

## NATIONAL HUMAN RIGHTS COMMISSIONS - NATIONAL AND INTERNATIONAL PERSPECTIVES<sup>1</sup>

**A Paper prepared for the Commonwealth Secretariat by Brian Burdekin, Special Adviser to the United Nations High Commissioner for Human Rights on National Institutions, Regional Arrangements and Preventive Strategies<sup>2</sup>**

### INTRODUCTION

*"The World Conference on Human Rights reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information and education in human rights...The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level."<sup>3</sup>*

#### 1. Human rights now constitute a major strand

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<sup>1</sup> I would like to express my thanks to Anne Gallagher, Human Rights Officer in the United Nations Centre for Human Rights, for her assistance in preparing this paper. Additional technical information on the structure and functioning of human rights commissions and similar bodies may be found in the United Nations Publication: *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, United Nations, New York and Geneva, 1995. (Copies available from the United Nations Centre for Human Rights, Geneva).

<sup>2</sup> Mr Burdekin was previously Federal Human Rights Commissioner of Australia (from 1986-1994).

<sup>3</sup> Vienna Declaration and Programme of Action, (adopted by the World Conference on Human Rights, Vienna, 25 June 1993) (A/CONF.157/24 (Part I, paragraph 36)).

in the fabric of international relations. Since the adoption of the Universal Declaration of Human Rights in 1948, a comprehensive body of international rules and standards has been developed, covering almost every sphere of human activity. Upon this substantial normative foundation has been built an embryonic network of international and regional human rights machinery - intended to ensure that these international instruments are respected and implemented.

2. While these mechanisms are important, and must be supplemented and strengthened, it is essential to recognize that the practical task of protecting human rights is primarily a national one - for which each state must ultimately be responsible. The current limitations of global and regional systems must be realistically appraised. The complaints procedures of the European Court of Human Rights, or of the United Nations Human Rights Committee, for example, will never be able to deal with more than a very small proportion of human rights violations. International investigators will seldom be able to do more than highlight trouble spots. The ability of a state to effectively discharge its responsibilities in the area of human rights will therefore depend predominately on the strength of its domestic institutions. A pluralist and accountable parliament, an executive which is ultimately subject to the authority of elected representatives and an independent, impartial judiciary are the minimal requirements in this respect.

3. These basic "institutions" must clearly be supported by other mechanisms. The development of a culture of human rights at the national level depends on the existence of a vigorous civil society - one which encourages the formation of community groups, which not only tolerates but encourages diversity and which enjoys a free and responsible press. One particularly useful mechanism for protecting individual liberties and freedoms, located somewhere between the sphere of government and that of civil society, is the "national human rights institution". This term is now commonly used to refer to a body which is established by government, under the constitution or by law or decree, for the specific purpose of promoting and protecting human rights. A variety of different institutional structures fall within this definition - including some types of ombudsmen and national human rights commissions.

4. This brief paper focuses on national human rights commissions - a concept defined in the first section. Part Two provides an illustrative (rather

than definitive) overview of the work of such commissions - with examples drawn from several Commonwealth countries and others. Aspects of the relationship between national human rights commissions and the courts are discussed in Part Three. Part Four outlines the basic features of an effective human rights commission. Part Five touches on recent developments in the area of national institutions. (The *Principles Relating to the Status of National Institutions*, which were adopted by the United Nations General Assembly in 1993, are reproduced in the annex to this paper).

#### DEFINING A NATIONAL HUMAN RIGHTS COMMISSION

5. Human rights commissions are generally concerned with a wide range of issues, usually including the protection of civil and political rights and the prevention of discrimination. Some commissions have jurisdiction over the public and private sector. Others are restricted to acts or practices occurring in the public sector. Commissions may also be empowered to promote and protect economic, social and cultural rights. The precise authority and functions of each particular commission are defined in the constitutional provisions, legislative acts or decrees under which it is established. Some commissions are limited to protecting rights prescribed in the national constitution. However, an increasing number are empowered to promote and protect human rights which are set out in international human rights treaties and other instruments. Several commissions which are about to be established in Commonwealth countries (for example, Papua New Guinea) will have a mandate to protect rights enshrined in the national constitution and in relevant international instruments.

#### THE WORK OF HUMAN RIGHTS COMMISSIONS

##### (a) Investigating alleged violations of human rights

6. One of the most important functions with which a human rights commission can be entrusted is the investigation of complaints from individuals (and sometimes from groups) alleging violations of human rights. Depending on the jurisdiction of the commission, these rights may be those enshrined in domestic law and/or those set out in international treaties which the state concerned has ratified. (These may be binding on the state in international law but may not have been given effect by domestic legislation in countries where treaties are not "self-executing"). The existence of a national mechanism with the power to investigate abuses and provide

relief to victims can, of itself, discourage acts or practices inimical to the enjoyment of human rights.

7. In order to discharge its investigative responsibility effectively, a commission may be granted a range of powers enabling it to gather evidence and question witnesses. (Even if used only occasionally, these powers are important in ensuring that the person or body complained against cannot frustrate the investigation by refusing to co-operate). While there are considerable differences in the procedures followed by various commissions in the investigation and resolution of complaints, a number rely on conciliation and/or arbitration. In the process of conciliation, the commission attempts to bring the parties together to achieve an agreed settlement. If conciliation fails to resolve the dispute to the mutual satisfaction of all parties the commission may be able to resort to arbitration or a formal hearing, following which it may issue a determination. Human rights commissions are not usually empowered to impose legally binding decisions on parties to a complaint. This does not mean, however, that the settlement or remedial steps recommended by the commission can be ignored. In some countries, a special tribunal (constituted either independently of the commission or by senior members of the commission not previously involved in the case) has authority to hear and determine issues arising from an unresolved complaint. In other cases the commission may be able to transfer matters to the regular courts for a final and legally binding decision or for enforcement of the determination made by the commission. In several Commonwealth countries this is a rapidly evolving area of the law.

##### (b) Conducting public enquiries

8. Some human rights commissions are also empowered to conduct public enquiries on their own initiative. This is a particularly important power - in effectively addressing violations of the rights of the most vulnerable and disadvantaged groups in society; the homeless, mentally ill, those with intellectual disabilities and others - many of whom are not in a position to lodge individual complaints. (One recent example of the effectiveness of such activities was a major enquiry concerning the plight of homeless children, conducted by the Australian Human Rights Commission, which revealed serious deficiencies in government policies and practices. The recommendations made in the Commission's report were largely accepted by the Government and led to approximately \$100 million being allocated by federal and state governments to ensure that the basic rights of these particularly vulnerable children were protected.)

**(c) Providing advice and assistance to governments**

9. Another important function of national commissions is providing assistance and advice to government in the field of human rights. The mandate given to a commission in this respect can be framed in different ways. Some are granted a general authority to bring matters concerning human rights to the attention of the parliament, the executive and/or the judiciary - to assist these institutions in promoting and protecting human rights. Commissions are variously able to submit opinions on proposed or existing legislation directly to parliament; to initiate and assist in the drafting of new legislation; to comment on existing legislation; or to intervene in legal proceedings involving questions of human rights (usually with the proviso that leave must be obtained from the court). Commissions may also be entrusted with responsibility for drawing governments' attention to situations of human rights abuse and making specific proposals aimed at ending such abuse. A number of human rights commissions are also playing an important role in monitoring the implementation of international human rights standards and assisting governments to fulfil their reporting obligations to various international human rights treaty-bodies.

10. The investigative and advisory functions of a national human rights commission are often interrelated. A commission which is able to receive and act upon individual complaints of violations is well-placed to identify areas where change is needed in legislation, administrative practices or policy. Similarly, a commission with power to initiate broad public enquiries into important human rights issues will be well-placed to comment on the need for systemic change

11. A capacity to advise will, of course, only be useful if there is a corresponding willingness on the part of government and its agencies to consider and act upon the information presented. Governments interested in maximizing the usefulness of national commissions should therefore ensure mechanisms exist for responding to such advice. If the recommendations of a national commission are ignored without reason, that institution will have little incentive to continue to perform these important tasks well.

**(d) Human rights education**

12. Perhaps the most important role of a national commission is to educate individuals that they have rights - balanced by responsibilities -

which governments, the private sector and other individuals must respect.

13. As recent massive violations of human rights in Europe and Africa have graphically demonstrated, remedial action to stem atrocities emanating from ethnic and religious intolerance is extremely difficult. There is a growing awareness that preventive strategies must therefore increasingly absorb our attention and resources - and that among the most effective of these are appropriate education and training in human rights. (Indeed, without these, no other preventive strategy can or will succeed.)

14. Almost without exception, national human rights commissions are entrusted with this task. This function can involve a variety of different activities including the collection, production and dissemination of information; the organization of promotional events and the development and implementation of training programmes for a variety of audiences. National commissions have been quick to focus their attention on the need to develop practical strategies for effective education, not only in the more formal settings of primary, secondary and tertiary educational facilities, but also in the critical areas of training for police, prison, paramilitary, military and security forces.

15. Recent activity by national commissions has also reflected the evolving international debate. In the past three months, important conferences to address these issues have been hosted by the Philippines Human Rights Commission (in December 1995 in Manila) and the National Human Rights Commission of India (in February 1996 in New Delhi). The Manila meeting, which focused, significantly, on "Human Rights Education for Development", produced a consensus among governments and national institutions attending that:

"Human rights education must embody the right to development. At the same time development programs and activities must uphold human rights in all its dimensions."

16. This principle is important in that it accords appropriate recognition to the central importance of the right to development - a right as yet inadequately recognized in some quarters and of particular significance in many countries of the Commonwealth. The reference to "human rights in all its dimensions" is also significant - a reflection of the growing consensus that all human rights are interdependent and interrelated and a recognition that western preoccupation with civil and political rights needs to be balanced - including by

institutional structures which accord appropriate priority to the rights to adequate housing, health, education and other basic economic and social rights.

#### **RELATIONSHIP BETWEEN NATIONAL COMMISSIONS AND THE COURTS**

17. A national commission, irrespective of the breadth of its powers or the efficiency of its operation, is not, of course, in any sense, a substitute for a properly functioning judiciary. However, it has become increasingly obvious in recent years, even in developed countries, that the courts are, in reality, inaccessible to a large proportion of the population because of the extremely high costs involved. (Even in countries with substantial legal aid programmes, very few provide funding to pursue complaints of human rights abuses). There is, therefore, a demonstrable need, in all countries, for a mechanism which permits the informal, speedy, effective and cheap resolution of human rights complaints.

18. It is encouraging that national human rights commissions which have been established in several Commonwealth countries are effectively addressing this need. The quasi-judicial nature of many national commissions means they are not only more accessible, but also have the capacity to resolve complaints more speedily than the courts. Most commissions are able to investigate complaints without recourse to cumbersome rules of evidence and procedure. Several also have the power to settle complaints by conciliation or arbitration as described above - procedures which are not only more "cost effective" than more traditional adversarial or inquisitorial procedures, but are more "user friendly" to groups which have traditionally been disempowered and frequently find the trappings of traditional courts quite intimidating. Conciliating disputes is, in a number of Commonwealth countries, also the most culturally appropriate way of dealing with human rights violations.

#### **FEATURES OF AN EFFECTIVE HUMAN RIGHTS COMMISSION**

19. It is the right of each state to choose the framework for a national commission which best meets its needs. In determining the type of institution to be established, states must consider a variety of factors including political, cultural and economic realities. Accordingly, it is not possible to prescribe standards which will be universally and uniformly applicable.

20. What we can do, however, drawing upon the experience of the past few years, is identify

"indicators for effectiveness". These indicators, summarized below, have received broad acceptance<sup>4</sup> and are therefore useful tools for evaluating institutions and encouraging their development.

#### **(a) Independence**

21. A national commission must be independent. While certain restrictions on absolute independence may be necessary, it is essential to ensure these do not impede its ability to discharge its responsibilities effectively. A commission should be legally and politically autonomous - to the extent that no branch of government - or any public or private entity - can interfere in or obstruct its work. A commission must also be able to control its own finances, with external accountability being limited to appropriate review and evaluation of financial reports and resource utilization. Clearly, any commission will only be as independent as the individuals of which it is composed. All members, acting individually and collectively, should be capable of generating and sustaining independence of action. The methodology and procedures by which members are appointed and dismissed are obviously important in this respect.

#### **(b) An appropriate, clearly defined mandate**

22. An effective national commission must enjoy a clearly defined area of jurisdiction. The commission and the community it serves should be in no doubt as to the functions which it is to perform. The legal powers conferred on it must be relative to its tasks. It is of no use, for example, granting a commission power to investigate complaints without also empowering it to collect evidence and subpoena witnesses. A carefully defined mandate should also serve to avoid possible conflict or overlapping of jurisdiction - with, for example, ombudsmen or other tribunals

#### **(c) Pluralistic and representative composition**

23. Diversity among those constituting the commission is important. An effective, credible national institution will be one which reflects, in composition, the community it is established to serve. A national commission composed solely of men, for example, or of one particular ethnic or

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<sup>4</sup> The majority of the elements listed in this Part are identified in the *Principles Relating to the Status of National Institutions*, endorsed by the General Assembly of the United Nations in Resolution 48/134 of 20 December 1993.

religious group, is unlikely to reflect the diversity of society or inspire confidence in its impartiality.

**(d) Accessibility**

24. A national human rights commission must be readily accessible to its "clients" - to those individuals and groups whose rights it has been established to promote and protect. In this respect it is essential to recognize that many of the most important "clients" - those who are most in need of help - will often be difficult to reach through standard channels of communication. An effective commission will therefore be one which develops proactive initiatives for assisting those who are most vulnerable and disadvantaged.

25. Human rights commissions should, of course, be physically accessible. In several Commonwealth countries - for example India and Australia - physical accessibility of the respective commissions has been improved through the establishment of related bodies at state and provincial levels. Where decentralization in this context is not a practical option, national commissions may recruit field officers to serve in different regions. Flexible rules of procedure (e.g. accepting complaints through the post or over the telephone) will also increase a commission's accessibility.

**(e) Co-operation with non-governmental organizations (NGOs)**

26. All effective human rights commissions have established and maintain close relations with NGOs involved in human rights matters. NGOs are a vital information source for national commissions and are often very effective partners - particularly in the areas of education and training.

27. The charters of national commissions already established throughout the Commonwealth (or soon to be established in countries such as Papua New Guinea) either explicitly or implicitly recognize the important role played by NGOs and empower the respective commissions to work closely with them. In both recent regional meetings involving national commissions - one held in Africa, the other in Asia - the leaders of all participating institutions stressed the importance they attach to effective co-operation with the non-government community.

28. It is essential that the synergy of this relationship is appreciated by governments currently contemplating the creation of independent national commissions - and that there is no misapprehension that the establishment of such mechanisms in any

way minimizes or derogates from the central role which a vigorous non-government sector has to play in protecting human rights.

**(f) Adequate resources**

29. Sufficient human resources and adequate funding are essential prerequisites for operational efficiency. Guarantees on these matters should therefore preferably be included in the commission's founding charter. As well as jeopardizing efficiency, a lack of resources can cripple a commission's credibility. (The commitment of a government which establishes and then fails to properly resource a commission must clearly be called into question.)

**THE INTERNATIONAL DIMENSION**

30. As mentioned in the introduction to this paper, national human rights commissions and similar bodies have now acquired an international dimension. In 1991, a meeting of heads of national commissions was convened in Paris. The result of this meeting was the "Paris principles on National Institutions" - a set of guidelines for the establishment and effective functioning of these bodies. These principles were formally endorsed by the General Assembly in 1993 - the same year that the World Conference on Human Rights, meeting in Vienna, emphasised the important role which national human rights institutions can play in protecting and promoting human rights<sup>5</sup>.

31. In 1995, the United Nations Commission on Human Rights requested the Secretary-General to accord high priority to requests from member states for assistance in establishing and strengthening national institutions (CHR Resolution 1995/50). The High Commissioner for Human Rights has, accordingly, made this one of his highest priorities.

**CONCLUSION**

32. It is precisely their capacity to contribute substantially to the realization of human rights which makes independent commissions so significant. Democracy alone is no guarantee that the rights of all persons will be protected - as the history of all democracies clearly demonstrates. Nor is the constitutional entrenchment of human rights (much beloved of lawyers) any guarantee that they will not be frequently and flagrantly violated in practice.

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<sup>5</sup> Vienna Declaration and Programme of Action, *supra* note 3.

33. But if there is an independent, autonomous, national commission or similar institution with a mandate and appropriate powers to monitor and protect human rights, the demonstrable deficiencies of democratic governments, constitutional "guarantees" and often inaccessible court systems can be considerably attenuated.

34. First, national human rights commissions can, by reaching so many, transform the rhetoric of the international instruments into reality for millions of people for whom the term "human rights" has previously had no meaning at all. Second, they can do this in a manner which is consistent with the standards prescribed in the international treaties, while accommodating constitutional peculiarities and the extraordinarily disparate challenges posed by local conditions and cultures - thus respecting ethnic, cultural, religious and linguistic diversity. Third, they can do this in a more informed and sensitive manner than any regional or international body. Fourth, they can do this without compromising a vigorous defence of the rights of minorities by reference to the wishes of the (sometimes overwhelming) ethnic, linguistic or religious majority - a feat sometimes beyond the capacity of democratically elected politicians who, in some countries, manifest an increasing tendency to formulate policies according to polls indicating what the majority want - irrespective of what human rights require. Fifth, they can contribute to and monitor the integrity of government reports to international treaty bodies, reflecting the reality of human rights beyond the perception of bureaucrats ensconced in national capitals. Sixth, they can provide constructive, well-informed criticism from within, which is frequently important in corroborating or balancing criticism from "foreigners" - often dismissed by governments subject to criticism for violating human rights as based on ulterior or illegitimate motives.

35. For these and other reasons, national commissions can therefore enhance national stability and security - and thereby contribute to national development - at the same time as promoting and protecting fundamental human rights. For the greater good of the Commonwealth, and indeed, of individuals in all countries, their establishment and development should be encouraged.

## ANNEX

### **PRINCIPLES RELATING TO THE STATUS OF NATIONAL INSTITUTIONS** (adopted by the United Nations General Assembly, 1993)

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## Annex

### PRINCIPLES RELATING TO THE STATUS OF NATIONAL INSTITUTIONS<sup>a</sup>

#### Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.

2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

3. A national institution shall, *inter alia*, have the following responsibilities:

(a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

- (i) Any legislative or administrative provisions, as well as provisions relating to judicial organization, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
- (ii) Any situation of violation of human rights which it decides to take up;
- (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;
- (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;

(b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

(c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

(d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations, and, where necessary, to express an opinion on the subject, with due respect for their independence;

(e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights;

(f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

(g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness; especially through information and education and by making use of all press organs.

#### Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members; whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

(a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;

(b) Trends in philosophical or religious thought;

(c) Universities and qualified experts;

(d) Parliament;

(e) Government departments (if they are included, these representatives should participate in the deliberations only in an advisory capacity).

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

3. In order to ensure a stable mandate for the members of the institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

#### Methods of operation

Within the framework of its operation, the national institution shall:

(a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;

(b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

(c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

(d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;

(e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;

<sup>a</sup> Commission on Human Rights resolution 1992/54 of 3 March 1992, annex (Official Records of the Economic and Social Council, 1992, Supplement No. 2 (E/1992/22), chap. II, sect. A); General Assembly resolution 48/134 of 20 December 1993, annex.

(f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular, ombudsmen, mediators and similar institutions);

(g) In view of the fundamental role played by non-governmental organizations in expanding the work of national institutions, develop relations with non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

**Additional principles concerning the status of commissions with quasi-jurisdictional competence**

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties,

non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

(a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;

(b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;

(c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;

(d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.