public at large; and hence arousing public interests and educating the public about the issues.

1021. As far as Hong Kong is concerned, during the second reading of the BORO on 5 June 1991, the ad hoc group divided on the function and terms of Human Rights Commission. Nevertheless, the group believed that speedy legislation of the BORO should be accorded with highest priority and such disagreement should not delay the passage of BORO. Hence, the ac hoc group urged the Government to fulfill its promise to study the matter and come up with a conclusion “soon”.¹⁰⁶¹ At the meantime, Mrs. Selina Chow, O.B.E., J.P. and Mr. Ronald Joseph Arclli, J.P. suggested that *an Advisory Committee akin to consumer council* could be a transitional arrangement towards the establishment of a Human Rights and Equal Opportunities Commission.¹⁰⁶² The interim arrangement that Mrs. Chow and Mr. Arclli proposed was actually an independent institution similar to a research-based human rights center without enforcement power.
1022. Based on the experience of Norway and other European countries, a human rights ombudsman accompanied with a research based human rights center can also adequately promote and protect human rights enshrined under the international laws, and hence is a desirable alternative to the proposed institutional framework comprised of a human rights commission and an equal opportunities commission. If a research based human rights center is established, compliance with international human rights laws must be one of its most important mandates. In addition, the Center could be granted with the power to handle complaints on particular ground of human rights concerns as the Danish Institute for Human Rights.
1023. In Hong Kong, the suggestion to establish a working group under the Panel of Home Affairs, comparable to the Joint Committee of Human Rights in the UK, to follow up the Government’s progress in implementing the recommendations of the UNHRC regularly, was rejected in the Panel’s meeting in May 2003.¹⁰⁶³
1024. However, without enforcement power, a working group under the Legislative Council or the Panel of Home Affairs, mandated to securitize the bills’ compatibility with domestic and international human rights laws, is in fact a very conservative alternative to the establishment of the HKHRC. If the Government refuses to establish the HKHRC as well as a working group under the Legislative Council, the only inference that can be drawn is

¹⁰⁶¹ Id at 29.

¹⁰⁶² LegCo’s meeting (5 June 1991), available at http://www.legco.gov.hk/yr90-91/english/lc_sitg/hansard/h910605.pdf at 30 and 40.

¹⁰⁶³ *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 at 5.

that fundamentally the HKSAR Government does not embrace any vision to promote a culture of respect for human rights.

1025. To conclude, there are four possible alternatives to the HKHRC: (1) an activation of the existing Office of Ombudsman without amendment of its mandate; (2) an expansion of the jurisdiction of the existing Office of Ombudsman; (3) establishment of a researched based human rights institute; (4) establishment of an advisory committee under the Legislative Council, Panel of Home Affairs, or Chief Executive.
1026. An activation of the existing Office of Ombudsman without amendment of its mandate is the most conservative alternative because it involves no legal or institutional guarantee on human rights protection. As such, this alternative is not very desirable in Hong Kong where the commitment to human rights protection remains limited in scope and weak in magnitude.
1027. The expansion of the jurisdiction of the existing Office of Ombudsman alone is not that satisfactory in light of trend of privatization of public services. Alternatively, research based human rights centers are not desirable because they lack power to handle complaint and to enforce their orders.
1028. Nevertheless, as a second choice, the expansion of the jurisdiction of the existing Office of Ombudsman to human rights violation, accompanied with a new researched-based human rights institute is a desirable alternative and to the establishment of the HKHRC. A human rights ombudsman and a research based human rights center can supplement each other and hence promote and protect human rights in a similar way as the dual-commission model.
1029. Alternatively, if the above proposal is also turned down, the expansion of the jurisdiction of the existing Office of Ombudsman to human rights violation, accompanied with the establishment of an advisory working group under the Legislative Council or the Panel of Home Affairs can also facilitate the introduction of the culture of respect for human rights.