

***ASIA-PACIFIC FORUM OF NATIONAL HUMAN RIGHTS
INSTITUTIONS***

**PRACTICES OF NATIONAL INSTITUTIONS FOR
RECEIVING, INVESTIGATING AND RESOLVING
COMPLAINTS**

PART

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1.INTRODUCTION

1. In 1996 a significant advance was made in the development of human rights in the Asia-Pacific region. At that time the first regional gathering of human rights institutions occurred in Darwin, Australia, known as *the Asia Pacific Forum of National Human Rights Institutions*. This regional Forum – which

now includes Indonesia, The Philippines, Sri Lanka, New Zealand, India and Australia - has drawn on internationally accepted principles of human rights to promote regional co-operation, participation and compliance in relation to human rights protection.

2. This paper is a step towards promoting understanding and awareness, specifically in relation to how the various national Human Rights Commissions in the region operate. In particular, this paper will focus on the various models of receiving, investigating and resolving complaints by national institutions. It will form the basis of a resource document which will be available to all the Commissions in the Asia-Pacific and to those countries in the region contemplating establishing a Human Rights Commission. This paper is a 'work in progress'. Forum members are encouraged to provide corrections. In particular recent legislative and administrative practices may not be clearly reflected in the paper.
3. It is intended to be used as a comparative guide for those involved in human rights, illustrating the different institutional methods and innovations implemented throughout the region, as well as problems faced in handling complaints. The paper acknowledges that different needs and internal national contexts will require different methods and practices for individual human rights commissions - no one 'best practice' model is advocated. Rather it is hoped that the paper will assist countries in the region to be aware of the alternatives available in crafting an appropriate and effective national Human Rights Commission complaints process.

2.BACKGROUND

4. The origins of this report stem from the Second Asia-Pacific Regional Workshop of National Human Rights Institutions in New Delhi, in September 1997. At that forum representatives of the national Human Rights Commissions of the region, - consisting of India, the Philippines, Sri Lanka, New Zealand, Indonesia and Australia - reaffirmed their commitment to the principles and outcomes of the first Asia Pacific Workshop which had been held in Darwin in July 1996.
5. In particular the national institutions reaffirmed their commitment to the United Nation's 'Paris Principles'¹ which constitute minimum standard criteria for the creation and development of national human rights institutions. These principles are characterised by such features as independence in composition, appointment, funding and control; pluralist representation within the Commissions from NGO's, academics, religious, civic and administrative leaders; and being granted as broad a mandate as possible, set down clearly by legislative or constitutional means.
6. The Paris Principles also articulate the responsibilities and method of operation national institutions should undertake, from educative functions to ensuring compliance with international instruments, from reporting to government on human rights violations within the country to examining legislative and administrative provisions.
7. For the purposes of this paper, the most important responsibility the Paris Principles articulate is that regarding complaint handling.
A national institution may be authorised to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by

1. Principles Relating to the Status of National Institutions United Nations General Assembly Resolution 48/134

*individuals, their representatives, third parties, NGO's, associations of trade unions or any other representative organisation.*²

8. Accordingly, Commissions must seek an amicable settlement through conciliation or through imposed binding decisions on the basis of confidentiality where necessary. A Commission must inform a party filing a complaint of his/her rights, the remedies available and, if the complaint is not within the Commission's jurisdiction, inform them of appropriate alternatives. If a Commission hears a complaint and finds it has substance, it must make recommendations to the relevant authorities regarding any reforms required.
9. One of the outcomes of the Second Workshop relates specifically to the complaint handling aspect of the Paris Principles. The Workshop, *Requested the Forum Secretariat to prepare a paper that would gather information on the various models of national institutions of receiving, investigating and resolving complaints.*³
10. The Secretariat currently resides in the Australian Human Rights and Equal Opportunity Commission, and this paper represents a step toward fulfilling that request.
11. At the outset it is important to note the limitations of this paper. There were significant gaps in the information available to the author concerning the minute detail of operations of each Commission. These gaps in knowledge are duly noted throughout the paper. It is for this reason that this paper constitutes a 'first step' toward a comprehensive document of the complaint handling procedures in the region. It is intended as a work in progress and as more information on the various systems becomes available the project will be further developed.

2. Principles Relating to the Status of National Institutions: see Additional Principles concerning the Status of Commissions with Quasi-judicial Competence

3. Concluding Statement, Second Asia Pacific Regional Workshop of National Human Rights Institutions, 10-12 September 1997, New Delhi

3.REGIONAL COMMONALITIES AND DIFFERENCES

12. While the universality of human rights is accepted by all members of the Forum, their practical implementation and interpretation varies widely. The six countries within the Asia Pacific Forum - Australia, New Zealand, India, The Philippines, Sri Lanka and Indonesia - bring their own social, cultural, economic and practical contexts to their complaints processes. For this reason, this paper will not attempt to ascertain the one, most effective model for complaint handling. On the other hand, it is hoped that regional co-operation and comparison will afford the best possible model within each national environment.

*States will benefit from the experience of others, particularly those in geographical, political, economic or cultural proximity.*⁴

13. The efficiency and quality of the protection of human rights depends on local circumstances.

*Effectiveness...can only ever be measured by reference to the extent to which a national institution positively affects the human rights situation of individuals and groups in a given society.*⁵

14. Indeed the Commissions in the region differ in many respects. As the New Zealand Chief Commissioner, Pamela Jefferies indicated, the sheer difference in scale of complaint loads is staggering.

*The Indian Commission was approached by a young film maker wanting to make a TV ad to promote human rights. It screened once and within 24 hours they had 1000 new complaints and they have continued to build up to a current total of 18 000.*⁶

4. United Nations Centre for Human Rights, Professional Training Series No.4 'National Human Rights Institutions' Geneva 1995 at p10 para 65

5. United Nations Centre for Human Rights, Professional Training Series No.4 'National Human Rights Institutions' Geneva 1995 at pg 10 para 65

6. Human Rights Commission, Tirohia - Quarterly Newsletter of the New Zealand Human Rights Commission, July 1997.

15. The stereotypical complainant at each commission varies largely also. Annual reports indicate that in countries such as Indonesia, complaints are brought on behalf of a class or large group and resolving a complaint of such kind usually involves broader community focus, representative of the social emphasis on the importance of community over individual interests in that culture. On the other hand, in countries such as Australia or New Zealand there is a very individualistic rights focus, and this is reflected in the nature and procedure of their complaints mechanisms.
16. Linked to the previous point, there are significant differences in the region in both the *nature* of the human rights violation complained of - in terms of first and second generation rights - as well as who represents the main perpetrator of the violations⁷. In Sri Lanka, the Philippines and Indonesia the Military/Security/Police forces represent the bulk of respondents. Whereas in Australia and New Zealand it is most commonly the government and employers.
17. Some countries favour an investigative and reporting response to complaints - such as Sri Lanka and India - while others prefer methods of conciliation and personal outcomes. These preferences are inevitably tied to the type of complaints predominantly handled and who the alleged perpetrator is. Some types of complaints are more conducive to conciliation than others, particularly with regard to serious human rights violations. As nature of complaint is linked to method of resolution, so too is method of resolution linked to enforceability of outcome. The majority of Commissions in the area are recommendatory bodies only with no enforceable powers.⁸
18. Some Commissions in the region are facing a common problem concerning the impunity of respondents, where persons being charged with human rights

7. The Country by Country section of this paper in Part 5 illustrate this point by making subheadings of these issues for each country.

violations are let out on bail by the authorities and sent back to the positions of power they formerly held. For Commissions in the region affected in this way, the effectiveness of their work is thus undermined.

19. A difference embedded in the various Commissions' founding legislation involves the extent of the Commission's mandate to investigate. In India, for example, the Commission is restricted to Constitutional rights and the International Covenants directly enforceable by Indian Courts.⁹ In Sri Lanka, human rights complaints are limited to constitutional rights under section 32 of the Act.¹⁰ In the Philippines, the Commission is limited to investigation of civil and political rights, by article XIII section 18(1) of the Constitution.
20. Another practical difference is the degree to which the Commissions are decentralised and the relationships the national Commissions have with other regional commissions, arms of governments and human rights organisations. For example, the Philippines has a uniquely co-ordinated regional 'filter system' through which complaints are handled.
21. Despite all these differences and more, a number of common themes are emerging as issues shared by a number of, or indeed all Commissions in the forum. It seems almost superfluous to comment that all the Commissions in the region operate under severe resource constraints. There exist deficiencies in funding, staff, infrastructure and transport.
22. Such resource constraints have forced a re-prioritising of activities and complaints received. Overwhelmingly this has meant for most Commissions, a reduction in their educative and promotional role as well as longer term projects, which is very unfortunate for the development of a human rights

8. Potentially the closest thing to an enforceable system is the New Zealand Commission's Complaints Review Tribunal, officially independent of the Commission, but to a practical extent gives the Commission enforceable rulings - see part 5.4.3.

9. South Asian Human Rights Documentation Centre, International Human Rights Instruments and their Application in India, Human Rights and Human rights instruments in India, <http://www.hri.ca/partners/sahrdc/india/instruments.html>

culture in these countries. Regarding individual complaints it has meant focusing on complaints whose resolution will bring maximum relief and results. This has meant concentrating on systemic/class based complaints which have the potential for an educative overflow.¹¹ By reducing and tailoring both these essential functions the Commissions are forced to try and achieve the same ends through the one process.

23. Possibly tied to this resource problem in some countries is the very high rate of dismissed complaints in all countries. For a variety of reasons, from lack of standing, to lack of witnesses, to restricted mandates and definitions of human rights for complaint handling, many complaints received cannot be undertaken or resolved by the Commissions. Combined with a staggering proportion of general inquiries, these unworkable complaints take up a great deal of the Commissions' time in ascertaining their actionability and represent a significant drain on available resources.¹² As the Indonesia 1995 annual report states,

*The public still places excessive hopes in the National Human Rights Commission for realising their expectations in connection with their complaints. Furthermore, not all complaints actually relate to violations of human rights either directly or indirectly.*¹³

24. All Commissions suffer backlogs to various degrees in internal and external processing of complaints.¹⁴ This factor has a very negative impact on complainants who may suffer further violations and high costs waiting for the resolution of their complaint.

10. section 32, Report of the Standing Committee A, on the Human Rights Commission of Sri Lanka Bill, tabled June 7 1996

11. refer to bibliography to see annual reports of Australian, Indonesian, Indian and New Zealand annual reports.

12. note the new attempts by the New Zealand Commission to reduce such resource constraints with their 2 option model in line with UN Handbook recommendations see parts 4 and 5.4.3

13. The Indonesian National Commission on Human Rights, Annual Report 1995, Jakarta, Dec 31 1995 at p3. Acknowledged as a problem still in 1996 Annual Report p 2

14. Only New Zealand produced statistics on low waiting times for tribunal outcomes - see part 5.4.9

25. All these issues noted immediately above were canvassed at the Second *Asia Pacific Forum* held in New Delhi in 1997. The Concluding Statement of that meeting recognised the rapidly increasing caseloads Commissions face and the serious implications this has for their resource allocation. The Concluding Statement also recognised that individual Commissions were working to improve management practices and complaints systems. It went further and suggested national institutions within the forum co-operate through staff exchanges and technical assistance to help alleviate these pressures.

4.EFFECTIVE ELEMENTS FOR COMPLAINT HANDLING

BY NATIONAL INSTITUTIONS

26. The United Nations has expanded on the 'Paris Principles' and identified several 'effectiveness factors' for national institutions.¹⁵ They include:

- # independence;
- # a defined jurisdiction and adequate powers;
- # accessibility;
- # co-operation internally, regionally and internationally;
- # operational efficiency; and
- # accountability.¹⁶

27. *Independence* must be considered as a relative concept given that any Commission will have inevitable institutional, financial and reporting links with government. These links are acceptable as long as they do not hamper the Commission's ability to discharge its mandated functions. With regard to complaint handling, independence can be assured by the Commission being entitled to formulate its own rules of procedure which are unable to be modified and are strictly adhered to. Recommendations and reports likewise, should not be open to review by government. The Commission should be endowed with the legal authority to compel the co-operation of other organisations.

28. A Commission's *jurisdiction and powers* are usually set out in its founding document. Where possible founding legislation should give Commissions a

15. This section of the paper is drawn from the United Nations Professional Training Series No.4 'National Human Rights Institutions' published in 1995 as well as from a comparative study undertaken by Tracey Raymond on behalf of the Human Rights and Equal Opportunity Commission detailing 'best practice' elements of various Human Rights Commission practices.

16. United Nations Centre for Human Rights, Professional Training Series No.4 'National Human Rights Institutions' Geneva 1995 at pg10

precise jurisdiction rather than a broad, vague one. A defined structure will also promote *accessibility* to complainants who will be able to understand how the system works. To any complaints mechanism, accessibility is a threshold issue influenced by a Commission's structure, organisation and procedures. Physical accessibility is assisted by local and regional offices rather than one central office. However those complaints procedures requiring personal physical attendance will inevitably be less accessible. The powers of a national body, whatever they are, must be established by law and enforceable. The Commissions must have *adequate powers to permit the effective discharge of [their] responsibilities*.¹⁷

29. The United Nations recommends a co-ordinated and contextual approach to the jurisdiction of the Commissions to avoid technical conflicts which can affect the effectiveness of their bodies. It is clear that any national human rights institution should supplement the judicial process, providing an accessible, rapid and inexpensive alternative. While overlapping jurisdiction can cause tension between human rights groups, on the other hand the need for internal co-operation with NGO's, community groups and other organs of the state can increase accessibility to the process, reduce misdirected complaints and ensure an efficient process as well as increase the Commission's standing in the eyes of the community.

30. As mentioned in the first section, all commissions are understaffed, under resourced and overburdened. Commissions are responding to this by streamlining recruitment processes, personnel, procedural rules and methods and developing performance reviews. As scarce resources are a reality, Commissions must be managed carefully with prioritized plans. It will become evident that all Commissions in the region are adopting their own strategies in relation to this point.

17. United Nations Centre for Human Rights, Professional Training Series No.4 'National Human Rights Institutions' Geneva 1995 p13 at 96

31. In terms of *accountability*, the UN recommends that any requirements be set down in the founding legislation. Usually this will involve legal and financial accountability to parliament, with reporting obligations to parliament or the government of the day. Public accountability of the Commissions should also be encouraged through public scrutiny, comment and debate as well as through transparency of procedures and decisions.

4.1 INVESTIGATING COMPLAINTS

32. The United Nations recommendations mentioned above relate to the operation of Commissions as a whole. Principle and practice have also revealed standards specifically important for the smooth and effective operation of the complaints process in particular.

33. Criteria for the admissibility of complaints is essential, and should define the objects/areas¹⁸ against whom a complaint can be made as well as the subject matter/ground¹⁹ of the complaint. These criteria should be clearly set out in the Act or by reference to international documents. Any restrictions on object or subject must be analysed within the context of a balance between 'suitability' to local circumstances and the need for a national institution to carry out the purposes for which it was formed.

34. The legislation must outline comprehensively 'who' may complain. Usually it will state 'any person', but in practical terms issues may arise as to whether this includes non citizens, refugees, children, prisoners, class actions, associations of people or third parties.

35. The legislation or detailed regulations authorised by the legislation must also outline the procedure for submitting complaints. The process should be ultimately as affordable as possible for complainants in terms of transport,

18. For example in the workplace, in detention, against the military

19. For example discrimination or unlawful imprisonment, some countries like the Philippines/India/Sri Lanka have placed limitations on the subject matter that the Commission can investigate.

accommodation and filing fees. Complaints should usually be in writing to ensure details are correct and reliable, however flexibility should be provided to allow oral representations when required. Regional offices greatly assist ordinary citizen's ability to file complaints, particularly where physical presence is required. Information on the complaints process should be available in appropriate languages.

36. An effective complaints mechanism should facilitate complaint making and be as 'user friendly' as possible. The process should be informal within the constraints of fulfilling procedural requirements, it should use interpreters, allow familial support during inquiries and not require confirmation by affidavit. While complaints can not be anonymous²⁰, the procedure should ensure confidentiality for the complainant.

37. With regard to rejecting complaints, if any precondition of making a complaint as set out by the legislation is not met -for example, if a complaint is frivolous, lacks standing, or is outside jurisdiction - the complainant should be notified without delay and be informed of all other avenues of relief.

38. Whilst conciliation is not always the most appropriate method of resolution²¹, it is highly recommended by the United Nations as a method of Alternative Dispute Resolution, particularly in discrimination cases. Hence it is used commonly in countries like Australia and New Zealand where discrimination complaints feature prominently. With a skilled conciliation team, resolution has proven to be less expensive than formal investigation, speedier, less confrontational and has a tendency to lead to changes in attitude rather than punishment.

20. Practical reasons for this are so the Commission can verify the validity of the complaint, and because the Commission cannot provide a remedy to an anonymous victim.

21. For example where the violation complained of involves a very serious allegation like sexual abuse; where the power relationship between the parties will detrimentally effect any outcomes; or where the complaint is of a class nature and broader remedies/systemic change is required rather than individual outcomes.

39. Where conciliation is not appropriate, is not agreed to by a party, or indeed is not provided for in the founding legislation or procedures, investigation is an alternative option. The aim of investigation differs from conciliation which primarily endeavours to afford settlement of a complaint as soon as possible. Investigation, on the other hand aims to establish first whether a violation/illegality has occurred and if so, who is responsible.

40. For an investigation to be truly effective, it must be characterised by:

- an adequate legal capacity
- organisational competence
- defined and appropriate priorities, and
- the political will to pursue its work²²

For example, an investigation team must have the power to compel written/oral evidence; freedom to access all documents, to call parties to a hearing and to conduct on-site investigations. In order to ensure the investigation team has adequate powers to fulfill its functions, an umbrella clause in the legislation for 'all other necessary activities' is often very useful.²³

41. To ensure the irreproachable independence of the investigation procedure, investigatory standards should reflect the Commission's responsibilities and should never be deviated from except in specific, clearly defined circumstances. This element of investigations procedure is relied on by the Indian Commission who have stated that investigative standards are strictly adhered to.

The alternative anxiety, as to whether investigating staff drawn essentially from the existing investigative agencies would be able to establish its own

22. United Nations Centre for Human Rights, Professional Training Series No.4 'National Human Rights Institutions' Geneva 1995 pg 28 at para 217

23. United Nations Centre for Human Rights, Professional Training Series No.4 'National Human Rights Institutions' Geneva 1995 p32 para 260

*credentials of impartiality, has also, in large measure been overcome by the manifestly fair and fearless way in which the staff of the Commission have been functioning, receiving instructions from no other source but the Commission.*²⁴

42. An important aspect of the investigations arm of any Commission is the ability to carry out an inquiry *suo moto*.²⁵ This power is particularly useful with regard to persons unable to make complaints themselves, such as the poor, homeless, women, children, prisoners, minorities and those incapacitated. As these groups represent the great bulk of human rights violation sufferers, a *suo moto* investigation by the Commission greatly improves the accessibility of the Commission to them.

43. Finally, a Commission must provide remedies for violations. These can vary widely depending on the powers granted to the Commission, the type of violations that are complained of, and the Commission's relationships with other institutions of the State.

*While recognising inevitable differences, it is also important to acknowledge that powers to receive and investigate violations are of little utility without a corresponding ability to provide remedies for violations. The lack of such ability, as well as operating to discourage the submission of complaints, is likely to undermine the credibility of the complaints procedure itself.*²⁶

44. A Commission may be endowed with the power to *recommend* a change in practice or procedure, the reversal of a decision, adoption of measures, or an apology or damages from a government agency, public official, private party or organisation. These recommendations are not binding, but may create publicity about an issue, or lead to referral to a higher body.

24. National Human Rights Commission, Annual Report 1995-1996, New Delhi, Nov 1996 pg 45

25. 'of their own motion' -independent action by the Commission without having to wait for an individual to file a complaint

26. United Nations Centre for Human Rights, Professional Training Series No.4 'National Human Rights Institutions' Geneva 1995 p33 para 269

45. Referral to a relevant Minister, Agency, Tribunal, Parliament or Judiciary may occur generally after initial steps in investigation or conciliation. Referral can occur when a respondent fails to take account of a recommendation (as above), fails to meet terms of settlement or obstructs an investigation. A complaint can also be referred when agreement cannot be reached between individual parties, or when investigation reveals further issues or more appropriate avenues. Founding legislation should set out avenues for review, referral and appeal.
46. Some Commissions may have power to make determinations, providing relief to victims depending on the nature of the violation. These decisions may be binding and enforceable, but more often than not will be merely advisory - as is the case with hearings in Australia - with the right to appeal to an enforcing body.
47. A final method of remedying human rights abuses is through publication of results of decisions, investigations or conciliation carried out by the Commission. More often than not this method complements the other procedures, and plays the dual role of ensuring the credibility of the complaints mechanism and informing public opinion.
48. To a greater or lesser degree, all the Commissions in the region are aware of and responsive to these procedures and each individual Commission adopts them to some extent. This final section below examines to what extent each Commission complies with these recommendations and examines the practical implementation of complaints procedures in each country considered.

5.THE INDIVIDUAL COMMISSIONS - Structure, Mandate and Complaints Mechanisms.

49. The following Part is divided into **country sections** and **theme subsections**. The themes emanate from the previous Parts and may be compared between each country section.

5.1 INDONESIAN NATIONAL HUMAN RIGHTS COMMISSION - KOMNAS HAM

5.1.1 STRUCTURE

50. The Indonesian Commission was established by *Presidential Decree No.50* in 1993. The Commission's philosophical basis is set out in article 2 of the Decree which contains the Indonesian 'National Code', known as Pancasila.²⁷ In line with the Paris Principles, the Commission's independence is guaranteed in article 3.
51. Articles 6-8 of the Decree outline the structure, membership and appointment procedures of the Commission (see appendix 1). The main bodies of the Commission are the Plenary Session of the Committee; the three sub-commissions which each fulfill one of the Commission's functions; and the General Secretariat. Members total 25 part time prominent national figures and are elected by Commission members themselves, after having been initially appointed by the President in 1993.

5.1.2 MANDATE

52. Article 5 of the Presidential Decree sets out the activities which the Commission 'is authorised and obligated to conduct'²⁸ and which are shared out between the three sub-commissions. The activities are:

27. The Pancasila code contains 5 principles, they are: 1. Belief in the existence of God the Almighty; Striving to achieve a Just and Civilised Humanity; Maintaining Indonesian Unity; Adherence to Democracy which is guided by Inspirational Wisdom in consultation and representation; and Striving to achieve Social Justice for all the People of Indonesia.

28. 'The Authority of the Commission', Komnas HAM homepage
http://www.komnas.go.id/English/komnas/kn_text05.html 01/15/98

- To disseminate information and educate the nation about concepts of human rights : carried out by the Sub Commission for Education and Public Awareness on Human Rights;
- To monitor international treaties on human rights and advise the government on the merits of ratification : carried out by the Sub Commission for Monitoring the International Conventions on Human rights;
- To monitor and investigate the implementation of human rights and advise the related government agencies of its opinion, consideration and proposals : conducted by the Sub Commission for Monitoring the Implementation of Human Rights; and
- To foster regional and international co-operation on human rights : conducted directly by the Vice-Chairperson of the Commission.

53. The founding legislation/decreed for the Indonesian Commission is a very brief and broadly worded document. This means that although the Commission's mandate is not limited in the way other Commissions' are, its sheer broadness causes ambiguity in terms of defining the Commission's mandate when it comes to handling complaints. In practice, this broadness can have as much of an effect on the range of human rights violations a Commission will investigate as a narrow mandate. The legislation *does* make provision for the Plenary Commission to draw up more detailed 'Rules of Procedure' to set out specifically what, and how the Commission should investigate. The Commission is currently in the process of developing rules of procedure. The following details of how the Indonesian Commission's complaint procedure works are based on annual reports, NGO papers and contact with the Commission itself.

5.1.3 PROCEDURAL NATURE OF COMPLAINT HANDLING - INVESTIGATIVE OR CONCILIATORY

54. As indicated above, the Sub Commission for monitoring the implementation of Human Rights is the body responsible for handling complaints. This Sub Commission absorbs the great bulk of the work and resources of the Commission.

55. The Commission's procedure is based primarily on receipt of complaints, followed by the Commission contacting the district or regional administrative head responsible for the specific complaint in that area - whether that be village head, the head of the Labour Ministry, the commander of the Armed Forces in the region or the Chief of Staff. In *civil* cases the primary aim of the Commission is to invoke the assistance of the relevant authority to encourage a fair settlement and compensation through mediated consultation. Such consultation is led by the relevant authority, between the respective parties to the complaint. The Commission itself has limited involvement at this stage. The Commission can request a report from the said authority and can then choose to investigate it further, if they consider the matter has not been settled satisfactorily, by sending a taskforce to visit the area. In *criminal* cases, such as arbitrary detention, the Commission *recommends* an injunction and respect for a complainant's legal rights. This is clearly an advisory role.

5.1.4 ENFORCEABILITY OF COMPLAINT PROCEDURE - ADVISORY OR ENFORCEABLE

56. The Indonesian Commission's mandate is worded to allow it the investigative role mentioned in 5.1.3, but restricts it to *advising* the relevant government authority of the action that should be taken if the investigation reveals substance. Hence the Commission has no power to enforce its own decisions. It has no explicit authority to call witnesses or obtain documents. It cannot take a complaint through the court system but can refer cases there when consultation fails.

57. Practice has shown that as the Commissions reports are recommendatory. They have not always been comprehensively followed by government.

5.1.5 INDIVIDUAL OR SYSTEMIC FOCUS OF COMPLAINT PROCEDURE

58. Although the Commission's main function is the monitoring and handling of complaints which would indicate a rather individualistic focus, the nature of complaints in Indonesia - being land/property issues and industrial relations matters - often incorporate systematic outcomes and impacts. In addition, in the 1995-96 year, strategical and structural programs increased significantly.

5.1.6 INDEPENDENCE OF COMPLAINT PROCEDURE

59. A issue emerging from the Commission's focus on *local consultation* and *settlement* is the lack of central monitoring of outcomes. This is no doubt related to resource constraints.

5.1.7 ACCESSIBILITY OF COMPLAINT PROCEDURE

60. The Commission receives individual and group complaints by letter and in person, but it also has the power to initiate its own investigations and instigate quick response taskforces, as it did when the popular *TEMPO* magazine was banned in 1994.²⁹ Filing a complaint is free. The Commission currently has one regional office. Public information on its work is only available in Bahasa Indonesia. However the Commission does have its own Web Site in both Bahasa Indonesia and English.

29. The Indonesian National Commission on Human Rights, Annual Report 1996

5.1.8 NATURE OF RIGHTS VIOLATED

61. In 1996 most complaints received came from Iryan Jaya, East Timor and nationally throughout the workplace. The most common *grounds* of complaints were land/property issues, civil and political human rights violations and labour associated disputes. The nature of complaints received involve largely first generation rights.

5.1.9 EFFICIENCY OF COMPLAINTS PROCESS

62. Between 1995-1996 the Commission experienced an increase both in cases handled, and in cases received but which were not within jurisdiction. From January - December 1996 it received 2446 complaints, of these 1927 were substantiated whilst 1519 were handled 'selectively' because they were not specifically intended for Komnas HAM. The Commission asserts that one of their main problems is that they receive many complaints which are not actually human rights violations and which slow down the process and waste scarce resources and funds due to efforts in directing these complainants to alternative options.

Extravagant expectations by the public regarding Komnas HAM's ability to obtain rapidly the desired settlement in the cases submitted continues to be a problem³⁰.

63. Of the 1927 substantiated complaints in 1996, 1406 of them were settled in the initial stages through consultation whilst 121 still awaited further clarification by the parties. There is no indication in the 1996 report as to the outcomes of the remainder of those substantiated complaints.

64. The Indonesian Commission has covered vast territory in its initial five years of operation and an enlarged and active human rights awareness exists in Indonesia today as a result.

5.2 THE INDIAN NATIONAL HUMAN RIGHTS COMMISSION - NHRC

5.2.1 STRUCTURE

65. The National Human Rights Commission of India (NHRC) was established under the *Human Rights Protection Act 1993* No. 10 of 1994. Its membership consists of a Chairperson; a Supreme Court Judge; the Chief Justice of the High Court; 2 members with human rights experience; a Chairperson of the National Commission for Minorities; a Chairperson of the National Commission for Scheduled Castes and Tribes; and a National Commissioner for Women. Members are appointed by the President after recommendations by a legislative committee set up pursuant to section 4 of the legislation. Members can only be removed by the President on grounds of misbehaviour or incapacity after a Supreme Court inquiry pursuant to section 5. Their terms of office are for 5 years with reappointment potential until the age of 70. Under the terms of section 6(3), after holding office on the Commission, that person is ineligible for further employment by both the national and state governments.

5.2.2 MANDATE

66. The NHRC has a broad list of functions apart from its complaint inquiries, including:

- gaol visitation and reporting;
- reviewing constitutional and legislative safeguards;
- implementing international treaties;
- research, education and publications;

30. The Indonesian National Commission on Human Rights, Annual Report 1996 p2

- court interventions;
- assisting NGO's.³¹

67. In relation to the complaints process, some commentators believe the Commission's mandate is limited by the definition of 'human rights' contained in the legislation. Sub-Clause 1(d) defines human rights as *the rights relating to life liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the International Covenants and enforceable by courts in India.*³²

India is signatory to the *International Covenant on Civil and Political Rights (ICCPR)*, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the Convention Against Torture. These are the international instruments enforceable by the Indian courts.

5.2.3 PROCEDURAL NATURE OF COMPLAINT HANDLING - INVESTIGATIVE OR CONCILIATORY

68. Chapter 4 of the legislation deals with the Commission's procedure in the investigation of a complaint. In relation to its complaint hearing function, by sections 13 and 14 of the founding legislation, the NHRC is vested with the powers of inquiry of a civil court and with powers of investigation. These powers give the Commission a broad mandate to obtain evidence, documents and public records, call witnesses, as well as power of entry and seizure. All statements made to the Commission in inquiry or investigation are confidential.

69. The NHRC can inquire into complaints received, or initiate its own inquiry. This *suo moto* power of inquiry is particularly useful where the victims affected by the violation of human rights are ill equipped to submit and follow

31. see section 12

32. see section 1(d)

through a complaint themselves, for example those who are illiterate, minorities, homeless persons and those with a fear of retribution. This independent action by the Commission often originates from highly publicised press reports, NGO's and State Government reports.

70. Like Indonesia, the Indian Commission's founding legislation also gives the Central Government the power to make rules for the effective implementation of the Act. This power has been taken up in India with the production of a comprehensive set of regulations - *NHRC (Procedure) Amendment Regulations 1997*. Some of its main features follow.

71. The regulations define a 'complaint' as all petitions/communications received from a victim or their representative, in person or by post, fax etc. alleging a violation or negligence in preventing a violation by a public servant. Interestingly, unlike many of the regional Commissions, in India a complaint cannot be brought against a private party. Complaints can be made in any language scheduled to the Constitution and no fee can be charged for filing a complaint. A complaint will not be entertained for a variety of reasons, for example if it is frivolous, vague, anonymous or illegible; if it relates to a civil, labour or service dispute; or if it is a matter already before a court or tribunal.

72. Once a complaint is received it enters the registry for an elaborate sorting, scrutiny, and classification process to determine the entertainable from the non-entertainable complaints, and then must be placed before the actual Commission within 7 days (24 hours for urgent cases).³³ All complaints are initially examined by a single bench of the Commission and then may be referred to a full/division bench. The Commission acts very much like a court with court practice, procedure and powers (see appendix 2: synopsis and summons forms).³⁴ The Bench receives evidence and a synopsis of the Registrar's report. It can dispose of the case without recommendations, or can call for an investigation report from the responsible government authority

33. see rules 11-15 of the 1997 Regulations

to be supplied within two weeks of the order. The Commission must consider the report and if it has recommendations to make, it must communicate them to the relevant authority within 7 days of making them, calling for comments and any action to be taken to be provided within one month.³⁵ If there are no comments or the comments are inadequate, the Commission under rule 28 may make orders as it deems fit, and publish that order, providing copies to both the complainant and the government.

73. No party has a right to seek review against the order or proceeding of the NHRC, although the original bench has a discretionary power to look at a decision again.³⁶ After an Order, the Commission requires reports of the follow up action taken.

5.2.4 ENFORCEABILITY OF COMPLAINT PROCEDURE - ADVISORY OR ENFORCEABLE

74. Generally, if the violation was perpetrated by a public servant, the NHRC can *recommend* prosecution by the government. The Commission can approach the Supreme Court or High Court for directions as to writs and can recommend immediate interim relief to the victims and families. Recently the Commission has commented on the *inordinate delay in the implementation of the recommendations of the Commission forcing it in some cases to approach the Courts for remedial action for want of adequate statutory power to enforce its orders.*

This aspect of the legislation is currently under review.³⁷ It represents a thematic problem for all Commissions in the region.

75. An idiosyncratic element of the Indian Commission's comprehensive procedures is the way it exempts the armed forces from independent

34. see rules 17-25 of the 1997 Regulations

35. see rule 27

36. see rule 32

37. National Human Rights Commission, *Human Rights Newsletter*, Vol.5, No.6, June 1998.

investigation under section 19. The NHRC can only request and receive a report on a complaint against the armed forces from the central government and make *comments* on that report to the government. This aspect of the Indian legislation is currently under review (see part 5.2.6).

5.2.5 INDIVIDUAL OR SYSTEMIC FOCUS OF COMPLAINT PROCEDURE

76. As will be demonstrated, there is clearly a more systemic and less individually focused complaints process in the Indian Commission, as compared to, for example New Zealand or Australia. The India Commission has led the way in the region to focusing on long term systemic solutions to complaints, partly as a policy choice, and partly due to resource constraints. The New Zealand Chief Commissioner, Pamela Jefferies made this statement in relation to India and its choice of a systemic focus,

*There is a way forward through these backlogs...it is to focus on dealing with complaints on a systemic or class basis.*³⁸

77. In India, such systemic activities include national workshops, human rights training for public servants, the military and prison staff, and prioritising complaints with the broadest run off effect.

5.2.6 INDEPENDENCE OF COMPLAINT PROCEDURE

78. The Commission's Investigation Team is headed by a Director General of Police and staffed by various other levels of police personnel.³⁹ For some commentators, this staffing choice is perceived as being open to bias and abuse as the police forces represent one of the largest violator groups in India. However the NHRC believes that since its beginnings in 1993, such

38. Human Rights Commission, Tirohia - Quarterly Newsletter of the New Zealand Human Rights Commission, July 1997

39. see section 11

misgivings about the independence of the Investigative Team have been overcome.

79. The separate procedure associated with alleged violations by security personnel has been highly criticised by NGO's given the high proportion of human rights violators in India coming from the armed forces. However in its 1996 Annual Report the NHRC acknowledged this criticism and responds by advising that in practice, whenever the NHRC doubts a report issued by the Central Government, it seeks supplementary reports and requests the presence of senior officers to provide information. So far, armed forces personnel have complied readily, the central government has published its report and informed the petitioner of the outcome.

80. At the writing of the 1996 annual report, there had been no instance of a State Government or Authority refusing to comply with the NHRC's recommendations.⁴⁰ More recently however, a high level Advisory Committee has been established to review certain aspects of the *Human Rights Act*, including section 19's special procedures for armed forces. The Commission acknowledges that *this exclusion (of armed forces from investigation) has resulted in a large number of such violations going uninvestigated and unpunished.*⁴¹

Amendments to the Act are expected to follow the review, which will seek the views of NGOs, human rights activists and the general public in considering a broad range of reform issues.

5.2.7 ACCESSIBILITY OF COMPLAINT PROCEDURE

81. Good relations between State and Central government are essential to ensure the accessibility of the Commission. Indeed some state governments draw incidents to the attention of NHRC. The Indian Commission has acknowledged it faces problems in its dealings with some State

40. National Human Rights Commission, Annual Report 1995-96, New Delhi 1996 p43

Governments. When investigating complaints, certain states have a tendency to 'cancel facts', disown responsibility and are perfunctory in responding to recommendations.⁴² The NHRC has appealed to the State Government leaders to assist. The Commission is developing a Central /State Government initiative to make its complaint handling more effective nationally.

82. Currently State Human Rights Commissions are being established - as was intended by the 1993 legislation - to save time, money and energy in complaint handling and to provide access to better services. District level committees are also being set up to further decentralise human rights education at the local level. The NHRC has also made a decision in principle to establish regional offices to redress grievances more speedily; to strengthen liaisons with state governments; and to establish circuit benches of the NHRC.⁴³ Anywhere a complaint is made, it is free to lodge and can be made in any language under the Constitution.

5.2.8 NATURE OF RIGHTS VIOLATED

83. Between 1995-1996 the Investigations Team dealt predominantly with issues of custodial death and rape; police torture; excessive use of force in areas of insurgency; mistreatment of inmates in gaols and mental homes; and police inaction during caste/ communal riots. It is clear that in India complaints are predominantly concerned with civil, political and economic and social rights rather than discrimination(see appendix 3). Police were the main respondents in the total number of complaints. In the 1995-96 year there were 22 criminal prosecutions brought against police, with another 29 recommended by the Commission. There were a further 79 police under suspicion(see appendix 4).

41. National Human Rights Commission, *Human Rights Newsletter*, vol.5 no.6, June 1998

42. *ibid* at 44

43. *ibid* at 41

5.2.9 EFFICIENCY OF COMPLAINT PROCEDURE

84. In the 1995-1996 fiscal year the Commission received 10 195 complaints, along with 1277 complaints carried over from the previous year. The total complaint load therefore was 11 472 - by far and away the highest level of complaints in the region. Of that grand total 11 153 were considered by the Commission, and of those 5894 were dismissed, 1178 were disposed of with directions to the relevant authorities, and 4081 were given directions for further enquiries by the Commission. Of those given directions for further enquiries, 546 were concluded by reports from either the relevant authority or the NHRC (see appendix 5).
85. In the most recent report available at the time of writing, the NHRC articulated a number of recommendations it suggests for its own complaint handling procedures in the near future. In relation to the disturbing problem of deaths in custody, the Commission would seek that persons in custody be entitled to have a friend or relative informed of their arrest or whereabouts. It would recommend that all post mortems following deaths in custody be video filmed and audio taped to avoid the problem of doctors bowing to police pressure.
86. At the writing of the 1995-96 annual report, only 4 state Human Rights Commissions had been established, and the Commission urged the government to fulfill the intention of the 1993 legislation by promptly establishing other state Commissions. Finally, the Commission, operating as it does within the dilemma of police as violators and enforcers of human rights, recommends improving the quality of policing through education and training in human rights. *An efficient, honest police force is the principal bulwark of the nation against violations of human rights.*⁴⁴

44. *ibid* at 96

5.3 THE SRI LANKAN HUMAN RIGHTS COMMISSION

5.3.1 STRUCTURE

87. The Sri Lankan Commission is the newest in the Asia Pacific Forum. The *Human Rights Commission of Sri Lanka Act, No.21 of 1996* was passed in 1996 and became operational on 17 March 1997. This legislation created the Commission and gave it its powers and functions. The Commission is in the early phases of development and as such its procedures are also at an embryonic stage. Therefore this section of the paper dealing with the Sri Lankan Commission will only deal briefly with the structure and potential of the Commission, the current activities its staff are undertaking and give the context of the challenges it faces.

88. The Sri Lankan Commission is a body corporate with perpetual succession, and its 5 members are appointed by the President on the recommendations of a Constitutional Council.⁴⁵ Of the 5 members, 1 is nominated by the President as Chairperson and CEO with a casting vote. All members have a 3 year term, with grounds for removal.⁴⁶ The members are eligible for reappointment. The Commission's administration is controlled by a Secretary and its staff are appointed under Part 3 of the Act.

5.3.2 MANDATE

45. In the interim, while the Commission is being established, the President appoints members on the advice of the Prime Minister, the Leader of the Opposition and the Speaker.

46. see sections 3 and 4 of the legislation

89. The broad functions of the Commission are contained in section 10 of the Bill and include:

- inquiring into and investigating executive and administrative practices and procedures for compliance with *fundamental* rights, and to promote respect for *fundamental* rights;
- inquiring into and investigating complaints of *fundamental* rights, and to mediate and conciliate those complaints;
- to advise and assist the government in legislating with regard to *fundamental* rights;
- to make recommendations to the government to ensure that all laws conform to international *human* rights norms and standards, and on the need to accede to treaties;
- and to promote education and awareness.⁴⁷

90. In addition to these functions, and for the purpose of discharging them effectively the Commission is vested with certain powers, as contained in section 11 of the Act. These include:

- power to investigate an infringement or potential infringement;
- power to appoint and delegate to, Provincial Sub Committees;
- power to intervene before any Court on a matter of *fundamental* rights (with permission of that court);
- powers of regular inspection of the welfare and conditions of those detained or arrested;
- power to take any steps as directed or referred by the Supreme Court;

47. see section 10.

- ability to undertake research into and promote awareness of human rights through seminars and workshops and publications; and
- power to award costs to the complainant for the cost of making the complaint.

91. The Commission's mandate is limited by the definitions of 'rights' in the founding legislation. The Act contains two distinct definitions of rights. '*Human Rights*' include all the rights enunciated in the ICCPR and the ICESCR. The use of this definition only applies to the Commission's *educational role*. The other kind of rights referred to are '*Fundamental Rights*' which are limited to constitutional rights.⁴⁸ It is only this second kind of right which the Commission has the mandate to investigate in its complaints mechanism.

92. The Sri Lankan Commission was created within the environment of a number of already well established human rights bodies such as the Human Rights Task Force, the Commission on the Elimination of Discrimination and the Supreme Court which is vested with fundamental rights jurisdiction. The Commission was created to be the co-ordinating 'parent body' of these organisations.⁴⁹

5.3.3 PROCEDURAL NATURE OF COMPLAINT HANDLING - INVESTIGATIVE OR CONCILIATORY

93. In addition to the powers listed in section 11, the Commission has specific powers of investigation, outlined in section 12. Like Indonesia and India, the founding legislation provides for the Minister to make regulations for carrying out the Act.

48. It is important to recognise that the Sri Lankan Government currently proposes a program of constitutional reform which would generously expand the constitutional protection of international human rights. Unfortunately there is political opposition to the reform proposals so it is unclear if and when they will be implemented.

49. Dr. Udagama, 'Creating an Effective Human Rights Commission' Daily News, 20.01.96, New Delhi

94. In terms of the Commission's investigations power, the Supreme Court can refer a matter to the Commission for *inquiry and report*. The Commission can also investigate - on its own motion, or as the result of a complaint – executive and administrative action which infringes or imminently infringes *fundamental* rights. In addition it has the power to investigate arrests, disappearances or detentions made under the *Prevention of Terrorism Act*. Under section 28, the Commission has not only the power to monitor conditions of those in detention, but also requires that it be informed of arrests made under that Act within 48 hours.
95. When inquiring into a complaint, the Commission has the power to summons and receive evidence and examine witnesses, but is not constrained by the usual rules of evidence applicable to courts in Sri Lanka. Failure to give evidence to the Commission would constitute contempt of court. All evidence is subject to confidentiality and is not actionable against a witness separately.⁵⁰
96. If no violation of rights is established by the Commission, the complainant must be informed within 30 days. If an infringement is found however, the matter is referred for conciliation/mediation. Conciliators are appointed by the Commission under the provisions of section 16, and all conciliations are video taped.⁵¹ If conciliation fails, or is not considered appropriate, the matter is reported to the Commission. If it is successful and a settlement is reached, the Commission is informed of the outcome.
97. A valuable provision in the Sri Lankan Bill is the discretion of the Commission, where conciliation is deemed inappropriate, to recommend to the appropriate authorities a prosecution or to refer the matter to an appropriate court to be heard and determined. The Commission also has the ability to make recommendations to the appropriate authorities with a view to

50. see section 20

51. this innovation was brought about as a result of the Standing Committee A Report which amended the Bill.

ensuring such infringements do not occur again.⁵² As mentioned above, the Commission has the power to award costs for the making of a complaint as a result of the Standing Committee amendments to the Bill.

98. If in any situation the Commission is uncertain of the scope of a particular *fundamental* right, under section 17 it has the power to refer the question of scope to the Supreme Court for a determination.

5.3.4 ENFORCEABILITY OF COMPLAINT PROCEDURE - ADVISORY OR ENFORCEABLE

99. The Commission's powers are recommendatory only and not enforceable by the Commission or the Courts. Copies of any Human Rights Commission recommendations must be sent to the aggrieved, the institution concerned and the Minister for the institution concerned. After which, anyone addressed in a recommendation must report to the Commission on acts proposed or taken in response. If such a party fails to report, the Commission must inform both the President and the Parliament.⁵³

5.3.5 INDIVIDUAL OR SYSTEMIC FOCUS OF COMPLAINT PROCEDURE

100. At this stage, the only information available was with regard to the individual focus of the complaint system. This would seem appropriate in the early days of the Commission

5.3.6 INDEPENDENCE OF THE COMPLAINT PROCEDURE

52. see section 15.

53. see section 15(7),(8).

101. It seems that complaints against security forces in relation to extra judicial killings and disappearances would form the bulk of complaints. By their very nature these complaints would be difficult for the Commission to resolve. Obtaining evidence and finding a willing complainant may be significant problems, despite the contempt of court procedures for failing to give evidence.

5.3.7 ACCESSIBILITY OF COMPLAINT PROCEDURE

102. Section 11 makes provision for the establishment of regional sub-commissions, which will no doubt advance the Commission's accessibility. There is currently a network of offices with coordinating and investigative officers.

5.3.8 NATURE OF RIGHTS VIOLATED

103. As the Commission is in the very early stages of development, there are no statistics available concerning the nature and quantity of complaints they receive.

5.3.9 EFFICIENCY OF COMPLAINT PROCESS

104. No data was available from the Commission as to the efficiency of its procedure. More information on their process will only become available once the Commission has had time to develop an established practice.

5.4 THE NEW ZEALAND HUMAN RIGHTS COMMISSION

5.4.1 STRUCTURE

105. The New Zealand Human Rights Commission administers the *Human Rights Act 1993*, which became operative on 1 February 1994. The Commission existed prior to this date and operated under different legislation. The legislation establishes a maximum of 7 Commissioners, currently there are 6: a Chief Commissioner, a Race Relations Commissioner, a Proceedings Commissioner, a Privacy Commissioner and two general Commissioners.⁵⁴

106. Commissioners are appointed by the Minister for a term not exceeding 5 years, on the basis of their knowledge and experience of the particular area of human rights.⁵⁵ The Chief Commissioner has the responsibilities of Chairing the Commission, handling administration and allocating spheres of responsibility.⁵⁶ The Commission has responsibility under Part 1 of the Act for education programs; guidelines; community and NGO liaisons; research; ministerial responsibilities to ensure compliance with International Human Rights Law standards; and an interesting program known as 'consistency 2000' aimed at ensuring all domestic laws and regulations comply with Part II of the Act.

107. Part II deals specifically and in detail with discrimination, the main focus of the Commission's work. Its main division, and the most important for the purposes of this paper, is the Complaints Division. This division consists of the Race Relations Commissioner and not more than 3 other Commissioners. The division possesses the Complaint Hearing Functions contained in Part 3

54. section7

55. section9

56. section10

of the Act.⁵⁷

5.4.2 MANDATE

108. The Act defines 'Discrimination' as :

When a person is treated less favourably than another in the same or similar circumstances (direct discrimination) and indirect discrimination where conditions are actually neutral but in effect discriminate.

109. For a complaint to be considered by the Commission, it must be within the Commission's jurisdiction. This is determined by the ground of the complaint and the area in which it occurred. The ground of complaints which the Commission will handle include: Disability; Age; Political Opinion; Employment Status; Family Status; Race/Colour (including racial harassment); Ethnic/National Origin; Religious/Ethical Belief; Sex (including pregnancy, childbirth, sexual harassment); and Sexual Orientation. These grounds apply to an individual or to someone discriminated against because they are associated with/related to that individual. They apply to past circumstances as well as discrimination based on a belief or assumption about someone, whether true or not.

110. The New Zealand Act, like the various Australian Acts, applies in public areas only. Areas of discrimination covered are Education, Provision of Goods and Services, Housing and Accommodation, Access to Public Places and Employment (both seeking and during). The Act has a number of exceptions to the grounds and areas listed above.⁵⁸

5.4.3 PROCEDURAL NATURE OF COMPLAINT HANDLING - INVESTIGATIVE OR CONCILIATORY

57. section12

111. The procedure for complaint handling is well laid out in the Act and in the comprehensive procedures manual.⁵⁹ The Act provides that anyone in New Zealand who bona fide believes they have been unlawfully discriminated against and can provide some evidence of discrimination can lodge a complaint.⁶⁰ A complaint can be lodged by phone, in writing or in person. On contacting the Commission a complaints officer discusses the matter with both the parties involved and determines whether the Commission has jurisdiction. Other factors considered at this stage include whether the complaint is trivial or vexatious, ensuring that the complaint is not more than 12 months old, and that there is no alternate form of redress.

112. Once the Commission decides these initial matters the complaint can be filed in one of three ways: as a file resolvable by initial conciliation, as a file requiring investigation or as a file requiring significant consideration by the Commission as a whole.⁶¹

113. The Commission encourages as a first option pre-opinion initial conciliation. If both parties agree the Commission will try and settle the matter immediately through meetings, letters and phonecalls - this process is entirely confidential. A settlement can involve an apology, compensation, references, access to services previously denied and an assurance against repetition of the violation. The Commission cannot impose a settlement, however it advises settlements in line with Tribunal decisions. In the majority of cases this method is successful,⁶² however if conciliation fails or is simply not appropriate and either one or both parties desire it, the Commission will

58. There are moves afoot in parliament to extend these exemptions by amending the 1993 Act, something the Commission is strenuously opposing - see homepage - media

59. see section 75 of the Act

60. homepage <http://www/hrc.co.nz> p 3/4 - the complaints process

61. similar in nature to the issues undertaken by the Australian Human Rights Commission's National Inquiry function.

62. About 1/3 of complaints found to have substance are not settled and go to the proceedings commissioner for a decision as to whether the complaint should go the Review Tribunal - currently 15 annually make it to the Tribunal stage- homepage Complaints p4

formally investigate the complaint and the complaints officer must produce a report.

114. In New Zealand all forms of discrimination have the same procedure - unlike the Australian system. The Commission's role is impartial, they take no advocacy role, merely assisting the parties to understand each other's position, to clarify the issues and develop options to settle the matter. Conciliation is the Commission's preferred option because it is quicker and uses less Commission resources than investigation, involves fewer people and ensures better confidentiality. It is also more conducive to situations where a continuing relationship is required. The investigation process provides an indication of what the Complaints Review Tribunal may decide and is important to highlight structural discrimination.

115. The New Zealand Commission's 1997 Annual Report ushered in a change in perspective on the most efficient and effective manner of dealing with complaints. It reassessed its complaint handling priorities and determined that those priorities were to achieve a free, speedy, unthreatening process which adhered to the principles of natural justice while maximising efficiency. Of the two main options for handling of complaints - conciliation and investigation - the Commission regards early conciliation, before investigating the detailed substance of the complaint, as the primary goal. The Commission considers that investigations are often drawn out, expensive and resource consuming processes which due to their lengthiness, do not necessarily afford better justice. By the same token the Commission realises the tension between efficiency and justice,

*There is a very delicate balance between early conciliation and the allegation of duress and undue pressure being placed on parties.*⁶³

116. However, the Commission asserts that the containment of costs through this method will allow it to deal with broader educative issues and research.

63. Human Rights Commission, 1997 Annual Report, 30 June 1997, Auckland.p 9

Like other countries in the region, the New Zealand Commission is recognising the need to focus less on individual complaints and to concentrate on more systemic issues.

5.4.4 ENFORCEABILITY OF COMPLAINT PROCEDURE - ADVISORY OR ENFORCEABLE

117. The Commission has the power under this process to compel evidence and relevant information, to interview, call witnesses and examine documents.

The investigation must be conducted in private, the accused must be informed of his/her rights and both sides have the opportunity to comment on the report. After such comment the Proceedings Commissioner considers the report and forms an opinion on the substance of the complaint using the civil standard. The complaint can be closed as having no substance, or it can be settled by a compulsory conciliation which is *binding* in nature.

118. If this binding settlement is not complied with, or if conciliation is not appropriate the decision of the Commissioner on the matter must go to the Complaints Review Tribunal, which consists of three members and functions as an independent judicial body. The Tribunal is independent of the Commission and under the control of the Department of the Courts. It has the powers of a court and can make binding decisions, award damages and hold public hearings. Complainants are represented by the Commission's lawyers free of charge. At the tribunal all evidence and documents from the investigation - not from the conciliation - can be used. The Tribunal's decisions may be appealed against in the High Court.

119. All of this procedure from initial enquiry to the Tribunal occurs at no cost to the complainant. However, if the Commission decides to close a complaint for lack of substance, an individual can take their complaint to the Tribunal at their own expense. At the tribunal stage, a respondent can represent themselves or at their own expense may seek legal representation.

5.4.5 INDIVIDUAL OR SYSTEMIC FOCUS OF COMPLAINT PROCEDURE

120. The very nature of the New Zealand legislation - devoting Parts II and III to discrimination and complaint handling - indicates an individualistic approach to complaint handling. However the Commission itself, in part of its bid to encourage initial conciliation and hence free up resources from the investigation process, is aiming to increase both its systemic approach to complaint handling itself, as well as its educational and structural activities - see 5.4.3.

5.4.6 INDEPENDENCE OF COMPLAINT PROCEDURE

121. The independence of the New Zealand Complaint procedure is guaranteed by the clearly defined role, functions and mandate based on international standards and spelt out in legislation. It is further guaranteed by the fixed terms of office of its Commissioners, its method of reporting to parliament and is exemplified in its support from NGOs and community organisations.

5.4.7 ACCESSIBILITY OF COMPLAINT PROCEDURE

122. The New Zealand Commission is highly accessible to the average resident. The entire process is free for a complainant, unless they seek to take a complaint to the tribunal on their own. There are a number of user friendly information brochures and fact sheets on each type of discrimination covered by the legislation, printed in English and Maori. The Web Site too, has both English and Maori versions. One factor that reduces the Commissions accessibility is the requirement that there be no other available form of redress to a complainant's problem, for a complaint to be accepted.

5.4.8 NATURE OF RIGHTS VIOLATED

123. The most common ground of complaint is Sexual Harassment - which increased by 45% in 1997 - and the most common area is employment - which climbed by 88% in 1997. Other significant grounds were sex discrimination, age discrimination, family status and disability discrimination. Significant areas were in the provision of goods and services and in providing pre-employment details.(see appendix 6).

5.4.9 EFFICIENCY OF COMPLAINT PROCEDURE

124. The New Zealand Commission is the only Commission in the region to include in their Annual Reports self-effacing statements of service performance, indicating targets for the year and actual performance achieved. These statements concern both quality, quantity and timeliness aims and represent a unique initiative for Commissions within the region (see appendix 7).

125. Statistics for the New Zealand Commission are comprehensive. At 30 June 1997 the Commission had 235 cases opened and 13 waiting, as opposed to June 1996 when there were 241 open and 40 waiting. In 1997, 33% of cases were settled by early conciliation as compared with 24% in 1996. A tension pervading both these sets of statistics is that while sexual harassment represents the main ground of complaint, the Commission finds it is often not conducive to conciliation due to the emotion and discomfort involved between the parties.

126. The Commission faces a number of challenges in the future. The Commission believes its complaints process still requires streamlining. Currently 'complaints' are only classified as including those actually within jurisdiction, this takes no account of the time and resources the Commission's help desk spends answering enquiries that can not be taken to the next stage, thereby under-reporting the work of the Commission. On

average the 3 staff members of the help desk handle 12-15000 enquiries per year, only 250-300 of which are within the jurisdiction of the Commission.⁶⁴

127. The help desk's database is not sophisticated enough to record the actual nature of the enquiries: an upgrade is required. In addition to this technical problem is the complaints recording system, which operates on a stand-alone database, not integrated with the Human Rights Commission network nor the enquiry database, hence it is impossible to track the progress of a complaint through the system.

128. During 1996-1997, the Proceedings Commissioner introduced 'threshold tests' to ensure that scarce resources are directed to priority cases. *These changes have brought about efficiencies but the litigation programme continues under conditions of serious resource constraint.*⁶⁵ An unusual advantage of the New Zealand Commission is that the Complaints Review Tribunal - unlike many similar bodies in the region - continues to run smoothly, even in an environment where more and more cases are reaching this stage of the process. Cases are heard within 2-3 months of being filed, and decisions are handed down within 4-8 weeks of the hearing. At present there is no backlog of cases or outstanding decisions. The average time between receipt of a complaint and its final disposition is from seven to twelve months. This is remarkably prompt compared to the backlog of cases in some countries.

64. Pamela Jefferies letter, 30.01.98

65. Human Rights Commission, 1997 Annual Report, 30 June 1997, Auckland at 33

5.5 AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

5.5.1 STRUCTURE

129. The original Human Rights Commission was established in 1981 under the *Human Rights Commission Act*. It was later replaced in 1986 by the Human Rights and Equal Opportunity Commission under the *Human Rights and Equal Opportunity Commission Act*. The Commission has a mandate for up to 6 full time Commissioners and a part-time President. Currently there are 4 Commissioners:

- Race Discrimination Commissioner and acting Aboriginal and Torres Strait Islander Social Justice Commissioner;
- Sex Discrimination Commissioner;
- Privacy Commissioner(not dealt with in this paper)⁶⁶;
- Human Rights Commissioner and acting Disability Discrimination Commissioner.

Each Commissioner carries out separate functions under their respective Acts.

5.5.2 MANDATE

130. The Australian Commission has four broad areas of responsibility. These are: policy and legislative development; public awareness and education; human rights complaints; and anti discrimination complaints. In addition, an important role in terms of the systemic focus of the Commission, is the

National Inquiry function. This function exerts a broad and long term impact on Australian society - see 5.5.5. The founding legislation for the Commission's complaint handling function is more complicated than any other commission in the region. Indeed this aspect of the Australian Commission's structure makes it unique from all the others. The same investigation and conciliation procedures apply across all legislation, with different procedures emerging in the final stages of the process.

131. The first piece of legislation to confer complaint handling power was the *Racial Discrimination Act 1975* under which any individual affected by discrimination based on race, colour, descent, national or ethnic origin can make a complaint if the said discrimination occurred at work, in trade unions or in public places, in relation to provision of goods and services, accommodation, land or housing, or in advertising and promotions. The Act also covers racial hatred and incitement of the same.⁶⁷

132. The second piece of founding legislation was the *Sex Discrimination Act 1984* which provides redress to someone affected by alleged discrimination based on sex, marital status, pregnancy, sexual harassment and family responsibilities. The Act does not yet cover sexuality and in relation to the other grounds makes exceptions for combat duties, voluntary bodies and affirmative action provisions under the *Social Security Act*. The areas where the discrimination must have occurred include those mentioned in the *Racial Discrimination Act 1975* as well as in education, in relation to membership of licensed clubs and in the implementation of federal laws and programs.⁶⁸

133. The *Disability Discrimination Act 1992* provides protection for those 'treated less favourably because of their disability' in all of the areas already

66. The Privacy Commissioner has a distinct role to the others, operating under the Privacy Act 1988, the role promotes systemic compliance with the Act's principles and incorporates advisory and audit functions.

67. sections 17 - 18F, RDA 1975

68. sections 21, 25, 26 SDA 1984

mentioned.⁶⁹ Importantly however, the protection does not extend to certain situations, for example, where due to disability a person cannot meet the ‘inherent’ requirements of a job. Under this Act a complaint must be brought by someone affected or by their representative or associate. These first three Acts cover discrimination, which, like New Zealand, forms the largest part of the Australian Commission’s complaint load. This highlights the differences throughout the region in the nature of complaints investigated by the Commissions, and reinforces that the nature of those complaints impacts on the method of resolving them.

134. In 1986 the Federal Government passed the *Human Rights and Equal Opportunity Commission Act*. This Act is unique in that it operates quite differently to the other three Acts. A complaint under this Act must have a basis in a relevant international instrument appended to the HREOC Act and except for the area of employment, the respondent must be a federal agency. If the complaint arises out of the operation of the law rather than a discriminatory act or practice, the Commission cannot deal with it as a complaint, but must report it to parliament as a deficient law. It cannot provide an individual remedy to the complainant. Importantly, anyone can make a complaint under this Act , regardless of their connection with the rights violation involved.

69. Divisions 1 and 2 DDA 1992

5.5.3 PROCEDURAL NATURE OF COMPLAINT HANDLING - INVESTIGATIVE OR CONCILIATORY

135. There is little room here for an examination of the ways in which each piece of legislation differs in its approach to complaints.⁷⁰ For all the legislation, the complaints processes are a free service with no need for legal representation. All legislation requires the Commissioner to inquire into, and attempt to resolve by conciliation all complaints, subject only to the decline power (for example, when a complaint does not fall within the Commission's jurisdiction). The Commission acts as no party's advocate and remains neutral in its conciliations and investigations.

136. A complaint generally begins with telephone enquiries made by a free call number which provides an interpreter service and TTY (hearing impaired) service. Enquiries may also be made in person or in writing. They can be made to central and regional offices or through the state and territory anti-discrimination agencies which are funded by the Commission to take complaints on their behalf. By this initial step a complainant can seek advice and information if they feel they may have grounds for a complaint under the legislation. A complaint must then be made in writing, if this presents a problem for complainants, Commission staff can assist in the preparation or refer the complainant for assistance. The written document must include: the complainant's name and contact details; the name and contact details of the respondent; an explanation of the complaint including where, when and how it occurred; an explanation of how the complainant has been affected; a list of referees, witnesses and documents in possession; the outcome sought; and what other government agencies have been contacted.

137. Complaints are then assessed at a senior level on an individual basis to determine whether the complaint is within jurisdiction. Further information

may be required from the complainant before a decision is made as to whether the matter should be declined or formally investigated. Such information may be obtained by letter, telephone or meeting. A complaint may be declined by a Commissioner, for example, if it falls outside the Commissioner's jurisdiction; if there is insufficient evidence; or if the complaint involves an incident more than 12 months old. If it is declined the Commissioner must give an explanation and advise of the relevant alternatives.

138. If the Commission is of the view that there is no basis for a recommendation that the Commissioner decline the complaint at this initial stage, the respondent will be contacted by phone -where an informal approach is deemed most appropriate - or by letter, providing a copy of the complaint and the relevant sections of the legislation. The Respondent has 21 days to reply. Respondents are assured of the Commission's impartiality and are advised to co-operate with the Commission's investigation and to provide all available information. The Commissioner has power to compel this information. Non production is an offence. Once the Respondent has replied, the complainant has a right of rebuttal, which is considered an essential part of the process. In this way the full story is revealed and any additional information in relation to the complaint is gained.

139. Information and evidence from both complainant and respondent are reviewed and a recommendation is made for decline, conciliation or referral to public hearing. This latter option occurs immediately where a complaint is not considered amenable to conciliation because of the nature of the violation and the relationship between the parties. An attempt is made initially to conciliate most matters. In Australia a model of statutory conciliation is used, as opposed to mediation or arbitration. The conciliation model differs from mediation in that the conciliator is active in determining the content and process and may assist in facilitating options for resolution. The conciliator is

70. see Human Rights and Equal Opportunity Commission, Complaints and Hearing Manual, Sydney, Nov.1995

not an advocate for either party but is an advocate for the legislation. The complainant 'owns' the complaint, as long as they are happy with a conciliated result, the Commission will not interfere, provided the legislation is not contravened.

While the Commission encourages conciliation, it must also be sure that any settlement properly reflects the nature of the discretion or rights violation that has taken place.⁷¹

140. Conciliation may take a number of forms. It will usually take the form of face to face meeting, in which the conciliator assists the parties explore the issues in the complaint and where possible assist them to come to some kind of mutually satisfactory resolution. Conciliators travel to all parts of Australia to conduct conferences in locations that are convenient to both parties. Where a high level of antagonism exists between the parties or there is significant geographical distance between them, conciliators may conduct telephone negotiations. Shuttle conciliations involve parties being in the same location but in separate rooms with the conciliator conveying messages between them. Conciliators use the statutory conciliation model. They have found this more directive and interventionist model – rather than mediation – assists the need for efficiency in the process, particularly as workloads increase. The Commissioner has the power to call compulsory conferences and to compel attendance and production of documents. The conciliation process can be terminated by the complainant or respondent at any time. If a complaint cannot be resolved by conciliation, a report on the investigation is presented to the relevant Commissioner with a recommendation that the matter be referred for a public hearing.

5.5.4 ENFORCEABILITY OF COMPLAINT PROCEDURE - ADVISORY OR ENFORCEABLE

71. Human Rights and Equal Opportunity Commission, The Complaint Guide, December 1997 p14

141. The *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*, all give the Commission a public inquiry power to make determinations. These determinations are not enforceable, but can be taken to the Federal Court to enforce compliance.⁷² The *Human Rights and Equal Opportunity Commission Act 1986* however has no public inquiry power nor availability of enforcement through the Federal Court. On the other hand a Commissioner may make a recommendation on the violation and the damage suffered to the Attorney General, who in turn reports on the violation to Parliament.⁷³

5.5.5 INDIVIDUAL OR SYSTEMIC FOCUS OF COMPLAINT PROCEDURE

142. Like New Zealand, the Australian Commission has traditionally had a very individualistic approach to complaints. Like New Zealand also, they have realised the need for a more systemic approach, both in terms of available resources and effectiveness. A good example of this is the National Inquiry role, in particular the attention that has been focused nationally on aboriginal deaths in custody, mental health and the Stolen Generation of Aboriginal children.

INDEPENDENCE OF COMPLAINT PROCEDURE

143. The Australian Commission has been established as an independent body, not under any government control. Its members are appointed for fixed terms,

72. There is currently legislation before the Senate to remove the Commission's hearing powers and for complaints to go straight to the Federal Court for an enforceable decision - Human Rights Legislation Amendment Bill 1996.

and its legislation clearly sets out its functions and responsibilities. Perhaps the clearest example of its independence is the prevalence of government employers in the lists of the Commission's respondents.

5.5.7 ACCESSIBILITY OF COMPLAINT PROCEDURE

144. The accessibility of the Australian Commission is assisted by the network of co-operation it enjoys with State Human Rights Bodies (whom it funds) and its own regional offices. Complaints are channeled through to the most appropriate body to avoid overlapping and inefficiency, and by the same token, complaints can be lodged at various locations. In addition, the flexibility of the Commission in sending conciliators to remote locations promotes the Commission's accessibility. The Australian process is also free and there is significant publicity and information available.

5.5.8 NATURE OF RIGHTS VIOLATED

145. In 1996-97 most complaints received were in relation to the Disability and Sex Discrimination Acts. Under the *Sex Discrimination Act 1984* complaints received and finalised in last year's report rose by 35%. An interesting contrast to the situation in New Zealand is that in Australia the rate of conciliation of sex discrimination complaints is relatively high (34%) due to an emphasis on resolving, rather than investigating complaints. The biggest grounds under this Act include sexual harassment (48%) and sex discrimination (26%). This kind of discrimination occurs mostly in employment (84%) and in the provision of goods and services (10%). Complaints are overwhelmingly brought by women.

146. Under the *Disability Discrimination Act 1992* complaints in 1996-97 rose by 51%, 25% of those were conciliated. The main ground under this Act was

73. Human Rights and Equal Opportunity Commission, *The Complaint Guide*, December 1997

physical disability, and the main areas were employment (38%) the provision of goods and services (32%) as well as access to premises, which increased dramatically this year from 19 to 93 complaints.

147. While not featuring prominently in the total complaints, there was a 90% increase in Racial Discrimination complaints in 1996-97. This is particularly due to racial hatred amendments to the Act in 1995. Statistics show that few of these complaints can be resolved by conciliation. Also it appears harder to pin down the 'unlawfulness' of the discrimination that occurs under this Act. The biggest areas of racial discrimination were employment (31%) and racial hatred (29%).

148. Under the unique *Human Rights and Equal Opportunity Act 1986* a 27% increase in complaints was recorded in 1996-97. 40% of complaints were based on the ICCPR and 44% occurred in the area of employment. 69% of complaint under this Act were declined, a figure much higher than the other Acts. This is due to the restricted mandate and procedure associated with this Act - the complaint is either not against the Commonwealth, is not a 'relevant right' or due to the lack of enforceability. Only 9% are conciliated.

5.5.9 EFFICIENCY OF COMPLAINT PROCEDURE

149. In recent years the Australian Commission has undergone serious streamlining and efficiency changes. Some of the more positive of these changes have involved: the development of a comprehensive procedures manual; training in both investigation and conciliation; the adoption of a computerised complaints management system allowing performance assessment; and a 'benchmarking' program. This 'benchmarking' involves visiting benchmark partners such as international and state human rights bodies and documenting their complaints procedures, methods and innovations and establishing benchmarks for performance within the Commission.⁷⁴

74. Human Rights and Equal Opportunity Commission, Annual Report 1996-97, 1997.

150. The 1996-97 Annual Report gives indications of performance for complaints under each of the Acts. Overall though, over the last 2 years finalised complaints have risen by 20%. The nature of outcomes for those finalised complaints showed an increase in conciliations from 9% to 24% over the same period (see appendix 8).

151. In relation to the Commissions hidden workload, 34% of enquiries are unrelated to the Commission's jurisdiction and need to be referred to the appropriate avenue of redress. It is important to note also that very few cases make it to hearing, and even fewer make it to the Federal Court. In 1996-97, 256 were referred to public hearing and of those, 244 were finalised there. Of the 244, 127 were conciliated prior to or during the hearing, 44 were substantiated after the hearing and a formal decision reached, 40 were dismissed after hearing and 33 were finalised in other ways.

152. The Australian Commission and in particular the final stages of its complaints process, is currently undergoing review by the Federal government. The changes will affect the hearing process, the role of Commissioners and the Federal Court's enforcement powers. The proposals are currently before the Senate.

5.6 PHILIPPINES COMMISSION ON HUMAN RIGHTS

5.6.1 STRUCTURE

153. The Philippines is one of the few countries in the world to have a **constitutionally entrenched** independent Human Rights Commission. The Commission on Human Rights was established by *Executive Order No. 163* on 5 May 1987 through Article XIII, section 17 of the Philippine Constitution. This same Order set out the structure and functions of the new body.⁷⁵The Commission consists of a Chair and 4 members appointed by the President.

154. Aside from the Commissioners, the Commission consists of: a Secretariat; an Executive Director; a Legal Office; a Public Information Service and Education and Training Office; a Field Operations Office; a Planning and Management Service; a General Administration and Support Service; and finally an Investigation Office which receives and classifies report and complaints and conducts fact finding exercises. Like the Indonesian Commission, the Philippines has established an Action Line and Quick Reaction Team to attend to urgent complaints.

5.6.2 MANDATE

155. The Philippine Commission is a recommendatory body only, having power of investigation, but limited power to prosecute human rights offenders. It has the power to investigate on its own, or as the result of a complaint all *civil and political* human rights abuses. CHR Resolution No. A96 - 005 which sets out the rights the Commission should investigate (see appendix 9). At this stage

75. article XIII, section 18 sets out the powers.

the Commission has no mandate to investigate economic, social and cultural rights.⁷⁶

156. The Commission has further powers to inspect prisons and detention centres, as well as to establish research, education and public information programs. It has the responsibility of monitoring government compliance with international instruments, it must recommend measures required to be taken to Congress and has the power to adopt operational guidelines and procedures.

5.6.3 PROCEDURAL NATURE OF COMPLAINT HANDLING - INVESTIGATIVE OR CONCILIATORY

157. The Commission's system for investigating complaints was established by adopting *Rules on Investigation and Hearing of Complaints*⁷⁷. These guidelines provide the standard operating procedure for filing complaints, determining jurisdiction, investigating and hearing procedures. Such procedures provide for the disposition of complaints, the designation of hearing officers and committees, the rights of respondents and the formulation of findings, final orders and recommendations.⁷⁸

5.6.4 ENFORCEABILITY OF COMPLAINT PROCEDURE - ADVISORY OR ENFORCEABLE

158. Like all regional Commissions, lack of enforcement power is recognised as a problem by the CHR – it is an advisory body only.

159. The Commission can provide compensation to victims and grant immunity to witnesses from further prosecution. It can issue subpoenae, provide legal aid, request information from government.

76. *ibid.*

77. Commission on Human Rights, Commission on Human Rights - Philippines Nov 6 1987

160. An extension to the Philippine process occurred in 1996 when the Department of Justice approved the use of CHR assistant prosecutors to handle human rights violations cases in the courts, thereby giving the Commission prosecutorial powers.

5.6.5 INDIVIDUAL OR SYSTEMIC FOCUS OF COMPLAINT PROCEDURE

161. The Philippine Commission has, since the initiation of the Barangay program in 1995 - see 5.6.7 - developed a broader focus for complaint handling, prioritising complaints and developing community based awareness of the processes available. Such activities include mobile education units, establishment of information centres, city or municipality bulletins, and occupational human rights training.

5.6.6 INDEPENDENCE OF COMPLAINT PROCEDURE

162. The Commission is an independent Constitutionally entrenched body. Its mandate protects the independence of the complaint process.

5.6.7 ACCESSIBILITY OF COMPLAINT PROCEDURE

163. In December 1995 the complaints handling function was supplemented by the establishment of the Barangay regional program. This program is not actually an arm of the Commission, but began as a Commission concept designed to facilitate the Commission's work at a grass roots level. The Barangay (BRAHC) system is designed to receive and monitor human rights complaints and to maintain a referral system with the CHR Regional Filed Offices. It must also document the Human Rights situation in the locality. The program was conceived in an attempt - in line with the Paris Principles - to make the CHR accessible and less costly and time consuming for

78. Commission on Human Rights, 'The Philippine Experience' Manila 26-28 August 1988

complainants in remote areas. *Under this program, the Human Rights Action Centre has been conceived so that the CHR will be within the reach of the people.*⁷⁹ The process by which Barangay offices handle and refer complaints is clearly laid out in (see appendix 10)

164. In 1994 the Commission established a Child Rights Centre designed to monitor and investigate violations of children's rights.

5.6.8 NATURE OF RIGHTS VIOLATED

165. In 1996 Murder/homicide/execution remain the highest ground of specific complaint at 13%, however consistently since 1988 a category classed as 'other' has represented the highest number of complaints. In 1996 this 'other' category accounted for 73%. Other significant grounds included arrest and detention, torture and disappearances. The most common perpetrators of human rights violations in the Philippines are the Police (35%), unidentified/miscellaneous perpetrators (17%) and the Military (12%). (see appendix 11)

5.6.9 EFFICIENCY OF COMPLAINT PROCEDURE

166. The Philippine Commission's statistical records incorporate as a total, figures from 1988-1996. This was the most up to date information available at the time of writing. Over this period the Commission received 12 419 complaints, 1900 of those in 1988 and 478 of those in 1996, indicating a generally downward trend over time(see appendix 12).

167. In terms of case management, a change to policy and procedure to cut down on bureaucratic processing has led to the final disposition of cases being fully delegated to regional field offices unless an appeal is made. Since

79. Commission on Human Rights, *Barangay Human Rights Centre Handbook.*, Manila 1996

1988 a total of 11 743 cases have been investigated, of those 5058 were filed, referred to prosecutors or the Courts. 4324 were closed or terminated and 2361 were archived. The highest caseload was investigated in 1994, since then there has been a significant drop in cases investigated (see appendix 13).

168. Like other Commissions, the Philippine Commission faces a backlog of cases. In a study of 6638 cases filed between 1986-1990, 88 were referred to the courts, 53 were tried and resolved, 34 were dismissed and 4 led to convictions. The rest awaited further attention. There was concern expressed by the Commission over the need for greater clarity regarding the Commission's jurisdiction.

169. Hence, like all other Commissions in the region, the CHR has also had to consider methods of streamlining its caseloads. The CHR has chosen to accomplish this by distinguishing between 'Human rights Violations Per Se' and 'Other Cases of Human Rights Violations/Borderline Cases'.

In order that the Commission would not be unduly saddled with, and its resources channeled to, these 'borderline' cases of alleged human rights violations, it is necessary to prescribe guidelines on the nature of the acts that may constitute clear or per se violations of human rights.⁸⁰

170. 'Per Se' human rights are those enumerated in the Constitution and those easily discernible as basic human rights under the *United Nations Declaration of Human Rights* and the International Covenants to which the Philippines is a signatory. Such provisions cover largely first generation civil and political rights and the basic right to development. 'Borderline Cases' involve rights that may strictly fall within the constitutional phrase 'civil and political' but are 'ordinary and non violent' violations which could be better dealt with elsewhere.⁸¹ These are referred to an evaluation committee to decide whether to accept the complaint, refer it to a more appropriate body, or

80. Commission on Human Rights, Resolution No.ABB-045, 26 July 1988

whether to drop it outright. Such an evaluation must at least *begin* on the same day such complaints are received to ensure speedy resolution.

6. CONCLUSION AND FUTURE DIRECTIONS

171. The trend continues throughout the region of attempting to streamline and make more efficient and effective the complaints processes, while ensuring accessibility and commitment to long term programs of education and combating systemic violations.
172. All Commissions continue to face funding and staff shortages, as well as facing the problems of limited or non existent enforceability of their procedures. Some Commissions are currently persevering under the most arduous working conditions.
173. In that sense, it is more important than ever, now that a regional forum for dialogue has been established, that the countries within the region educate themselves about each others systems and offer support, advice and assistance, where and when required.
174. A number of recommendations can be made for consideration by Forum members at the next meeting. Members might consider the need to change the focus of national institutions from symptomatic individual complaints to a systematic, preventative and educational role for commissions, particularly given the resource constraints all commissions operate under.
175. Members should explore the importance of decentralisation through regional offices to improve the accessibility of the commissions to complainants. A pertinent area for discussion will be the increasing importance of technology to improve the efficiency of institutions' complaint record keeping, databases and ability to produce statistics for analysis.
176. Toward ensuring a deeper understanding of members' individual processes, the Forum might consider activities such as staff exchanges. This would provide comprehensive, hands-on experience of the advantages and problems of other commissions.

177. The meeting should resolve to further develop this paper through co-operation and consultation, to ensure it becomes a useful and accurate resource document for both established institutions and for countries proposing to establish a national institution.