HR/PARIS/1991/SEM/WP2/
20 September 1991

Original: English

UNITED NATIONS WORKSHOP ON NATIONAL INSTITUTIONS
FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS
Paris, 7-9 October 1991

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DEFINITION, JURISDICTION AND POWERS OF NATIONAL INSTITUTIONS

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INTRODUCTION AND DEFINITION'

In considering ways of strengthening national institutions on human rights it is first necessary to define which institutions we are examining. All organs of State and indeed all sectors of society have important roles and responsibilities in relation to human rights - reflecting the fact that the law of human rights is now relevant to almost every aspect of government activity and many other areas of life. However, I take our topic as addressing institutions whose functions are specifically defined in terms of the protection and promotion of human rights. These institutions generally bear a title such as "Human Rights Commission" although, as will be seen, some are concerned more specifically with discrimination on a particular basis (such as race or sex) or the rights of a specific group (such as children).

This paper does not, therefore, deal directly with the fundamentally important role of an independent judiciary in protecting human rights, nor (except as it relates to the institutions under discussion) with the judicial application of human rights through a constitutional or statutory Bill of Rights - such as have now been adopted by a significant number of countries.

THE OFFICE OF OMBUDSMAN

The institution of Ombudsman will be discussed only briefly in this paper, except where a particular Ombudsman has been given specific jurisdiction in relation to human rights. This is not, however, to deny the importance of this institution.

The office of Ombudsman is now established in a wide range of countries. The most recent report on national institutions prepared for the United Nations Commission on Human Rights lists the following countries as having an ombudsman's office: Sweden, Denmark, Norway, Finland, Australia, Austria, Barbados, Canada, France, Ghana, Guyana, India, Jamaica, Japan, Mauritius, New Zealand, Portugal, Spain, Trinidad and Tobago, the United Kingdom, Nigeria, the Sudan, Tanzania and Zambia.' To this list may be added Zimbabwe, Uganda and Namibia, St. Lucia, Papua New Guinea, the Solomon Islands and Western Samoa (on the basis of a study recently undertaken for the Commonwealth Secretariat Human Rights Unit). Offices with similar functions but different titles also exist in a number of countries. (Poland, for example, has indicated that its office of Civil Rights Spokesman is similar in nature to an Ombudsman.)[3]

> The role of the Ombudsman is concisely and usefully summarised in the UN report just referred to: The primary role of the Ombudsman is to protect the rights of the individual who believes he is the victim of unjust acts on the part of the public administration. Generally appointed by the Parliament, the ombudsman often has a supervisory role acting on behalf of the parliament. ... Essentially, the ombudsman in all countries follows similar procedures in the performance of his duties. He receives complaints from aggrieved parties, and subsequently initiates an investigation if

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I am indebted to Mr David Mason at our Commission for preparing a first draft of this paper.

U.N.Doe.E/CN.4/1991/23.

U.N.Doc CCPR/C/58/Add.10

the claim has merit and falls within his jurisdiction. The ombudsman is generally granted access to documents of all authorities within his jurisdiction, which are pertinent to the investigation. He then usually issues a statement of recommendation based on his investigation, which is given to both the complainant and the office or authority against whom the complaint has been lodged. If the recommendation is not acted upon, the ombudsman may then submit his recommendation to Parliament.'

As will be seen, these powers are similar to some of those available to national commissions on human rights.'

It is apparent, however (from this not necessarily exhaustive list of countries having an Ombudsman) that in a number of countries this institution is maintained together with a Human Rights Commission or similar body. In some cases (such as Canada and New Zealand) there is also a judicially enforceable Bill of Rights. Clearly, in these countries at least, the different institutions are regarded as performing basically distinct functions. The main distinctions may be defined as follows:

(a) In most cases the jurisdiction of the Ombudsman is to ensure general fairness and legality in public administration. The jurisdiction of a human rights cornrnission is more specifically focussed on human rights and non-discrimination, and, at least so far as non-discrimination is concerned, frequently extends beyond actions of government to include other areas of public life - such as discrimination by private employers. The Swedish model constitutes an exception from the general model, and is discussed further below. (In Sweden, in addition to the Parliamentary Ombudsmen with general jurisdiction, there are Ombudsmen for Ethnic Discrimination, Equal Opportunities and other matters) •6

(b) In general, the principal focus of activity for an Ombudsman is dealing with individual complaints. Human rights commissions generally also have this function, but tend to embody a broader range of powers - including educational and promotional activities, and review of legislation.

(c) A number of human rights commissions have international standards on human rights as the explicit or implicit basis of their work - whereas for an Ombudsman the principal basis is generally domestic legislation, with international standards being, at most, of indirect relevance.' In a number of common law countries, the Ombudsman is seen as approaching issues of "justice" from precepts of

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U.N.Doc. E/CN.4/1991/23.

5 Togo has noted that its National Human Rights Commission uses similar methods of work to an Ombudsman: see U.N.Doc. CCPR/C136/Add.5; Mexico has also indicated that its National Commission on Human Rights is similar to an Ombudsman: U.N.Doc. E/CN.4/1991/23/Add.l.

6 There are (in addition to those specified above) Ombudsmen to deal with consumer complaints; to oversee fair competitive practices in the market; and to deal with complaints against the press. These last three institutions are outside the scope of this paper.

7 In Finland, however, the Parliamentary Ombudsman is reported to have referred to the International Covenant on Civil and Political Rights in a number of recommendations: U.N.Doc.E/CN.4/1991123.

administrative law and good administrative practice - rather than on the basis of international human rights Jaw.

In principle, however, there need be no fundamental inconsistency between the functions of an Ombudsman and of a human rights commission. In some countries it might be considered economical to combine the functions by conferring on the Ombudsman the specific human rights jurisdiction, and wider promotional and policy functions (in addition to complaint handling) which a separate human rights commission would generally have. Sufficient resources and sufficiently clear human rights responsibilities would, however, have to be provided for to ensure that the effective focus on human rights issues was not lost by this strategy.

The office of the Procurator, which exists principally in Republics and States of the former Soviet Union and in Eastern Europe, also has some similarities with the office of the Ombudsman - being concerned with legality and propriety in administration. However, the Procuracy also has direct responsibilities for instituting criminal prosecutions, which may well conflict with this institution being entrusted with the tasks of a national human rights commission.

GENERAL CONSIDERATIONS

This paper does not purport to provide a comprehensive account of every national institution which fails within its scope. Apart from limits of space and time, the increasing awareness of the importance of national institutions has recently been accompanied by rapid developments - so that it is entirely possible that important institutions have developed of which I remain unaware. This only emphasises the importance of this conference and of continued exchange of ideas and information in meetings such as this.

In my view it is obvious that no single model of national institution or institutions can, or should, be recommended as the appropriate mechanism for all countries to fulfil their international human rights obligations. Although, as indicated by this meeting itself, each nation can benefit from the experience of others, national institutions must be developed taking into account national conditions and existing institutional frameworks. (In particular, a number of features discussed in other papers prepared for this meeting are of direct relevance to the model most appropriate for each country.)

An important part of the framework for discussion in this area are the regional arrangements and institutions, if any, which exist - and the extent to which they can, or should, perform some of the same functions as national institutions. In my view, however, they clearly cannot supplant the need for effective national machinery.

Much depends on the nature of the national constitution: in particular, whether it contains a bill of rights and, if so, the content and range of rights covered and the mechanisms for enforcement provided. It is also important whether the constitutional structure is that of a unitary State, a federation or confederation, or other variations.

Recent momentous and rapid developments in international events must also be taken into account.

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[8]: Others more familiar with civil law and socialist legal traditions might have different perceptions on this issue.

Existing structures are forming or dissolving rapidly in a number of areas. This will have important implications for future developments relating to national human rights machinery.

DOMESTIC AND/OR INTERNATIONAL SCOPE

At the same time as acknowledging differing national conditions, it is necessary to re-emphasise the universality of human rights and the obligations of all governments to their peoples.

At a legal level this is clear: by the act of joining the United Nations, States subscribe to the basic purposes of the organisation enumerated in the Charter - including the promotion and protection of human rights - and undertake to co-operate for these purposes. But it is also relevant in considering national institutions to recall that human rights have deep roots in the traditions of all peoples - even if this is not reflected in the practices of their governments.

The Universal Declaration of Human Rights did not spring fully formed from the minds of delegates to the United Nations. It derived largely from a common reflection on national constitutional and legal provisions and traditions. Nor was it the work of people from any particular tradition. Although the United Nations General Assembly, at the time of the drafting of the Declaration, was clearly not as representative as it now is, careful study of the drafting history indicates the range and significance of contributions from many different traditions. The Declaration, as is often noted, bears the influence of common law systems, in their various forms; of civil law; and of socialist systems and legal thinking.

Less often noted are the contributions of Latin and South American, Arabic and Asian nations, despite the smaller numbers then represented. Least well represented, of course, were African nations, since for most the realisation of the right to self-determination - now recognised in positive law at the head of the human rights Covenants - was still in the future. In this context, therefore, it is particularly notable that as many of those nations gained their independence the provisions of the Universal Declaration were incorporated, more or less directly, in their national Constitutions. (This degree of reflection in national law is, indeed, one of the bases for the view of many commentators that at least major elements of the Universal Declaration have achieved the status of customary international law.)[9]

The Universal Declaration and later human rights instruments to which it gave birth, call for measures of implementation at the national level. International commitments and standards, and international machinery, however sophisticated, are a very long way from the direct realisation of human rights for most individuals. It is primarily at the national level, including through national institutions, that human rights must be made a reality in the lives of men, women and children throughout the world.

Each of the principal human rights instruments developed by the United Nations recognises this, in requiring nations not merely to "respect" human rights, but to take appropriate measures to "ensure" these rights, or

[9] On the basis of human rights in African traditions see for example K.M'Baye, Background Paper, U.N. Seminar on Establishment of Regional Commissions on Human Rights, with Special Reference to Africa, U.N.Doc. HR/Liberia/1979/Bp.2.

"to take steps by all appropriate means" for their realisation.'

Clearly, there are a variety of national measures which may be adopted to achieve these goals - in addition to such essential prerequisites as the effective rule of law, independence of the judiciary, freedom of information and expression and, importantly, the protection provided by freely chosen democratic representative institutions. In particular, a number of States have incorporated specified human rights instruments (particularly the International Covenant on Civil and Political Rights) directly into national law. This is necessary in most common law countries, for example, to give human rights instruments legal effect - since the general position of the courts in these countries is that treaty obligations are not effective in domestic law without specific statutory incorporation. A number of common law countries and others, as already noted, have reproduced provisions of these instruments in national constitutions. In other cases, by constitutional provisions, or as a matter of legal doctrine, treaty obligations in general take precedence over internal law,"

Equally clearly, however, as the last 40 years have graphically demonstrated, legal provisions simply referring to or incorporating international instruments are not enough. As is clearly envisaged by each of the United Nations human rights instruments, practical measures of protection and active promotion are also required for the effective realisation of human rights. Rene Cassin noted this in the drafting of the International Covenant on Economic, Social and Cultural Rights when he said "it would be deceiving the peoples of the world to let them think that a legal provision was all that was required ... when in fact an entire social structure had to be transformed by a series of legislative and other measures. [2]

The protection and promotion of human rights is not a fixed state to be achieved prior to or immediately after the ratification of international instruments, but a continuing, challenging enterprise. [3]

The obligation to "respect' human rights may be said to impose a "negative" obligation not to violate human rights. But the obligation to "ensure" is of critical importance and goes much further. It clearly imposes an obligation to act positively to guarantee such rights. On the nature of these obligations see for example P.Alston and G.Quinn, "The nature and scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, (1987) 9 Human Rights Quarterly 156.

11 Note for example the provision of Article 43 of the Constitution of Togo: "From the date of their publication duly ratified treaties and agreements shall take precedence over the laws, provided that all such treaties and agreements are applied by the other party": see U.N. Doc CCPR/C/36/Add.5. par.37. Note however that in the United States of America - where treaties are similarly declared by the Constitution to be the "supreme law of the land" - doubts have been raised as to whether the human rights treaties are "self executing" so as to be legally effective without a further process of incorporation by national law. The basis of this doubt is that in their terms the human rights treaties oblige States Parties to take measures, rather than directly conferring legally enforceable rights on individuals.

12 U.N.Doc. E/CN.4/SR.232 (1951); and see P.Alston and G.Quinn, op.cit.

13 The view has also been expressed in the Australian High Court that even at the level of legal implementation, in some cases simply reciting the terms of international instruments may be insufficient to give them legal effect in national law without a further process of translation into more specific rights and obligations: Dawson J, Gerhardv v. Brown (1985) 159 Commonwealth

It is the central thesis of this paper that appropriate national human rights institutions are essential to the realisation of the rights recognised in United Nations human rights instruments.

Such institutions can be roughly divided into several categories - based on the criterion of "domestic or international scope".

(1) Those which are concerned solely with human rights in the international arena, but which appear to lack any significant direct domestic jurisdiction (such as the sections on human rights maintained by many Ministries of Foreign Affairs), are outside the scope of this paper.

(2) A number of institutions are primarily international in focus, but also have the function of conducting public information in relation to international human rights law. An example of such an institution is the Finnish Committee on International Human Rights Issues (comprising representatives from each of the political parties, as well as representatives nominated by the national sections of the Red Cross and Amnesty International), the role of which is described in Finland's 3rd periodic Report to the Human Rights Committee' as to assist the Ministry of Foreign Affairs on human rights issues and to conduct public education. The membership of this Committee includes the Deputy Parliamentary Ombudsman (which may serve to some extent to facilitate co-ordination between international policy on human rights and domestic implementation).

(3) Some national institutions have a fully mixed jurisdiction, with principal or major responsibilities relating both to domestic and international policies on human rights. In France, for example,' the National Advisory Commission for Human Rights (composed of representatives of relevant associations, a number of prominent individuals in the field of human rights, 2 members of parliament and a number of non-voting representatives of government) has both national and international responsibilities - being concerned with human rights violations both in France and abroad [16]• In Ecuador, the Ad Hoc Commission on Human Rights of the National Congress has, together with a range of domestic human rights responsibilities, the functions of following up human rights complaints against Ecuador in international bodies, and monitoring respect for human rights internationally, with particular reference to

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Law Reports 70 at 157. Note also the comments of the Hon-Justice P.N. Bhagwati: "It is obvious that a certain degree of positivisation or particularisation is required, if specific human rights are going to have practical force...": Inaugural Address, in Developing Human Rights Jurisprudence: the Domestic application of International Human Rights Norms (Report of the Judicial Colloquium, Bangalore 1988, Commonwealth Secretariat, p.xx.

[14] U.N. Doc. CCPR/C/58/Add.5

[15] U.N. Doc. E/CN.411991123

[16] In Turkey, the Human Rights Inquiry Commission (whose membership is determined by the National Assembly according to a formula of party representation) also has a mixed jurisdiction. This institution proposes legislative amendments and investigates complaints within Turkey by reference to international human rights treaties to which Turkey is party. It also has the function of examining violations of human rights in other countries when necessary and transmitting views on these to the parliamentarians of the country concerned. (U.N.Doc. E/CN.4/1991/23/Add.1)

Latin America".

This model offers the advantage of relating domestic and international policy. In particular, in a number of countries, it may also be an effective means of ensuring that the limited number of available personnel with expertise in, or even familiarity with, the international law of human rights, have some responsibilities for, or influence on, domestic law, policy and administration. That is, it may assist in avoiding the current tendency (which is widespread) for knowledge of international human rights instruments to be confined to Ministries of Foreign Affairs - while the responsibility for the national implementation of human rights rests with domestic departments or agencies.

Disadvantages of such a model may include the imposition of an excessive workload on one institution - compared to its resources. [18] There may also be the possibility of conflict of responsibilities in some cases (depending on the way the institution's charter is framed). To the extent that an institution is responsible not simply for providing advice, but for contributing to the formulation of foreign policy on human rights, it could be placed in the position of defending the nation's record internationally while criticising it at home.

(4) A farther model is that typified by the Australian national Commission, the Human Rights and Equal Opportunity Commission. This Commission administers legislation directly based on, and incorporating, United Nations human rights instruments. The functions of the Commission are principally domestic, but it also has a degree of international competence - to the extent that this is ancillary to its domestic functions.

The instruments currently within the jurisdiction of the Australian Commission are:

– the International Covenant on Civil and Political Rights (ICCPR);

the Convention on the Elimination of all forms of Racial Discrimination (CERD);

the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW);

the Declaration of the Rights of the Child;

– the Declaration on the Rights of Disabled Persons;

the Declaration on the Rights of Mentally Retarded Persons; and

– the International Labour Organisation's Discrimination (Employment and Occupation) Convention.'

This extensive jurisdiction enables the Commission to promote human rights in an integrated way. Federal law also provides for further instruments to be added to the Commission's responsibilities. (The

U.N.Doc. CCPR/C/58/Add.9

[18] This is suggested, for example, by the Second Periodic Report of Zaire to the Human Rights Committee, U.N. Doc. CCPR/C/57/Add.1, which states: "The Department of Citizens' Rights and Civil Freedoms, operating within a rather modest budget, is required to do virtually everything."

[19] Within the Commission, the Sex Discrimination Commissioner has particular responsibilities for promotion and implementation of CEDAW. The Race Discrimination Commissioner has similar responsibilities regarding CERD, and the Human Rights Commissioner has primary responsibility for the remaining instruments listed, and any others which may be added to the Commission's jurisdiction. Details of the structure of the Australian Commission are given at Appendix B.

Commission has recommended, for example, that this be done in relation to the Convention on the Rights of the Child.)'

There are a number of advantages in giving national institutions a charter directly based on international human rights instruments. First, it serves as a convenient point of reference by which the degree of domestic implementation of human rights may be assessed - both internally and externally.

Second, it facilitates the development of experience and jurisprudence in applying international standards which, though framed by reference to national conditions and problems, may be applicable by others.

Third, it is increasingly clear that international machinery for the protection of human rights, both Charter based (such as the Commission on Human Rights and mechanisms created under its mandate), and the treaty based Committees (both in their function of receiving individual complaints and in consideration of reports) are limited in the number of problems, situations and cases which they can handle. This is not to denigrate the importance of these bodies or the need to provide them with adequate resources and pursue means of making their operation more effective.' However, with growing international acceptance of these mechanisms, and in particular of the treaty based provisions for individual complaints, there is a need to squarely face the danger of overloading the machinery which should form the peak of the international system for protection and promotion of human rights by placing excessive reliance on it to perform tasks which, in the first instance, should be more appropriately and effectively addressed at the national level.

Fourth, as far as the international system is concerned, national machinery has important preventive functions - either in preventing human rights violations from occurring, or in achieving resolution of cases, and redress for violations of rights, before the international level is reached. One particular benefit of national institutions having a specific basis in international human rights instruments is that it addresses the problem of cases falling through gaps in domestic legal categories. It is clear, for example, that common law systems, although containing important human rights elements, by themselves offer very inadequate protection of human rights, particularly concerning discrimination' and the rights of especially

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20 The jurisdiction of the National Human Rights Commission of Togo, while emphasising civil and political rights in particular, also clearly extends to human rights more generally: see Initial Report of Togo to the Human Rights Committee, U.N.Doc. CCPR/C/36/Add.5. The New Zealand Human Rights Commission Act, s.6(a), specifies that the functions of the Commission include reporting to the Prime Minister from time to time on "the desirability of legislative, administrative or other action to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights". In Guatemala, the Attorney for Human Rights is appointed by Congress for defence of human rights, both as recognised under the Constitution and in the Universal Declaration of Human Rights and international treaties.

21 Discussed in the important report to the General Assembly by Professor Philip Alston, U.N.Doc A/44/668.

22 W.Tarnopolsky, "Race relations commissions in Canada, Australia, New Zealand, the United Kingdom and the United States", (1985) 6 Human Rights Law Journal 145, at 151-154, gives a concise summary of the narrow coverage and pathetically inadequate remedies provided by the common law in relation to racial discrimination. For example, when, on the basis of racial

disadvantaged groups (such as the mentally ill)[23].

Fifth, where an individual complaint is not resolved at the national level and comes before a body such as the Human Rights Committee, the Committee on the Elimination of Racial Discrimination or the Committee Against Torture (where the nation concerned has taken the requisite steps to make those procedures available), prior consideration of the matter based on the same international standards by a national body is likely to be of considerable assistance to the international Committee concerned.

Sixth, with respect to the reporting systems instituted under United Nations instruments, a national institution dealing directly with the human rights instrument in question may be of great assistance both to the monitoring body in gaining accurate and authoritative information, and to the Government concerned in compiling information to fulfil its reporting obligations. Given the proliferation of reporting requirements, the extent of overlap between requirements under different treaties, and the difficulties experienced by many governments in collecting information to fulfil their obligations, the model of an integrated national Commission to deal with all or many of the international human rights instruments to which the nation is party has particular advantages. In some cases, depending on the extent of the national Commission's jurisdiction, the annual report of such a body could effectively serve as the basis for substantial parts of the nation's report under the relevant instruments.

A number of national commissions whose principal functions are domestic also have responsibility for providing advice to government on a range of international actions relating to human rights, particularly in relation to the negotiation and ratification of international instruments. This is the case, for example, in relation to the New Zealand Human Rights Commission. The legislation establishing that Commission' expressly gives it the function of reporting on "the desirability of the acceptance by New Zealand of any international instrument on human rights". The more general responsibility of the Australian Commission, to recommend action by Australia in relation to human rights includes advising the government on negotiation and ratification of international instruments.

PARTICIPATION IN INTERNATIONAL MEETINGS

Clearly, governments have the power to determine both how they wish to be officially represented internationally and what, if any, international functions they confer on national human rights commissions.

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discrimination, the West Indian international cricketer Leroy Constantine and his family were refused admission (in insulting and degrading terms) to a London hotel where they had booked to stay, the common law courts could only award five pounds damages: Constantine v. Imperial Hotels Ltd. [1944] 1 Kings Bench Reports 693. Had the hotel refused him service rather than accommodation, no remedy at all would apparently have been available.

[23] With respect to the rights of the mentally ill, the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care [U.N.Doc.E/CN.4/1991/39, Annex 1] (which were adopted by the Commission on Human Rights at its 1991 session and will be adopted by the General Assembly later this year) provide some much needed standards for the proper protection of this particularly disadvantaged and stigmatised group of people.

[24] New Zealand, Human Rights Commission Act 1977 s.6(b), and see Mr Justice Wallace, "The New Zealand Human Rights Commission", (1989) 58 Nordic Journal of International Law 155.

There are, however, a number of roles which national commissions may usefully play in international meetings, in addition to providing advice or information to their government beforehand.

(a) In general it is possible for governments to request that members of national commissions serve as expert members of government delegations to United Nations treaty monitoring bodies. Australia has done this, for example, in presenting reports to the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. In each case the Committee expressed appreciation for being able to receive information from people directly responsible for administering legislation implementing the international instrument in question. Where the national Commission is independent from direction by Government", it is of course necessary to ensure that this independence is not compromised when participating in a Government delegation. In our experience this is quite possible if Commissions act as advisers to the delegation, rather than as members of it.

(b) Members of national commissions may, in some cases, also usefully serve on government delegations in negotiation of international instruments. Members of the Australian Commission have recently been included in the Australian delegations involved in drafting the Convention on the Rights of the Child and the Principles on the Protection of the Human Rights of Mentally Ill Persons. They have also participated in working groups of the Commission on Human Rights, in drafting the Declaration on the Rights of Indigenous Peoples, and in negotiating draft Standard Rules for the Equalisation of Opportunities for Disabled Persons (presently before a Working Group of the Social Development Commission). The contribution of national commissions has generally been recognised as valuable in this area. The authority of the substantial body of international instruments already adopted depends, in part, on the efforts which have been made to ensure that these instruments reflect national experience. Participation by members of national commissions is likely to contribute to this purpose.'

(c) A number of national commissions (including that of Australia) have also recently made significant contributions to international discussions in relation to human rights matters, as experts in their own right rather than as representatives of government. It may soon be appropriate, therefore, for the United Nations to acknowledge the role of national commissions in an appropriate form, without trespassing on the right of governments to determine the form of their own representation in international political bodies. It appears, for example, rather anomalous that provision is made for formal recognition only of non-government organisations, some of whose focus on human rights is considerably less direct than

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[25] As is the case with the Australian Commission.

[26] Note the related comments by Justice Rajsoomer LaIlah, Member of the Human Rights Committee: "Far too often in the past, the question of human rights at the international level has tended to be dealt with solely by Foreign Ministries, admittedly with the assistance of Home Office legal advisers. It is to be wondered whether that is enough. It is the courts which normally deal with the implementation of human rights or their violations at grassroots level. The time has perhaps come to ensure that the thinking of the judiciary is tapped in a systematic way, and that it should be involved at the international level.": "International human rights norms", in Developing Human Rights Jurisprudence, Commonwealth Secretariat, p.21.

national human rights commissions.

(5) A number of national human rights institutions have their responsibilities defined by reference to purely domestic legislation rather than by reference to international instruments. However, a number of these institutions have expressed recognition of the relevance of international instruments and the importance of international experience. The Canadian Commission on Human Rights, for example, although administering legislation which does not explicitly refer to international instruments, describes its role" as "to put institutional flesh on the bare bones of [Canada's] international commitments on human rights". There are numerous similarities between the domestic legislation of many countries on human rights and non-discrimination, and the international instruments in these areas - even where international instruments are not referred to in the legislation itself. Where national legislation has particular shortcomings (for example in defining particular forms of discrimination to be combatted) legislation elsewhere may have effectively addressed these.

This highlights the importance of comparing experience. Part of this obviously involves communication in published form, The Annual Reports of a number of national commissions afford valuable material for comparative study.' There are various commercially produced law reports which deal with particular national institutions and legislation.' There are also a number of journals which include materials on national institutions within a more general regional or international focus." And, as participants from Commonwealth countries in particular would know, the Commonwealth Secretariat's Human Rights Unit attaches considerable importance to making comparative information available. Further, there are the relatively brief but useful reports on national institutions prepared for the General Assembly' and the Commission on Human Rights', shortly to be consolidated in a manual on national institutions by the Centre for Human Rights.'

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[27] Canadian Human Rights Commission, Annual Report 1990, p. 11.

[28] The Annual Report of the Canadian Commission should be mentioned in this context. It has the advantage, in terms of accessibility, of French and English text in the one volume.

[29] The Australian and New Zealand Equal Opportunity Reporter is interesting in this respect since it is inherently international and comparative, dealing with both the Federal and State (provincial) human rights legislation and institutions of Australia and New Zealand.

[30] The Nordic Journal of International Law, for example, has included articles on the Australian and New Zealand national commissions.

U.N.Docs. A/36/440; A1381416.

[3] N.Docs. E/CN.4/1987137; E/CN.4/1989/47 and Add.1; E/CN.411991/23 and Add.l.

[33] There is more that could be, and needs to be, done in making comparative information available in published form: not only by the United Nations - which has recently made national institutions and human rights in general a much higher priority in its public information activity, but by each of our own national institutions. There are, however, limits to the extent to which written reports can reflect the particularities of national conditions and the work of national commissions. Direct

Where they exist, regional arrangements offer valuable opportunities for sharing national experience. Such arrangements, of course, remain absent in the Asian-Pacific region, so that institutions in this region are particularly in need of active strategies to ensure that they benefit from experience elsewhere. In recognition of this, the Australian and New Zealand commissions have undertaken staff exchanges which we intend to continue. The Australian Commission also has a continuing program of staff exchanges with the Danish Centre of Human Rights and has undertaken placement of staff with the United Nations Centre for Human Rights. (Discussion of this and other forms of increased direct co-operation between national institutions at this meeting would be valuable.)

PARTICIPATION IN THE DRAFTING OF LEGISLATION

Most national commissions have the power to make recommendations for the introduction of new legislation, or the amendment of existing legislation, for the protection of human rights. In the case of a number of institutions composed of members of the legislature itself, or appointed directly by the legislature', this may be seen as a means by which the legislature ensures that human rights receive their proper place on the legislative agenda.

Institutions which are distinct from the legislature, either as independent statutory commissions or within an executive department, also have functions relating to the drafting of legislation. There are a number of reasons for conferring these functions on national commissions.

(A) REVIEW OF HUMAN RIGHTS LEGISLATION

National commissions which are responsible for administration of human rights legislation will often be in the best position to identify areas where this legislation requires improvement, either because of technical defects or because experience has indicated human rights problems which existing legislation does not adequately address. National institutions responsible for dealing with complaints in individual cases have concrete knowledge (which the legislature may not have in the same detail) concerning human rights problems in society. Where the national commission has power to conduct wide-ranging national inquiries, and is directed to work with non-government organisations, as is the case in Australia, this provides a further basis for legislative recommendations.'

(B) DRAFTING OR REVIEW OF OTHER LEGISLATION (EXISTING OR PROPOSED) National commissions on human rights generally have the power to review legislation in any area

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contacts are therefore particularly useful.

34 For example, the Human Rights Commission of the Congress of the Republic in Guatemala - see U.N.Doc. E/CN.411991123; the National Congress Ad Hoc Commission on Human Rights in Ecuador see U.N.Doc. CCPR/C/58/Add.9; and the Human Rights Inquiry Commission of Turkey - see U.N.Doc. E/CN.4/1991/23/Add.I.

35 The Australian Commission has recommended new legislation, or improvements to existing human rights legislation, in a range of areas including the rights of people with disabilities, protection against age discrimination and discrimination relating to HIV or AIDS, measures against incitement to racial hatred, various aspects of sex discrimination, and the enforcement of the Commission's determinations.

affecting human rights, rather than being confined to review of, or recommendations concerning, specific human rights legislation. The Australian Commission, for example, has functions of reporting on the consistency with human rights of all existing enactments and proposed enactments", as well as the more specifically expressed functions of reporting on laws that should be made or actions taken in relation to human rights'. Exercise of this function is limited by available resources. The New Zealand Commission also has the function of reporting on human rights implications of proposed legislation[38]. Clearly, such a function supplements, rather than displaces the responsibility of all other responsible agencies of government (including Attorney-General's Departments and other Departments responsible for drafting legislative proposals), and the legislature itself to ensure that legislation is consistent with human rights.

The Chairperson of the New Zealand Human Rights Commission has noted that this function is the one particularly likely to bring the Commission into conflict with the Government.' [An instance of such conflict occurred this year in Australia in relation to legislation introduced by the Federal Government to ban all advertising containing "political matter" (political matter being very widely defined, and "advertising" not being defined at all) from radio and television. As Federal Human Rights Commissioner I advised the government that such a ban would be inconsistent with the rights to receive and impart information and ideas recognised in Article 17 of the ICCPR, had the potential to interfere with the political rights recognised in Article 25 of the same Covenant, and would have a discriminatory impact on people with disabilities in respect of each of these rights. This advice was released publicly, (pursuant to a request under Freedom of Information legislation). The Government has now amended the legislation and a Parliamentary Committee is currently considering the matter.]

(C) INITIATION OF LEGISLATIVE CONSIDERATION

An important factor is whether the national commission can initiate a recommendation for legislative action itself, or only on reference from the Government or Parliament. In some instances government authorities may not be aware of relevant human rights issues. The Canadian Human Rights Commission has noted' the danger that once human rights legislation is in place, the legislature may neglect the need for continuing improvement to the legislation, shifting its attention to other areas. In some cases, the government may regard it as politically inconvenient to receive recommendations from the human rights commission. Particularly where the commission is part of the Parliament, legislation or the procedure of parliament may require that matters having human rights implications be referred to the national

[36] HREOC Act s.11(1)(e).

[37] HREOC Act s.11(1)(k).

[38] New Zealand Human Rights Commission Act s.6(2).

[39] Mr Justice Wallace, "The New Zealand Human Rights Commission" (1989) 58 Nordic Journal of International Law 155 at 157.

Annual Report, 1990.

commission. In other cases, however, there may be no legal compulsion on the Government to refer proposed legislation to the commission. For example in Australia the Human Rights and Equal Opportunity Commission Act allows the Attorney-General to refer proposed legislation to the Commission, but does not require him to do so. For these reasons, the power to make independent recommendations is an important element for effectiveness in this area.

QUASIJUDICIAL POWERS

The question of whether national human rights institutions have quasi-judicial powers raises a number of important issues.

(A) POWER TO COMPEL PRODUCTION OF DOCUMENTS AND GIVING OF EVIDENCE;, POWERS TO PREVENT INTERFERENCE WITH ACTIVITIES

Offices of Ombudsmen appear to be invariably invested with these powers to assist them in their investigations. Specific human rights commissions clearly also require these powers in order to be effective, particularly in investigating actions of government agencies. In the case of bodies formed within the legislature, these powers are generally inherent in the Parliament itself. In cases where the national commission is a separate body, these powers need to be specifically conferred.'

In Canada, powers to enter and search premises, and require production of evidence etc, are vested in investigators and Tribunals instituted under the Human Rights Act rather than in the Human Rights Commission itself.[42] In Australia, the national Commission itself has power to require production of documents and to compel the giving of evidence'.

At the time of the creation of Australia's national commission, these powers were the object of much misconceived criticism to the effect that the new Commission constituted a "star chamber" which itself would be a threat to human rights. This criticism overlooked a number of provisions which ensure that the Commission operates consistently with human rights. (For example, there is specific provision for refusal to give evidence on the grounds of self incrimination.") The Commission also has a firm policy that its compulsory powers should only be used where absolutely necessary, in keeping with the emphasis of

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4L In Togo, the national commission has juridical powers: see U.N.Doc. CCPR/C/36/Add.5. In Guatemala, a similar position applies to the Attorney for Human Rights appointed by the Congress to work in association with the Human Rights Commission of the Congress of the Republic: see U.N. Doc. E/CN.4/1991/23. In Mexico, the National Commission on Human Rights has authority to demand all appropriate information for the purposes of its functions, similarly to an Ombudsman: see U. N. Doc. E/CN .4/1991/23/Add .1.

42 The Canadian Human Rights Act s.50 provides that a Tribunal established under the Act "may, in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents or things as the Tribunal deems requisite to the full hearing and consideration of the complaint".

43 HREOC Act ss. 21, 22.

HREOC Act s.23(3).

the legislation on settlement by conciliation.

The Australian Attorney-General is able to order that evidence should not be produced, if it would prejudice the fair trial or safety of any person or national security.' The Commission itself is able to order that evidence given to it should not be published, in order to protect the human rights of any person. The Commission is specifically required to observe the principles of natural justice.' It is also subject to administrative appeal machinery and to judicial review. These safeguards are important in ensuring that a national human rights commission operates in accordance with the law.

(B) POWER TO MAKE DETERMINATIONS

A number of human rights institutions, in particular those directly associated with the legislature, deal with complaints (after preliminary analysis and verification) principally by referring them to other appropriate authorities for investigation or institution of legal proceedings.'

It is common for the charters of national human rights commissions to emphasise settlement of complaints by conciliation wherever possible. This is particularly the case in relation to complaints of discrimination. At the international level, the conciliation method as an effective means of resolving disputes has been emphasised in the practice of the International Labour Organisation and in a number of instruments adopted by that organisation. At the national level, conciliation has frequently been found highly effective in resolving complaints by a settlement agreed by the parties, thus avoiding the need for the law to impose a settlement. In Australia, for example, the vast majority of complaints brought to the Commission are either successfully conciliated or withdrawn voluntarily - rather than requiring formal determination.

However, where a solution cannot be agreed by conciliation, the issue arises of what determinative powers are available. Experience in dealing with discrimination cases in Australia has been that where legally enforceable remedies are ultimately available, this contributes to the effectiveness of conciliation. The desire to avoid more formal legal proceedings gives parties an additional incentive to conciliate their dispute if possible.

In a number of countries, the human rights commission itself has no determinative powers, but may refer matters to the courts or to a specialised human rights or equal opportunity tribunal. This is the position, for example, under the New Zealand Human Rights Commission Act, which provides for an Equal

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[45] HREOC Act s.24.

[46] Where the Commission proposes to report that a person has engaged in an act which is inconsistent with human rights or constitutes discrimination, that person must be given the opportunity to make oral or written submissions: HREOC Act s.27.

[47] The Attorney for Human Rights in Guatemala is empowered to institute legal proceedings after investigation of a complaint: see U.N.Doc E/CN.4/1991/23. The Human Rights Inquiry Commission in Turkey examines complaints and refers them to relevant authorities: see U.N.Doc. E/CN.4/1991/23/Add.1. In Ecuador the National Congress Ad Hoc Commission on Human Rights has the function of analysis and verification of complaints of human rights violations and the institution of proceedings against officials responsible: see U.N.Doc. CCPR/C158/Add.9.

Opportunities Tribunal.

In Sweden, if the Equal Opportunities Ombudsman is unable to negotiate a settlement in a case of sex discrimination, the case may be referred to the Labour Court." In cases where the Equal Opportunities Ombudsman has unsuccessfully sought to persuade employers to take positive measures to promote equality, an injunction may be requested from a separate body, the Equal Opportunities Commission:[49]

In the United Kingdom, the Equal Opportunity Commission (which deals with sex discrimination) and the Commission for Racial Equality do not themselves have determinative powers." If a complaint of discrimination cannot be settled by conciliation, it may be referred to a court or, in employment-related cases, to an industrial tribunal.

The various pieces of legislation administered by the Australian national Commission offer a range of models in relation to determinative powers. Under the Sex Discrimination Act and the Racial Discrimination Act, if complaints cannot be settled by conciliation, they may be referred for determination to a tribunal hearing. The tribunal consists of the Human Rights and Equal Opportunity Commission itself, rather than a separate body. However, the interests of natural justice are protected by legislative provisions specifying that the Commissioner responsible for conciliation in a case (for example the Sex Discrimination Commissioner in the case of sex discrimination complaints) is not permitted to sit as part of the tribunal or to take part in any Commission decisions relating to the case.

Because of the strict separation of powers which the courts have held to exist under the Australian federal Constitution, Commission determinations in these cases are not directly legally binding. However, a complainant, or the Commission itself, may take enforcement proceedings in the Federal Court. The Commission has recommended, and the Australian Parliament is presently considering, measures to reduce the need for re-hearing in the enforcement proceedings of evidence already presented to the Commission.'

Under the Human Rights and Equal Opportunity Commission Act [which deals with employment discrimination, and complaints against Federal government departments and agencies in relation to civil and political rights and the rights of children and people with disabilities] the Commission may make findings, but these are contained in a report which must be tabled in Parliament, rather than in the form of an enforceable or binding determination.

Experience has indicated a number of advantages in having a specialist tribunal with binding or enforceable jurisdiction:

(a) Such a tribunal will develop expertise in human rights and discrimination law (which in some

[48] U.N.Doc.E/CN.4/1991/23 par.31.

[49] See Fact Sheet on Sweden: The Swedish Ombudsmen, published by the Swedish Institute.

[59] On these bodies, see e.g. the 3rd periodic report of the U.K. to the Human Rights Committee, U.N.Doc. CCPR/C/58/Add.6 pars.39-42, 51-53.

[51] Under the Privacy Act, the Privacy Commissioner has power in some circumstances to make determinations which are more directly legally binding on Federal government agencies.

cases is less well developed in the general court system). As well as leading to more effective handling of individual cases, this is expertise on which the judiciary and other institutions with relevant responsibilities may draw.

(b) It is possible to design hearings by a human rights tribunal to be less expensive, less formal and more accessible than court proceedings. This is particularly important for human rights and anti-discrimination legislation to be effective in protecting the rights of people who are, in many cases, both economically disadvantaged and also disadvantaged by sophisticated systems of advocacy and pleadings.

(c) In a number of countries, including Australia, it has been found advantageous to provide for more flexible remedies to deal with human rights violations than have traditionally been available through the courts.

(d)In many cases the composition of the judiciary is not highly representative of the social composition of the population, and, in particular, contains few representatives of the classes of people most likely to suffer discrimination. The very fact of discrimination means that women, people with disabilities, indigenous people and others experiencing discrimination on the basis of race, religion or other characteristics may be less likely to rise through professional training and experience to the point where they are considered for judicial appointment, particularly at higher levels, (apart from any more direct discrimination in the process of judicial appointment itself). It is possible to make a specialist tribunal more representative, including by specifying that it should include members with particular responsibilities regarding specified groups.[52] Legislation may also specify that the tribunal should include members drawn directly from particular disadvantaged groups, either on a permanent basis or for the purposes of a particular case.

It has generally been recognised that where a specialist tribunal is created, its decisions should be reviewable by the judiciary to ensure legality and fairness to all parties is observed. This role obviously provides an important reason for ensuring that judges are aware of the principles of human rights law.

ACTIVITIES FOR PROMOTION AND PROTECTION OF HUMAN RIGHTS

As already noted, both national experience and the terms of international human rights instruments indicate that legislative measures alone are not adequate to guarantee the effective enjoyment of human rights. Other active measures of promotion and protection are also needed. In particular, it is necessary to ensure that effective and accessible remedies are available to translate the theoretical protection of the law into practice, and that human rights and the legislative machinery are made widely known - to victims and potential victims of violations of rights, to government agencies, employers and others exercising significant

52 As for example by the inclusion of the Race Discrimination Commissioner and Sex Discrimination Commissioner within Australia's national human rights Commission. Proposals for addition of commissioners with specific responsibilities regarding Aboriginal people and for a Children's Commissioner are presently being considered by the national government. The concept of a Disability Commissioner has also been raised by members of the community in the context of proposed further national legislation on the rights of people with disabilities.

power in society, and to the community generally. It is also important to promote consideration of human rights on a wider basis than simply that of individual violations and complaints: in legislation, in the administration and interpretation of the law, and in the formation of social policy. National commissions have extremely important functions in each of these respects. The very fact that a body such as a Human Rights Commission exists to promote human rights indicates a recognition that simply passing legislation is not, by itself, sufficient.

EFFECTIVE AND ACCESSIBLE REMEDIES

Different provisions for receipt of individual complaints are discussed in a later section of this paper. A major reason for vesting this jurisdiction in a national commission (rather than relying on civil, administrative and criminal law remedies through the courts) is to increase the accessibility of remedies to members of disadvantaged groups.

There are a number of examples in national experience of the ineffectiveness of anti-discrimination legislation relying only on remedies through the courts. Considerable shortcomings of early legislation in this area (particularly that of the United States and Canada) have been pointed out.'

(a) With respect to models relying on penal or criminal law:

frequently the police and prosecution authorities did not act to enforce these laws;

victims of discrimination were frequently reluctant to institute a private prosecution;

there were difficulties arising from the rules of evidence, particularly where proof beyond reasonable doubt of discriminatory action and discriminatory purpose was required;

the judiciary in some cases were reluctant to convict, regarding anti-discrimination law as an interference with traditional notions of freedom of contract;

without any agency responsible for public education and promotion of the legislation, most people were unaware of its existence;

criminal law penalties for perpetrators of discriminatory actions did not, in themselves, provide the person discriminated against with any effective remedy or compensation.

To this list may be added the fact that not all discrimination results from a conscious and deliberate discriminatory intention so as to be culpable in the usual criminal law sense. Discrimination may be equally damaging when it results, as is frequently the case, from stereotyped attitudes or from failure to be aware of the needs of a particular group.

(b) With respect to laws providing for civil remedies through the courts:

litigation, and fees for lawyers, are expensive in many countries. Many victims of discrimination cannot afford these costs.

the compensation received (even if the action is successful) may be less than the legal costs incurred.

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53 See e.g. Tarnopolsky, supra, pp.167-69, who also cites Maslow and Robison, "Civil right legislation and the fight for equality, 1862-1952", (1953) 20 University of Chicago Law review 363. Similar problems were encountered with the first Australian anti-discrimination legislation, the South Australian Prohibition of Discrimination Act 1966.

– this is particularly the case where only individual complaints are provided for. A great and damaging social wrong, such as racial discrimination in access to public places, might result in relatively small financial compensation to each individual (so that it might not be financially feasible for any one person to take legal action).

– individual legal actions, even where successfully undertaken, might be insufficient to change widespread discriminatory practices. It might be economical for the discriminator to simply pay damages to those victims sufficiently determined, well informed and well-resourced to sue, rather than change the discriminatory practice.

– civil proceedings, though less restricted in procedure than criminal cases, may nonetheless involve technical problems of proof.

some discrimination cases, in particular those where indirect or systemic discrimination is sought to be shown by analysis of patterns of disadvantage, require specialised skills which many lawyers and courts may not have.

– particularly in countries where the judicial system is primarily based on adversarial procedures, court proceedings may often result in confrontation rather than negotiation and settlement of disputes. Court proceedings may not, therefore, be the best approach where the critical need is a change in attitudes, or where discrimination or interference with rights was unintentional.

Human rights commissions and similar bodies therefore have an important role in making remedies effective and accessible. Dealing with complaints by conciliation is relatively informal and inexpensive.' In many cases it can lead to the parties agreeing on a solution much more suited to the individual circumstances of the case than any remedy which a court could order, including in redesigning policies and practices which have a discriminatory effect. The settlement agreed need not be confined in its application to the individual case, whereas for courts in many countries there are difficulties in making an order which applies to persons other than the immediate parties to the action. Conciliated settlements may also have important effects in changing attitudes.

INVOLVEMENT IN LEGAL PROCEEDINGS

Several human rights institutions which lack determinative powers but which refer complaints to courts or tribunals may appear in the courts and tribunals in support of a complainant's case. The Canadian Human Rights Commission, for example, has such a function.

The Australian Commission is able to appear in court to support orders for the enforcement of Commission determinations. It also has a more general power to intervene in legal proceedings, not confined to those brought under human rights legislation, in order to bring relevant principles of human rights law to the attention of the court. Exercise of this power is conditional on the leave of the court, and (in a practical sense) on there being a basis in domestic law for the application of international human rights instruments.

[54] The court system, in many countries, is now effectively beyond the reach of those except the well-to-do or those of the poor who can arrange to get legal aid. For example, in Australia an action in the County or District Court now costs at least $40,000 on average, and a Supreme Court action at least $60,000 on average.

Where such instruments are effectively incorporated into domestic law, a similar function to this would appear to be of considerable relevance, in its direct effects in individual cases and in educating the judiciary and the legal profession generally.

COMMUNITY EDUCATION, AWARENESS OF HUMAN RIGHTS AND PARTICIPATION

National commissions are of major importance in promoting awareness of human rights, and generally have public education and information as an important function.' Part of this function is directly related to complaint handling.[%]

A number of national institutions also place particular emphasis on human rights training for government officials - including the police and the military. (The Philippines commission, for example, has done important work in this area.) This education seeks to build a culture of human rights wherein human rights violations are less likely to occur.

The comment that legal measures alone are insufficient for realisation of human rights applies to all categories of human rights, whether designated as "civil and political", "economic, social and cultural", or according to other classifications. While it is clear from experience that different methods may be needed for the realisation of different rights, it is also clear that simple divisions cannot be drawn along the lines of civil and political rights on the one hand and economic social and cultural rights on the other. The realisation of civil and political rights often requires considerable resource commitments, including assistance to disadvantaged groups to enable them to assert their rights. Conversely, the idea that the realisation of economic social and cultural rights is simply a matter of provision of adequate resources is a caricature of these rights as human rights, as well as being contradicted by experience.

Despite the clear position in international law that the different categories of rights are indivisible', arguments continue to be advanced that one or the other has priority: in simple terms, that civil and political rights are irrelevant until basic economic needs are met; or, conversely, that if certain political rights are respected that satisfaction of economic needs will follow. There have been expressions of concern, by

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55 This function is expressly provided for in the responsibilities of the Australian national Commission under each of the Acts it administers. Similarly, the New Zealand Human Rights Commission has the function "to promote, by education and publicity, respect for and observance of human rights" listed first among its statutory functions: New Zealand Human Rights Commission Act s.5(1)(a).

56 In Australia, for example, the national commission has conducted a major awareness campaign for young women on the protection provided by the Sex Discrimination Act against sexual harassment, particularly in employment and education. This arose from an analysis of individual complaints which showed that few young women were aware of their rights and how to exercise those rights. As well as indicating how to seek a remedy for discrimination, this campaign had a preventive purpose - to assist young women in preventing this form of discrimination from occurring.

57 Note for example the comment of the Hon Justice RN. Bhagwati: "...each category of human rights is indispensable for the enjoyment of the other. Hence, it is axiomatic that the promotion respect for and enjoyment of one category of human rights cannot justify the denial of the other category of human rights": Inaugural Address, in Developing Human Rights Jurisprudence: the Domestic application of International Human Rights Norms (Report of the Judicial Colloquium, Bangalore 1988), Commonwealth Secretariat, p.xxii.

some Western governments and commentators in particular, that attention to the right to development will reduce attention to the more traditional categories of human rights.

It is interesting that at the recent Global Consultation on the Right to Development it was reportedly Western representatives who asserted the extremely doubtful position that economic, social and cultural rights were simply a matter of satisfaction of basic needs, while it was representatives from developing countries who asserted the more defensible and useful view that economic, social and cultural rights, as human rights, involved rights to participate in economic and social development and decisions, as envisaged in the Declaration on the Right to Development. Human rights are not things which can simply be handed out by government to a passive population. They involve opportunities for people to shape their own lives individually and collectively. A major challenge for national institutions, including specific human rights institutions (which has also been addressed in previous United Nations studies), is to ensure that rather than being bureaucratically remote, they promote participation and the empowerment of disadvantaged groups in society.

PUBLIC INQUIRY MODEL

A problem in giving effect to economic and social rights, in particular (but also in systemic discrimination affecting other rights), is that the issues may often be too wide to be addressed by an individual complaint. One of the most significant and innovative powers given to the Australian Human Rights and Equal Opportunity Commission is the power to conduct public inquiries. This power enables the commission to investigate and report upon human rights problems of a more general nature. Typically, public inquiries by the Australian Commission have involved taking oral evidence (in public hearings as well as confidentially where necessary), receiving written submissions from interested individuals, NGOs and government agencies, further research and analysis of the evidence in the light of relevant international human rights law, and the publication of a report with findings and recommendations which is presented to Parliament.

Public inquiries on human rights issues have an important educational function in addition to identifying human rights problems or abuses and recommending solutions. This power is particularly effective in dealing with situations which involve people who do not have the financial or social resources to lodge individual complaints.

Major inquiries recently conducted in Australia have included:

(i) a national inquiry into homeless children;

(ii) a localised inquiry concerning lack of services to particular Aboriginal communities;

[58] See R.L. Barsh, "The Right to Development as a Human Right: Results of the Global Consultation", (1991) 13 Human Rights Quarterly 322-338. (Note also that the participants in the Consultation affirmed that "participation is the right through which all other rights in the Declaration of the Right to Development are exercised and protected": U.N.Doc.E/CN/4/1990/Rev.1(1990) ch.7 par.177; note also par. 157, emphasising the need for indigenous participation and consent to development plans in view of the extent to which indigenous peoples have been victims of unsustainable activities carried out in the name of development in many developed and developing countries.

(iii) a national inquiry on racist violence;

(iv) a localised inquiry on health services to an Aboriginal community.

(v) A national inquiry on the human rights of people with mental illness (which is not yet completed.)

(Details of these inquiries are provided as appendix C to this paper.)

RELATIONS WITH NON-GOVERNMENT ORGANISATIONS (NGO's)

Relations with non-government organisations, although the subject of a separate session at this seminar, also need to be emphasised as being of critical importance in effective work by any national commission to promote and protect human rights.

A number of national commissions include representatives from community organisations within their membership.'

Several national commissions have associated with them a formally constituted advisory body including representatives of the community or of community organisations. In Mexico, for example, the National Commission on Human Rights has a Council composed of persons prominent in human rights, which conducts studies and issues recommendations to the Commission.' In Australia, the legislation which created the national commission permits establishment of a number of such committees to advise the Commission. Moreover, it specifically requires the establishment by the Government of a Committee to advise on matters of discrimination and equality in employment.'

In addition to formal links through advisory bodies, or community representation in the membership of national Commissions, co-operation with community organisations more generally is important. In many countries the number of non-government organisations concerned with issues which include human rights aspects is very large, making it impossible that they all be included directly in advisory bodies or in Commission membership.

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[59] For example the National Human Rights Commission of Togo set up in 1987 included an elected representative of the Togolese Red Cross, and two lawyers elected by the Bar Association, in addition to elected representatives of women, youth, workers, and the traditional chiefs, together with a number of other members: Initial Report of Togo to the Human Rights Committee, U.N. Doc. CCPR/C/36/Add.5.

[60] U.N.Doc. E/CN.4/1991/23/Add.1. In addition, there are bodies which facilitate consultation directly between the community and the government. In Morocco the Human Rights Consultative Council serves as a forum for consultation on human rights between non-government organisations and the government: see U.N.Doc. E/CN.411991123.

[61] When the Government completes the steps to establish this Committee, it will comprise, in addition to representatives of employer organisations, government and unions, representatives of relevant groups including women, Australia's indigenous people and people with disabilities. This Committee will advise the Commission on policy issues in this area, and is also expected to be of great assistance in community education and promotion of non-discriminatory practices. Its advice will be of particular value in dealing with the practical implementation of non-discrimination in various employment settings. There is also a specific Privacy Advisory Committee comprising representatives of interested organisations to provide advice to the Privacy Commissioner on issues in relation to the protection of the right to privacy.

The Australian national commission's charter specifically mandates us to work with non-government organisations, which we do with a large number, both on long term policy, through regular consultations, and on a day to day basis. Several examples of specific types of co-operation are:

(1) The Australian Commission conducts a regular formal consultation, generally on an annual basis, to which non-government organisations interested in human rights are invited. More frequent informal consultations are conducted on specific issues. This consultation gives NGOs information which they can use in their various fields of human rights activity, as well as assisting to co-ordinate their efforts. It also assists the Commission to ensure that its work program and methods of work are of continuing relevance to the community.

(2) The Convention on the Rights of the Child provides a recent example of close co-operative work between the Australian Commission and NGOs in relation to an international instrument. First, in providing advice to the Government on its position in the drafting of the Convention, the Commission took account of views expressed by NGOs in its regular consultations. Second, the Commission co-ordinated a group of NGOs which, together with the Commission itself, engaged in public education and promotion concerning the Convention: through the national media, through publications, and through community networks. This work was crucial in achieving relatively early ratification of the Convention in view of misunderstandings regarding human rights law and the role of the United Nations which continue to exist in some sections of the community. The third stage is that the Commission, jointly with a major national NGO, is currently conducting a review of Australian law and practice relating to children, based on the Convention, which will result in recommendations to Government on further necessary measures for implementation of the Convention. This review includes a survey both of non-government organisations and of government agencies. The information gathered should be of assistance in ensuring that Australia's first report to the Committee on the Rights of the Child is as comprehensive and accurate as possible.

(3) In the area of the rights of people with physical, intellectual, sensory and psychiatric disabilities, the Australian Commission has worked closely with non-government organisations to promote the translation of international standards into national legislative protection. The Commission engaged a major NGO representing people with disabilities, in co-operation with other NGOs in the field, to produce a report on areas of need for increased protection. After two years of consultation and research, the Commission put proposals to the national government for legislation against discrimination in this area. The Commission is now participating in a government committee preparing that legislation, and is continuing to consult with NGOs as legislative proposals develop.

(4) NGOs can also play a crucial role in what may be termed the "empowerment" of members of disadvantaged groups to bring their concerns to the attention of national commissions. A specific example may be found in the conduct of the Australian Commission's public inquiry on the human rights of people affected by mental illness. Because of experience of discrimination and denial of rights, and in some cases more directly because of their medical condition, many people with mental illness are reluctant to approach any official body directly. Community organisations have played an important role in facilitating evidence by many individuals to this Inquiry - either by serving as an intermediary or by providing them with

encouragement to personally make submissions. The advice of such organisations has also been valuable to the Commission in designing its procedures to be as accessible as possible.

SPECIFIC ISSUES OR GENERAL HUMAN RIGHTS JURISDICTION

A structural feature which has important implications for the work of national institutions in promoting and protecting human rights is whether there are several institutions with jurisdiction to deal with specific categories of rights and/or discrimination, or only one national commission with more general human rights jurisdiction.

A number of national commissions have jurisdiction defined by reference to any human rights treaties to which the nation is a party. [62] The Australian Commission has jurisdiction only in relation to the international instruments included in its legislation but, as already noted, these cover a very wide range of rights and there is provision for further instruments to be added.'

In Canada, the Human Rights Commission has jurisdiction to deal with discrimination on a wide range of grounds, including sex, race, religion, marital or family status, disability or age. The Commission does not have direct jurisdiction regarding civil and political or economic, social and cultural rights per se, but only so far as these are affected by discrimination. However, in democratic and economically developed societies such as Canada or Australia, many violations of civil and political, or economic social and cultural, rights are likely to include an element of discrimination against disadvantaged and relatively politically powerless groups.[64] In practice, therefore, the Canadian Commission may be seen as exercising a fairly broad human rights jurisdiction, despite the fact that the direct enforcement of civil and political rights as such (and of some economic, social and cultural rights, in particular Aboriginal rights and language rights) is allocated separately to the courts under the Canadian Charter of Rights and Freedoms.

In New Zealand, the Human Rights Commission has jurisdiction in relation to human rights generally, and specific jurisdiction in relation to discrimination on grounds of sex, marital status and religious or ethical belief. Jurisdiction over racial discrimination is exercised by the Race Relations Conciliator, who is a member of the Human Rights Commission but has separate statutory responsibilities

62 For example the Turkish Human Rights Inquiry Commission: see U.N.Doc. E/CN.4/1991/23/Add.1; the Philippines Commission on Human Rights and the Guatemala Attorney for Human Rights; see U.N.Doc. E/CN.4/1991/23.

63 The Australian Commission's jurisdiction covers discrimination on grounds of sex or race in a wide range of areas, and on other grounds including religion, national origin or nationality, social origin, political opinion, sexual preference, marital status, criminal or medical record, trade union activity, age, impairment, or disability of any kind in relation to employment, as well as having jurisdiction in relation to civil and political rights, the rights of children and the rights of people with disabilities. The Privacy Commissioner is also a member of the Commission and is assisted by Commission staff in his functions.

64 Thus in Australia, although civil and political rights are generally well respected, equality of civil and political rights is not in fact enjoyed by Aboriginal people, by people with disabilities, by many children or in some cases by people of non-English-speaking backgrounds. In most cases, though not always, the human rights of the majority and the politically powerful are likely to be reasonably well protected by the democratic political process.

and maintains a distinct staff. There is also a separate Children's Ombudsman in New Zealand and in a number of other jurisdictions.

In the United Kingdom, the Equal Opportunities Commission has jurisdiction in relation to sex discrimination while the Commission for Racial Equality has jurisdiction regarding racial discrimination, but there is no national commission with general human rights jurisdiction.[65]

In Sweden, as noted earlier, there are a number of Ombudsmen. The Ombudsman Against Ethnic Discrimination deals with racial discrimination in the labour market and in other aspects of public life. The Equal Opportunities Ombudsman deals with sex discrimination. The jurisdiction of the Parliamentary Ombudsman is not specifically defined by reference to human rights but includes some human rights issues within the more general jurisdiction to supervise actions of government authorities.[66] In Finland there is also a separate Equality Ombudsman who deals with issues of sex discrimination.°

In our experience there are a number of advantages in having an integrated human rights body rather than separate bodies to deal with different grounds of discrimination and other aspects of human rights.°

Where the different grounds of discrimination are combined under the jurisdiction of an integrated Commission, connections and similarities between different discrimination issues can be more clearly seen. This has several consequences:

(a) It promotes co-operation between members of different disadvantaged groups and gives each an interest in the protection of the others.

(b) Consequently, the political position of a human rights commission is made more secure. This can be of considerable importance since it is inevitable that from time to time effective advocacy of human rights will involve disagreement with significant political forces in society.

(c) Expertise and experience in one area of discrimination, both in legal interpretation and in practical measures, will frequently be relevant in other areas.

(d) An integrated body makes possible more effective use of resources and specialised expertise, including in human rights law.

Another very important feature of an integrated human rights body is that it helps to counteract the impression that anti-discrimination law unfairly gives special rights to particular groups .° A more helpful

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6.5 There may be some relationship between this fact and the relatively high number of cases before the European Commission on Human Rights which have concerned the United Kingdom.

U.N.Doc. CCPR/C/58/Add.7.

[67] See U.N.Doc.E/CN.4/1991/23.

[68] A number of these points are noted by Tarnopolsky, supra at 169.

[69] Much ill-informed comment to this effect was made in Australia, for example, in the early period of operation of race and sex discrimination laws.

and less divisive approach is that human rights law exists to ensure the equal right of all persons to enjoyment of human rights, including members of minorities who are in particular need of protection. It also reinforces the fact that equality and non-discrimination are an integral part of human rights in international law rather than being something distinct.' This approach is emphasised particularly in those countries (Australia and New Zealand for example) where the same body has responsibility for anti-discrimination law and in relation to civil and political rights more directly.

Particular bodies for particular areas of discrimination and human rights have the advantage of ensuring that the issues within their jurisdiction (for example sex discrimination or the rights of indigenous peoples) receive appropriate priority, and may assist in ensuring that the issues in each area are dealt with by persons of appropriate expertise and sensitivity. These concerns, however, would appear to be equally capable of being addressed by instituting an integrated collegiate body with designated officers having specific responsibilities. Clearly, in an integrated body, it is necessary to ensure that each area receives proper priority and a share of resources relative to the needs which exist. The degree of integration achievable in practice is, of course, dependent to some extent on national conditions, including the views in this respect of the disadvantaged groups principally concerned.

RELATIONS WITH INDIVIDUALS

1. INDIVIDUAL COMPLAINTS

Although in some countries the main function of specific human rights institutions is to provide advice to government on issues of policy and legislation, it is generally recognised that an important function of a human rights commission is to accept complaints from individuals.' Dealing with individual complaints is also a principal part of the functions of an Ombudsman.

2. "CLASS ACTIONS" AND REPRESENTATIVE COMPLAINTS

In a number of jurisdictions there is provision for an individual affected by discrimination or other human rights violation to complain not only on his or her own behalf but on behalf of others similarly

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70 See similarly Mr Justice Wallace, supra, at 159. This is particularly important to emphasise in common law countries where there has been a tendency to think of human rights only in terms of civil liberties. In the same paper Mr Justice Wallace noted that the New Zealand Commission has advised that its jurisdiction regarding discrimination is too narrow: p.160.

71 [This is the case with independent commissions with specific statutory functions regarding human rights and/or discrimination, such as those of Australia, Canada, New Zealand, the Philippines, Togo, and the United Kingdom; with a number of bodies established within government departments, such as the Mexican National Commission on Human Rights, established within the Department of the Interior; and with a number of bodies associated directly with national Parliaments, such as in Ecuador, Guatemala and Turkey.]

affected.' In Australia, the Sex Discrimination Act lists a number of factors which should be present for a matter to be considered as a representative complaint: that the complainant is a member of the class affected or likely to be affected; that the complainant has personally been affected by the conduct in question; that the class of persons is so numerous that it is impractical to deal with the matter simply by joining a number of specified individuals to the complaint; that there are questions of law or fact common to the members of the class; that the claims of the complainant are typical of the claims of the class; that multiple complaints would be likely to produce inconsistent results; and that the grounds for the action complained of appear to apply to the whole class, making it appropriate to grant remedies to the class as a whole. The same section also provides, however, that a matter may be dealt with as a representative complaint wherever this is demanded by the justice of the case.

Provision for representative complaints helps to ensure that more general social problems are not treated only on an individual basis in the complaint process. Problems of a purely individual complaint based approach have already been noted in this paper under the heading of activities for protection and promotion of human rights. In particular, a successful individual complaint may not always be enough to secure a change in a more widespread discriminatory practice, and the damage to any one person (and therefore the likely amount of compensation) may not be sufficient to make it worthwhile even to take action. A representative complaint may also help to reduce the disparity in resources between individual complainants on one side and a large institution such as a corporation or government agency on the other. Representative complaints appear particularly appropriate in cases of indirect discrimination, where an apparently non-discriminatory requirement in fact has a disproportionate and unjustifiable adverse impact on a disadvantaged group.

3. COMPLAINTS BY THIRD PARTIES OR NGOS

The most vulnerable members of society may not be in a position to lodge a complaint or to authorise others to do so on their behalf, because of the very circumstances which render them vulnerable: for example, persons detained incommunicado, or people with severe physical, intellectual or psychiatric disabilities, or whose legal capacity is limited for other reasons. This last group includes, importantly, children.

This is addressed to some extent by provisions allowing a number of national commissions to receive complaints from third parties or from non-government organisations." More specific provision is

[72] Examples of such provisions may be found in the Canadian Human Rights Act s.40(4) and the Australian Sex Discrimination Act, sections 50, 70, 71 and 72. The Australian Sex Discrimination Act s.61 also allows the Commission itself to decide that a number of individual complaints should be heard together.

[73] Section 70(2).

[74] This is the case, for example, with the National Human Rights Commission of Togo: see U.N.Doc. CCPR/C/36/Add.5; and the Canadian Human Rights Commission: Canadian Human Rights Commission Act s.40(1).

made in some cases for complaints by trade unions.[75]

Specific provisions allowing third parties and non-government organisations to bring complaints are desirable, to avoid technical arguments regarding who has "standing" to complain. Where such complaints are possible, it would also appear desirable to specify that the complaint should not proceed if the person on whose behalf the complaint is made does not wish it to proceed.'

4. CAN THE COMMISSION INITIATE INVESTIGATIONS ITSELF?

A number of national human rights institutions have jurisdiction to initiate an investigation of possible cases of discrimination or other human rights abuses without needing to receive a formal complaint.[77]

This power is important - given that many sections of society remain at best inadequately aware of their rights and how to exercise them; that vulnerable groups or individuals suffering violations of human rights (for example, prisoners or persons affected by mental illness) do not always have effective representative organisations or advocates to act on their behalf; and that people or groups who are the victims of violations of human rights may be reluctant to approach any official agency with a complaint.

RELATIONS WITH THE STATE

A variety of institutional types have been noted in this paper:

- institutions created by decision of the Parliament and composed of members of the legislature;
- institutions constituted within a government department such as the Ministry of the Interior or the Ministry of Foreign Affairs;

institutions created by legislation.

The first two of these types may be seen as having some advantage in more direct involvement in the process of legislation and policy making.

However, an important feature of a separate commission set up by statute is its greater independence from government. In Australia for example, although the functions of the national commission include giving advice to government, the Commission is independent by law and is not subject

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75 Such provision is made in Australia under the Sex Discrimination Act s.50, and the Racial Discrimination Act s.22. The Human Rights and Equal Opportunity Commission Act does not specify any restrictions on who may complain and therefore implicitly permits complaints by third parties, NGOs and trade unions.

76 Such provision is made in Canada: Canadian Human Rights Act s.40( ), and in Australia under the Human Rights and Equal Opportunity Commission Act s.20(2).

77 For example, the Philippines Commission on human rights may investigate cases on its own motion: see IJ.N.Doc. E/CN.4/1991/23. The Canadian Human Rights Commission Act, s.40(3), provides that the Commission may initiate an investigation itself where it has "reasonable grounds" to believe that a person is engaging in a discriminatory practice. The Australian Commission has power to initiate an investigation in any case "where it appears to the Commission to be desirable to do so": Human Rights and Equal Opportunity Commission Act s.20(1); or in the case of race and sex discrimination "where it appears to the Commission that a person has done an act which is unlawful" under the legislation: Racial Discrimination Act s.24, Sex Discrimination Act s.52.

to direction by government in the performance of its functions, including in handling complaints and in initiation of national or local inquiries. This independence has been a crucial part of the effectiveness of the Commission's operations.'

ADVISORY OR BINDING JURISDICTION

The Ombudsman and similar institutions do not generally make binding determinations, but either refer cases to the courts or other bodies with power to take binding decisions, or else make non-binding recommendations addressed to the government agency which is the subject of the complaint or to the legislature.

A number of more specific human rights institutions also appear to have a purely advisory jurisdiction. The principal force of the recommendations of such institutions is the force of public opinion.' For such institutions to be effective, therefore, it is important that their reports and recommendations be made public and that this function should be independent of government control.'

In several instances, national human rights institutions have binding jurisdiction is some areas (or have associated with them specialist tribunals which have binding jurisdiction) but advisory jurisdiction only in other respects. Commonly there is a distinction between certain grounds of discrimination which are declared unlawful, and regarding which binding determinations may be made, and other human rights matters, regarding which advisory jurisdiction only is created. This is the position, for example, in New Zealand. In Australia, determinations under the Sex Discrimination Act, the Racial Discrimination Act and under aspects of the Privacy Act are enforceable.' In cases of discrimination on other grounds such as disability, sexual preference and age (these being additional grounds of discrimination declared pursuant to Article 1 of the Discrimination (Employment and Occupation) Convention) and in cases regarding rights under the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child and the U.N. Declarations on the rights of people with disabilities, the Commission has power only to

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[78] The New Zealand Commission regards its own independence as similarly vital: see Mr Justice Wallace, supra at 157.

[79] This has been noted, for example, by Mexico regarding its National Commission on Human Rights: "The strength of its recommendations is of a moral nature, in accordance with the Commission's credibility in society, and is enhanced by the fact that failure to comply with its recommendations will be commented on in its periodic public reports, which would imply a high political cost for the authority involved": U.N.Doc. E/CN.411991/23/Add.1 par.2.

[80] In Australia, the Human Rights and Equal Opportunity Commission reports to the Attorney-General, who is required to lay the reports of the Commission before Parliament: Human Rights and Equal Opportunity Commission Act s.46. In addition, the Commission's functions of promoting public awareness and discussion of human rights permit it to publish papers itself.

[81] As noted earlier this requires enforcement action through the courts in the case of sex and race discrimination since Commission determinations are not immediately binding.

report and make recommendations.'

Power to make non-binding recommendations and experience gained in the operation of legislation on this basis may, in some instances, be useful as a transitional measure before the introduction of legislation providing for enforceable remedies. This model allows for a period of community education before legislation is introduced imposing binding obligations, and affords government agencies, employers and other interested parties a period to adjust their practices. It may also be a means of ensuring that problems in the operation of legislation are discovered before enforceable legislation is introduced. In particular, it may be important to give judges some guidance in the interpretation of human rights law in cases where the judiciary is not familiar with interpreting and applying statements of rights, and in translating international law into domestic effect.

CONFLICTS OF JURISDICTION

1. NATIONAL COMMISSIONS AND THE COURTS

As noted earlier, in several countries there is both a national human rights commission or similar body with jurisdiction to receive complaints, and a judicially enforceable Bill of Rights. Where these jurisdictions overlap, complainants may be expected to approach whichever institution appears more likely to give the remedy desired, although as discussed above there are problems in effective access to the courts for members of disadvantaged groups (and indeed, in many countries, for all but a minority of the population) so that the national commission may remain the only remedy effectively available.

As administrative bodies, national commissions established under human rights legislation are generally subject to the supervision of the courts, including in their interpretation of this legislation. However, in specific cases where commissions are not directly bound by a court decision they may tend to take a broad approach based more on the purposes of the legislation - whereas courts (at least in common law countries) may adhere more closely to stricter domestic rules of legal interpretation.

One area where conflicts may arise is in approaches to positive measures designed to promote equality for disadvantaged groups. In some cases courts taking a formalist approach to discrimination law may regard these as constituting "reverse discrimination"."

One interesting mechanism for ensuring that measures which are not in fact discriminatory are not struck down by a formalist approach to anti-discrimination law by the courts (without providing for excessively wide legislative exceptions) is the provision in the Australian Sex Discrimination Act for the Human Rights and Equal Opportunity Commission to grant exemptions from provisions of the Act. This power is required to be exercised consistently with the purposes of the legislation and is subject to judicial review, so that it is not used to undermine the protection of the law against discrimination. The power to

[82] The Commission has recently recommended legislation to enable binding determinations to be made regarding discrimination on a number of further grounds - including age and disability. Legislation on disability is currently being prepared by the Federal Government, in consultation with the Commission, as noted earlier in this paper.

[83] For discussion of problems in this area see e.g. W.Sadurski, "Gerhardy v. Brown v. the concept of discrimination", (1985) 11 Sydney Law Review.

grant exemptions has also been relevant in avoiding misinterpretations of anti-discrimination law in industrial tribunals. In other jurisdictions, a similar purpose is served by provisions which allow the human rights or anti-discrimination commission to certify that a measure or program for the benefit of a disadvantaged group, or measures conforming to certain guidelines, are permissible.

2. HUMAN RIGHTS COMMISSIONS, OMBUDSMEN AND OTHER AGENCIES

In many cases where a human rights complaint is made against a government agency, it may be possible for the matter to be dealt with either by the human rights commission or by the Ombudsman where both exist. In such cases it is necessary for one agency to be able to refer complaints to another, and for both agencies to maintain good communications. In Australia, areas where both the human rights commission and the Ombudsman have been involved have not caused conflicts of jurisdiction to any significant extent.

3. FEDERAL - STATE CONFLICTS

A detailed examination of the operation of human rights institutions in Federal systems is beyond the scope of this paper. It is important, however, that where both Federal and State or provincial human rights mechanisms and legislation exist, these should be effectively co-ordinated - so that individuals are not deprived of a remedy by jurisdictional conflicts and so that more effective or appropriate provisions or procedures in one jurisdiction are not displaced by less suitable measures in the other.

In Australia, Federal legislation displaces any inconsistent State legislation by virtue of the Australian Constitution. Both the Sex Discrimination Act and the Racial Discrimination Act contain provisions indicating to the courts that the Federal legislation does not displace any State legislation which is capable of operating together with the Federal legislation and which furthers the objects of the relevant international Convention in each case. [85]

CONCLUSION AND RECOMMENDATIONS

1. The jurisdiction of a human rights commission should be defined as broadly as possible.
2. This jurisdiction should include monitoring and reporting on the nation's compliance with international instruments on human rights. National commissions may usefully be involved in the preparation and presentation of country report under human rights treaties.
3. Preferably, the charter of the commission should be established by law or by the Constitution.
4. The independence of the commission should be specified in its charter, including by providing for a fixed term of appointment of its members.
5. Where a number of human rights institutions exist in a country, their functioning should be closely co-ordinated.
6. A desirable model incorporates the greatest possible degree of integration of responsibility for different types of human rights and discrimination, together with specific legislative and

Section 109.

[85] The Convention on the Elimination of Discrimination Against Women, and the Convention on the Elimination of Racial Discrimination.

institutional provisions to protect and promote the rights of particularly disadvantaged or vulnerable groups.

7. A national commission on human rights should be mandated to consult and work with non-government organisations. It is desirable for human rights commissions to be accompanied by formal advisory bodies or other structures to ensure close contact with NG0s.

8. It is desirable for national commissions to be authorised to work with and consult international organisations and other national commissions.

9. National conunissions should have broadly defined promotional and educational functions in relation to human rights.

10. National commissions should have power to review existing and proposed legislation for consistency with human rights, and recommend legislative and other measures to protect human rights.

11. National commissions have an essential role in providing effective and accessible remedies in cases of discrimination and human rights violations. National commissions should be authorised to receive complaints from individuals on their own behalf; from individuals representing themselves and others similarly affected ("class actions"); from third parties; and from NG0s, including trade unions and other representative organisations.

12. National commissions should also be empowered to undertake broader investigations, including by conducting public inquiries involving taking of evidence and making a public report.

13. It is highly desirable for national commissions to be authorised to initiate an investigation of their own motion.

14. Procedures for making a complaint and for the handling of complaints should be as simple, accessible, and inexpensive as possible. Provision may usefully be made for the commission to attempt to resolve complaints by conciliation. Confidentiality of the conciliation process is an important part of its effectiveness.

15. Provision should be made for referral of complaints by the human rights commission to other agencies including the courts and the Ombudsman (where a separate office of the Ombudsman exists) in appropriate cases.

16. The commission should have power to gather evidence and require production of documents and other evidence for the purposes of its investigations.

17. Where a complaint cannot be resolved by conciliation, provision should be made for a determination to be made. Preferably, such determination should in the first instance be made by the human rights commission or by a specialist human rights tribunal.

18. Effective and accessible means of enforcement of the determinations of the commission or tribunal should be provided.

19. In some cases, depending on national conditions including other institutions which exist, it may be appropriate to give recommendations of the human rights commission advisory rather than binding status.

20. In cases where determinations or recommendations of the human rights commission are advisory rather than binding, these should be made publicly available. Provision should be made, in particular, for the tabling of the reports of national commissions before the legislature.

APPENDIX A:

NON-EXHAUSTIVE LIST OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

Australia, Human Rights and Equal Opportunity Commission

Canada, Human Rights Commission

Ecuador, Ad Hoc Commission on Human Rights of the National Congress

Finland, Committee on International Human Rights

Finland, Equality Ombudsman

France, National Advisory Commission for Human Rights

Guatemala, Human Rights Commission of the Congress of the Republic

Guatemala, Attorney for Human Rights

Mexico, National Commission on Human Rights

New Zealand, Children's Ombudsman

New Zealand, Human Rights Commission

New Zealand, Race Relations Conciliator

Norway, Children's Ombudsman

Norway, Equal Opportunities Commissioner

Norway, Human Rights Committee

Philippines, Commission on Human Rights

Sweden, Equal Opportunities Ombudsman,

Sweden, Equal Opportunities Commission.

Togo, National Human Rights Commission

Turkey, Human Rights Inquiry Commission

United Kingdom, Equal Opportunity Commission

United Kingdom, Commission for Racial Equality

Zaire Department of Citizens' Rights and Civil Freedoms

APPENDIX B: STRUCTURE AND FUNCTIONS OF AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

Note: Paragraphs 11(1)(b) and (c) refer to functions pursuant to co-operative arrangements with State governments. Section 31 confers on the Commission similar functions regarding discrimination in employment as section 11 confers regarding human rights.

APPENDIX C: PUBLIC INQUIRIES ON HUMAN RIGHTS IN AUSTRALIA

* NOTE: Reports of each of the Inquiries listed will be available at the seminar.

1. THE TOOMELAH INQUIRY

The first public inquiry conducted by the Australian Human Rights and Equal Opportunity Commission was a local inquiry into the economic and social rights of the Toomeiah Aboriginal community - having regard to the standards laid down in the Convention on the Elimination of All Forms of Racial Discrimination. The inquiry conducted hearings in the area itself (near the N.S.W / Queensland border) and received evidence from individual members of the Aboriginal and non-Aboriginal communities, from local community organisations and leaders and from federal, state and local government authorities. The community had experienced a long history of dislocation, discrimination and inadequate servicing. The standard of housing, health, education, water and other basic services was totally inadequate, (as in many other Aboriginal communities) and well below that enjoyed by neighbouring towns with a white population. The inquiry identified fundamental problems in co-ordination, allocation and acceptance of responsibilities between different government departments and different levels of government. (These problems have adverse effects on Aboriginal communities in many other parts of Australia.)

The inquiry has resulted in significant improvements in the services provided to the local community involved. The Commission was concerned, however, that similar problems in other communities might not be addressed. We are therefore conducting a follow up project on the adequacy of water supplies to remote Aboriginal communities generally. The Commission is approaching the issue not as an abstract engineering issue but on the basis of consultations with the affected communities. As with the Toomelah inquiry itself, however, the announcement of this project by the Commission has resulted in several positive responses from government even before the Commission has reported its findings.

2. THE HOMELESS CHILDREN INQUIRY

The Homeless Children Inquiry was a national inquiry conducted by the Commission with reference to the principles of the Declaration of the Rights of the Child, (stipulating that children are entitled to special protection, adequate housing and protection against neglect, cruelty and exploitation). The report of this inquiry was presented to the federal government and parliament in February 1989 and then made public. The inquiry did more than just describe the problem, affecting tens of thousands of children. It identified the inadequacies of government responses, and made recommendations to correct them. Some of these recommendations went into some detail on the design of social programs. (This level of involvement with the details of policy was found necessary to give definite content to the economic and social rights involved.)

Giving practical effect to rights with significant public resource implications involves political processes. The level of responses to the homeless children inquiry - in public and political discussion, and in program responses (the federal government has provided $100 Million over four years) already implemented or proposed has resulted, in larfe part, from the human rights basis of the inquiry. That is, to have a situation identified as a major breach of fundamental international standards on human rights is not just a legal point - it is, in itself, a major political argument.

The inquiry heard evidence in every State and Territory from a wide range of people and organisations. That extensive process of consultation assisted in framing a comprehensive set of recommendations on a wide range of issues dealt with by applicable human rights principles.

A government inquiry conducted without reference to human rights principles might look at homelessness purely as a problem in the supply of housing. Human rights instruments dictate a broader approach. First, the right to housing requires that shelter be accessible to young people - not just physically available. It also requires that a range of appropriate accommodation options be available - particularly for those groups who are the subject of particular disadvantage and/or discrimination (such as Aboriginal young people and young people with disabilities).

Other relevant rights - including the right to special protection and, specifically, protection against neglect or abuse - led the inquiry to conclude that accommodation services should be integrated with other support services where these are necessary, (including services to promote family reconciliation wherever possible and appropriate). Increased assistance and support services for families were also emphasised by the inquiry as a means of preventing homelessness, (partly arising from the references in the international human rights instruments to the central role of the family).

Human rights principles also led the inquiry to reject simplistic solutions, like forcing young people to return home if they are mature enough to make their own decision not to, or locking homeless children up in institutions.

The inquiry was also concerned by the vulnerability of homeless young people in their contact with the legal system. It made recommendations for improving the availability, accessibility and quality of advocacy and information services - in dealing with the criminal justice system, child welfare systems and social security and accommodation authorities. These recommendations, although directly related to the needs of homeless children, are also relevant to the protection of the rights of all children and young people - both regarding civil and political rights and economic and social rights.

The commission is continuing to actively monitor government responses to the Inquiry's report, including by reconvening the formal hearings of the Inquiry to receive evidence from governments and community organisations on the implementation of its recommendations. The Federal government and most State governments have implemented a number of major changes to programs in response to the report of this inquiry.

3. TUE RACIST VIOLENCE INQUIRY

This national inquiry was conducted by reference to the Convention on the Elimination of All Forms of Racial Discrimination. It examined racist violence and intimidation as forms of racial discrimination, and assessed their impact on the equal enjoyment of human rights in the civil, political, economic, social and cultural spheres.

The Report of the Inquiry, released in March 1991, analysed the adequacy of government and community responses, in particular by reference to the right to the equal protection of the law. It also examined preventive measures. The Inquiry found that racist violence against Aboriginal people was widespread and included officially perpetrated violence. It found that although the number of incidents of racist violence

against other groups was relatively low, there was a need for improved measures and procedures. The Report recommended legislative measures in a number of areas, including that Australia should introduce national legislation against incitement to racial hatred, in order to fulfil its obligations under Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination. The Federal Government is presently considering implementation of this recommendation. The Inquiry also made major recommendations in the areas of community education, and human rights training for public officials including police. The Commission is now working with both State and Federal authorities to put these recommendations into effect.

4. THE COOKTOWN INQUIRY

This inquiry concerned the provision of medical and health services to three Aboriginal communities in North Queensland. It was prompted by a number of incidents where it was alleged that racial discrimination had led directly to inadequate medical care for Aboriginal people. Again, the Inquiry took evidence from the local community, from government agencies and community organisations. The Report of the Inquiry was released last month. The Report does not fix responsibility on individuals for individual acts of racial discrimination. It is concerned, rather, to improve enjoyment of social rights in this area by dealing with inadequacies and inequalities in health care available, and in the need for increased Aboriginal community participation in the planning and operation of health services.

5. THE MENTAL ILLNESS INQUIRY

The Commission is presently conducting a national inquiry on the human rights of
people affected by mental illness - principally by reference to the International Covenant on Civil and Political Rights, the Declaration on the Rights of Disabled Persons and the Principles for the Protection of Mentally Ill Persons and for the Improvement of Mental Health Care (adopted early this year by the Commission on Human Rights). The inquiry has already received hundreds of written submissions and taken oral evidence from several hundred people affected by mental illness and organisations representing them, families and carers, experts and government authorities.

The major human rights issues including mental illness which have received attention as human rights issues in Australia prior to this Inquiry have been civil and political rights issues concerning involuntary treatment and detention, and protection against abuse. Clearly there are serious issues to be considered concerning the legal protection required in this respect.

The international instruments, however, also recognise a much wider range of rights which are extremely important and which the Inquiry will address - including rights to treatment, rehabilitation, education, counselling and other services; the right to economic and social security and a decent living standard; and the right to protection from discrimination, including in employment and in other areas of social life.