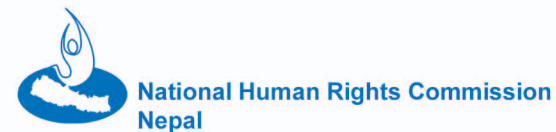


**National Human Rights Commission-Nepal and
OHCHR-Nepal Observations on the
National Human Rights Commission Bill - 2009**

Open Dialogue on Draft Legislation Series-**2**

January 2011



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National Human Rights Commission
Nepal



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER
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I. Introduction

A “national human rights institution” (NHRI) is an institution with a Constitutional and/or legislative mandate to protect and promote human rights. When in compliance with the Principles relating to the status and functioning of national institutions for protection and promotion of human rights (Paris Principles), NHRIs are cornerstones of national human rights promotion and protection systems. NHRIs are independent, autonomous institutions that operate at the national level. The Paris Principles set out basic standards for NHRIs.¹

The National Human Rights Commission of Nepal (NHRC) was established on 26 May 2000 under the 1997 Human Rights Commission Act. The 2007 Interim Constitution of Nepal included provisions for the establishment and functioning of the NHRC, thus elevating the institution to the status of a Constitutional body. A consequent new draft law – *Draft Bill of the National Human Rights Commission with regard to its functions, duties, powers and working procedures* (“Bill”) – was prepared by the Government and registered with the Legislature Parliament in August 2009. The Bill is pending before the Legislative Parliament since then.

National Human Rights Institutions (NHRIs) should be established by law or Constitution with guarantees of their continued existence and

¹ The Paris Principles (Principles Relating to the Status and Functioning of National Institutions) set out basic international standards that all the national institutions should meet. They were adopted by a group of NHRIs at an inter-national workshop in 1991 and were later endorsed by the United Nations Commission on Human Rights and the General Assembly in 1993 and today are broadly accepted as the test of an institution’s legitimacy and credibility vis-à-vis international standards.

independence. As such, NHRC and OHCHR commend the Government of Nepal for taking the initiative to prepare a new Bill following the provision of Constitutional status for the National Human Rights Commission.

II. Analysis of the draft legislation

NHRC and OHCHR have analysed the draft Bill to assess its compliance with the Paris Principles and to provide comments and recommendations. This analysis is based on the six key criteria of the Paris Principles: (1) independence, guaranteed by law or Constitution; (2) autonomy from Government; (3) pluralism, including in membership; (4) a broad mandate based on universal human rights standards; (5) adequate powers of investigation; and (6) adequate resources. This analysis is also based on lessons learned stemming from the practice of NHRIs and the General Observations developed by the International Coordinating Committee of NHRIs (ICC).²

The comments are primarily in relation to the Bill, however, they also reflect upon the Interim Constitution and the preliminary Constitutional proposals in relation to the NHRC (and other constitutional bodies) submitted by the *Constituent Assembly Committee for Determining the Structure of Constitutional Bodies* in February 2010.

The Bill has a number of positive provisions that are important for the strengthening and smooth functioning of an effective national human rights institution. Other important provisions may require amendments to be in conformity with the Paris Principles and to ensure a fully independent and effective NHRI for Nepal. NHRC and OHCHR present their comments and recommendations on the Bill to further strengthen its compliance with the Paris Principles.

1. Constitutional Status

The Paris Principles require that an NHRI's mandate "*shall be clearly set forth in a constitutional or legislative text*" but does not distinguish

² The International Coordinating Committee (ICC) is a representative body of national human rights institutions established for the purpose of establishing and strengthening national human rights institutions which are in conformity with the Paris Principles. ICC has the mandate to review and analyse accreditation applications of the NHRIs on the compliance with the Paris Principles, the ICC Sub-Committee on Accreditation (SCA) reviews and analyse the accreditation applications. The ICC General Observations are interpretive tools of the Paris Principles that can be used to provide further tailored advice on specific aspects of the Paris Principles and the crucial value of clear provisions.

between these two mechanisms for properly entrenching an NHRI within a particular state. However, experience suggests that it is highly desirable that the NHRI be formally established under a Constitution, since this provides greater security than an ordinary law. That said, the details of the Commission's functions, powers, duties and operational provisions are better included in a law, since such details may require amendment over time in the light of the Commission's experience and any changes in the context in which it operates. It is generally a simpler process to amend an ordinary law than a constitution.

The NHRC should be formally established under the Constitution. Provisions relating to the NHRC in the Constitution should include: (i) to establish it; (ii) to give it a broad mandate; (iii) to provide generally for its membership and staffing; and (iv) to include a clause allowing for further specific provisions relating to the Commission to be included in enabling legislation.

2. Guarantee of Independence and Autonomy

Ensuring independence and autonomy is the cornerstone of all NHRIs and is key to its ability to promote and protect human rights. NHRIs must be free to perform their mandates without outside restraint or improper influence. As such it is of serious concern that there is a lack of guarantees of NHRC independence in the Bill, and that guarantees contained within an earlier draft of 2007 have since been removed.³

The Constitutional provision would thus be significantly improved by the addition of "*independent*" in the Articles establishing the Commission. Furthermore, it is also important that the law includes specific provisions reinforcing the Commission's independence. NHRC and OHCHR note that there is no reference to the independence, autonomy and impartiality with regard to the function and the proceedings of the Commission.

It is important to make amendments to the Bill in order to strengthen the independence of the NHRC: suggested amendments include

³ There was another draft shared by the government in 2007.

reference to the independence of the Commission in the Preamble of the Bill; and to incorporate a section on the "Independence, autonomy and impartiality with regard to the functions and proceedings of the Commission".⁴

Also extremely important for the independence of the Commission is the power to appoint its own staff, including its Secretary, and provisions requiring it to be funded adequately, as set out below.

The Bill also includes provisions regarding the delegation of powers which are inappropriate and may directly affect the independence, or perception of independence, of the Commission. Section 30 should thus be amended to clarify that the powers of the NHRC may only be exercised by the Commission or delegated to its staff, but not be delegated to 'officers of the Government of Nepal' or to 'any agency or institution or any person' as the Bill states.

3. Definition of 'Human Rights'

"Human rights" – The way this provision has been drafted in the Bill has the potential for considerable confusion. Using the expression *"the rights related to life, liberty, equality and dignity of the individual guaranteed by the Constitution and other prevailing laws*, could give rise to the interpretation that the only human rights in the Constitution that are within the Commission's jurisdiction are the civil and political rights. Jurisdiction in relation to economic, social and cultural rights, as well as human rights set out in all international human rights instruments are not properly captured by the language in the Bill.

As such the scope of the Commission's jurisdiction could be interpreted as more limited than is desirable and inconsistent with the broad definition required by the Paris Principles, which provide that a national institution shall be vested with "competence to promote

⁴ The earlier draft (of 2007) included a section (Section 6) which states - Independence, autonomy and impartiality with regard to the functions and proceedings of the Commission, this section is removed in the 2009 draft:

1. Any member or employee of the Commission and any person deployed for the Commission's work shall practise and observe the functions, duties and powers conferred on the Commission by this Act in an independent, autonomous and impartial manner.
2. No government agency or authority shall make any form of intervention or create obstacles in the performance of the Commission, and such agency or authority must by highly regarding the independence, autonomy, impartiality and dignity of the Commission always avail the Commission with the assistance it has sought for.

and protect human rights” and be given “as broad a mandate as possible.” Best Practices of NHRIs suggest that for a NHRI’s mandate human rights should be defined not only by reference to domestic law, but also by reference to all international human rights instruments, whether or not acceded to by the relevant State.⁵

It is therefore recommended that the definition be expanded, as follows:

“‘human rights’ means the rights embodied in the United Nations human rights instruments and includes the fundamental rights in Part III of the (Interim) Constitution of Nepal, provided that in relation to Chapter 3 – Procedures Relating to Complaint Proceedings, ‘human rights’ means the rights embodied in the United Nations human rights instruments to which Nepal is a party and includes the fundamental rights in Part III of the Constitution of Nepal.”

4. Membership and appointment of the Commission

The manner by which the members are appointed to an NHRI is crucial to ensuring the independence, professionalism, integrity and credibility of the institution. There should be a transparent process that involves not only the executive branch, but also the legislature and civil society, and is characterised by broad consultation and a process for the public nomination of candidates. Collectively the members should reflect gender balance and the ethnic diversity of the society and the range of vulnerable groups in the country.

The appointment process is set out in Article 131 of the Interim Constitution, rather than the Bill, and has some important features, including the requirement for diversity among commissioners, especially in relation to gender. In the process of making the new Constitution, while it is very important to retain these important features, it is also pertinent that some provisions are strengthened. For instance, while it is highly desirable that those appointed as Commissioners are people of status and relevant experience, it is inappropriate to specify a tertiary degree as a prerequisite for membership of the Commission. There may well be people – former human rights activists who have operated at a grass-roots/community

⁵ National Human Rights Institutions Best Practices, Commonwealth Secretariat (2001)

level, for example – who would make effective members even though they have not had the opportunity to avail themselves of tertiary education. “Criteria” clauses are better expressed if they refer to the need for skills and experience (i.e. both technical capacity and knowledge) in the human rights issues likely to come before the Commission.

The current process allows for the President to make the appointments on the advice of the Constitutional Council. The current appointments also went through the parliamentary hearing. It is noted that the Constitutional Council is the body to recommend appointment for other Constitutional bodies as well. As emphasised by the International Coordinating Committee, appointments made by the executive-dominated body have the potential to undermine the independence of a national human rights commission, this should be seriously taken into account in the drafting of the new Constitution.

The provision aimed at ensuring independence through Commissioners not holding other official posts is not well expressed and could disbar retired commissioners from being appointed to government service after their terms end, a result which is unlikely to have been intended. It would be better recast as: *“Neither the Chairperson nor any Member may hold office in the government service during their term as Chairperson or Member.”*

Furthermore, there is no stipulation for consultations nor for the possibility of public nominations. Such a process cannot meet the purpose of maximising the pluralist representation, as required by the Paris Principles, and will inevitably lead to questions regarding the independence and credibility of the Commissioners. The ICC SCA has repeatedly emphasised that appointments should be preceded by a process of consultation. There are only advantages in the search for appointees being as wide as possible, and consultation with stakeholders will increase the likelihood that the commission ends up with a *“pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights including NGOs, philosophical/religious representatives, universities, parliament and government departments (with the latter involved in an advisory capacity only)”* in accordance with the Paris Principles.

The Paris Principles stress the need to ensure a stable mandate for members. Conditions for appointment, terms and renewability of membership, incompatibility, dismissal and removal are issues to be clearly stipulated in the founding law. There should be the possibility to dismiss a member if he or she is alleged to be engaged in actions that are incompatible with service, but the criteria under this provision should not open the door for any arbitrary cessation of membership. This dismissal procedure, like the appointments procedure, should be open and transparent.

NHRC and OHCHR recommend that the appointment procedure is entrenched in the new Constitution and also set out in the Bill, and includes the provisions necessary to ensure standards of independence and credibility in the Commissioners appointed to the NHRC, including the requirement for a representative and inclusive committee - such as a special parliamentary committee - to make recommendations concerning the appointment of members of the NHRC. The committee should also be required to undertake a broad consultation, fully engaging civil society across Nepal, and with a process allowing for public nominations, prior to any recommendations being put forward.

The Bill should further include a provision that allows the Commissioners to continue in their role past the expiry of their terms until new appointments are made.⁶ An example of this type of provision can be found in the law of New Zealand.⁷ It is also recommended that the Bill include provisions to protect legal liability for actions undertaken in the official capacity of the NHRI.

5. Operational independence

5.1 Staffing

The Paris Principles require a NHRI to have its own staff, in order to be independent of the government, and to further ensure its impartiality and credibility. Similarly, the General Comments of the ICC SCA also emphasise that: *“As a principle, NHRIs should be empowered to appoint their own staff.”* The Bill should thus empower the NHRC to appoint its staff – including its Secretary – to ensure its operational

⁶ National Human Rights Institutions Best Practices, P-17 -('Where the term of a commissioner expires and it is not immediately possible to appoint a new commissioner, the term of a serving commissioner should continue for such period, not exceeding 12 months, until a new appointment is made').

⁷ See New Zealand Human Rights Act, section 100(4).

independence and to be able to appoint staff with the relevant professional skills and experience. NHRC may avail the services or advice of the Public Services Commission in relation to the procedures: however, authority to recruit the staff should be vested in the NHRC. Equally important, the Bill should include a requirement for the Commission to ensure that its staffing reflects the diversity of Nepali society in relation to caste and gender. In Nepal this is particularly important, given the under-representation and historical marginalisation of particular groups such as Dalits, indigenous communities and women. As the primary rights body in Nepal, with a mandate to promote equality and combat discrimination, the NHRC need to set a positive example in this regard with a legislative stipulation to ensure its staffing reflects the diversity of Nepali society.

5.2 Funding

The Paris Principles require an NHRI to have adequate funding and that “the purpose of this funding should be to enable [the NHRI] to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.”⁸ It is important that the NHRI budget is approved and decided by the parliament and comes directly from the State budget. It is also necessary that this budget be sufficient to cover running costs (premises, field offices, salaries, etc.) as well as other activities (i.e. monitoring, investigations, education and capacity-building programmes, etc.) It is important that the NHRI has the authority to use its own resources freely and independently to hire staff and recruit human rights experts. A lack of financial independence could undermine the effectiveness of the institution.

There is no provision at all in the Bill referring to the funding of the Commission. It is usual for NHRI legislation to include a provision setting out what the funds of the Commission shall consist of, where they are sourced, etc. to ensure that the NHRC is funded adequately. While defining what is “adequate” can be problematic, some states

⁸ Principle 2 of the Paris Principles (Composition and guarantees of independence and pluralism) states that a national institution “shall have an infrastructure, which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.”

have made provisions for this. For example, in the Fijian HRC law, the relevant Minister is required to “... use his or her best endeavours to ensure that moneys appropriated by the Parliament for the Commission are adequate for the performance of the functions of the Commission; and to maintain the Commission’s independence and impartiality.”

As such, more explicit provision should be made in the Bill to allow the NHRC the level of control necessary to ensure its’ operational independence, including a provision obliging the State to provide sufficient funding for the Commission’s operations, as well as providing for greater financial autonomy of the NHRI in its daily operations.

Furthermore, the requirement (in section 20(2) of the Bill) that agreements involving financial matters require the approval of the Finance Ministry impedes the Commission’s independence and should be removed. That said, it is not unreasonable for the Finance Ministry to monitor aid flows, and the provision could require that the Ministry be informed of such agreements by the Commission.

6. Functions, Duties and Powers

It is important that an NHRI law clearly spell out the roles, powers and the mandate of the institution as broadly as possible. In Nepal the preliminary Constitutional proposals and the Bill leave significant gaps in the functions allocated to the Commission. Furthermore, in addition to section 4 on ‘Functions, Duties and Powers’ there are other sections in the Bill that also contain NHRC functions – for example, elements in section 6 relating to the provision of opinions and a requirement for consultation. Functions should be clearly consolidated in one section in the law to avoid confusion.

For the effective functioning of the Commission, it is important that the following functions or mandates are incorporated into this section of the Bill.

- The Bill must include a provision that specifies the duty of the government and other state authorities to cooperate with the NHRC, with powers of sanction, such as administrative penalties, against state officials who fail to properly cooperate with the NHRC in the exercise of its mandate, through non-compliance, obstruction,

interference or retaliation.⁹ This could be complemented by a positive obligation for the NHRC to make public the name of any official, person or agency that complies with or implements recommendations made by the Commission (section 7 of the Bill provides the same for those who do not comply).

- The function relating to international instruments is somewhat narrow and does not envisage, for example, working towards the removal of ratifications etc. Nor would it authorise parallel reports or participation in the UPR process, or regional human rights mechanisms (should one be developed in the region). The Commission should be mandated to cooperate and engage with international organisations including the Human Rights Council, UN treaty bodies and Special Procedures mandate holders and UN agencies.
- The function under section 6 should be clarified to ensure that the NHRC has full scope to *advise* the government on official reports prepared for the international human rights mechanisms, but does not itself *prepare* the reports which must be a governmental responsibility.
- The Commission should have the power to seek services of experts, collect further evidence or summon witnesses or conduct a public hearing at any time. Under Section. 12(3) of the Bill the Commission can undertake these activities only *after* the completion of both the preliminary inquiry under Section.11 and the investigation under Section. 12(1).
- The NHRC should be authorised to provide amicus curiae briefs as part of court proceedings pertaining to human rights, with the leave of the court. Ideally, the judiciary should accord the NHRC official status as a friend of the court.
- The Commission should be specifically authorised to visit ‘other places of detention’, in addition to ‘prisons’ as currently specified in section 4(1)(a).

⁹ National Human Rights Institutions Best Practices- P-21: NHRIs should have the power to effectively address non-cooperation, obstruction, or victimisation in an investigation, e.g. a refusal to produce evidence. For examples of such provisions, see s 35 of the National Human Rights Commission Act 1999 (Thailand).

- The government should further have a duty to consult with the NHRC on the formulation of, or amendments to, legislation regarding human rights and on matters relating to Nepal becoming a party to international or regional human rights treaties. The Commission should also be mandated to review the policies and programmes of Government with a view to making recommendations as to the promotion and protection of human rights in Nepal.
- Some provisions are also unnecessarily bureaucratic and could result in the Commission being distracted by attention to formalities and procedure. One example of this is the specification that the Commission meet “*at least twice a month*”. It should be left to the Commission to decide how often it meets, for what purpose and where, and in the interests of democracy, a majority of Commissioners should also have the power to requisition a meeting. Furthermore, it may be better to include such details in internal regulations, rather than the central Act.

7. Procedures related to Complaints

Overall, the Bill contains fairly complex provisions relating to the complaints process, not all of which are consistent. They impose a somewhat bureaucratic process, and it is worth remembering that one of the advantages of NHRIs over the Courts is that they are able to dispense with much of the formality of the judicial system and thus avoid the delays and costs that are widespread in court systems everywhere. By and large the Commission should be left to develop its own procedures, which it could undertake via its power to make rules and regulations in section 32 and to develop its own procedures under section 12(4). As such, the complaints process needs considerable simplification, with an understanding that detailed procedures will be defined subsequently by the NHRC.

The Commission, by virtue of Article 132 of the Interim Constitution, has wider powers to initiate an investigation than are recognised in the Bill (Chapter 3), including the power for the Commission to initiate an investigation without waiting for a complaint. Many NHRI’s have this *sui moto* function which has often proved useful when quick action is required in a case, for example an obvious violation that has been highlighted in the media. This *sui moto* responsibility should be

recognised in the Bill – ideally by providing that the Commission has the power to regulate its complaints procedures, including for complaints commenced on its own initiative.

Time limits - such as that in section 10(5) which requires complaints to be lodged within six months of the violation - often prove problematic. It is obviously desirable to have some limits so that the NHRC does not get bogged down with minor matters many years after the event. However, often people will take longer than six months before they are in a position to submit a complaint, or they may not even know of the mechanism. This is particularly apparent in the difficult context of Nepal where geography, levels of public awareness and culture of impunity curtail the prompt access of victims to any remedy or mechanism including NHRC. As such, no time limit to file a complaint of human rights violations to NHRC should be stipulated in the Bill.

The Commission must also be provided with the discretion to decline a complaint for investigation provided that in these circumstances the complaint may be lodge again if sufficient evidence emerges. The NHRC may decide as such because it lacks jurisdiction to investigate a particular matter or because a complaint is manifestly without foundation. An appropriate filtering process for complaints is important to avoid the NHRC expending considerable resources on matters not entirely within its jurisdiction, or which are more appropriately dealt with in other forums. There should also be a provision for the Commission to refer a complaint to another competent authority in appropriate cases, e.g. where the case falls outside the mandate of the Commission, but within the mandate of another body. However, the dismissal of petitions should be without prejudice to the ability of complainants to re-lodge complaints where new evidence becomes apparent.¹⁰

Section 10 of the draft Bill refers to petition or complaints being filed by 'the victim or a person on his/her behalf'. This should be broadened to allow for 'representative actions' in terms of permitting an organisation to file a complaint on behalf of a victim or a group of

¹⁰ More detailed provisions can be found in other legislation (e.g. Timor Leste Statute for the Provedor for Human Rights and Justice, section 37(3) or section 27 of the Fijian Human Rights Commission Act 1999). Having an appropriate filtering process for petitions is important to avoid the NHRC expending considerable resources on matters not properly within its jurisdiction, or more appropriately dealt with in other forums.

victims. NHRC and OHCHR also note that the provision related to language of the complaint that was provided in the earlier draft prepared by the government in 2007 (*Section 14(4) - “petitions or complaints can be registered at the Commission in any language”*) has been deleted from the current Bill. NHRC and OHCHR stress the need of reinserting such a provision in order to enable victims to better access the NHRC jurisdiction.

There is no mention in the provisions concerning the complaints function of how complaints might be resolved or remedial action undertaken, other than through punishment of officials or provision of compensation. Having an official punished for a human rights violation may be of some satisfaction to victims, and the provision of compensation may go some way to improve their situation and resolve their grievance. However, this should be augmented with a function for the Commission to suggest steps that a state body should take to provide an effective remedy for the cause of complaints, which will go further in preventing its repetition in future.

Section 13 provides that the complaints may be ‘repealed’ or put on hold. It is important that the law specifies the time limit within which a case file may be kept pending (‘put on hold’). This is important to avoid the build up of back log cases kept pending or unresolved.

8. Jurisdiction in relation to the Army

NHRC and OHCHR are concerned that the proposed Bill does not provide clarity regarding the NHRC’s jurisdiction in relation to the Army. While the Interim Constitution (article 132 (4)) states that matters which fall under the Army Act are not within the jurisdiction of the NHRC, it further states that this is not a bar to undertaking proceedings concerning human rights or humanitarian law violations. This issue should be clarified in the Bill and the new Constitution in order to ensure that the NHRC is fully able to look into all alleged human rights violations, regardless of which State officials are suspected to be responsible, including all Army officers and personnel.

9. Implementation of Commission decisions and recommendations

The Bill (Section 17) does not clarify the status of the decisions of the Commission are. Globally, some NHRI’s have been given a specific quasi-judicial competence where, within the limits of the law, they are able to issue binding decisions. Other bodies are limited to

informing the petitioner of the remedies available, promoting access to those remedies or transmitting cases to other competent authorities. Clarification is required on whether the NHRC is to be given the competence to issue binding decisions, in which case a mechanism for enforcement of the decisions should also be established.

NHRC and OHCHR recommend that the Bill provides the NHRC with the power to either issue directly binding decisions or provides for a procedure to convert these into binding decisions. This could be realised through a mechanism to refer decisions to the courts followed by a screening and registration of the decisions by the relevant courts. To avoid confusion, it is also suggested that the Commission's competence to refer matters to the appropriate authorities be addressed and clarified in the same provision.

10. Compensation

Section 16 of the Bill covers issues related to compensation for victims of human rights violations. Section 16 (3) put a ceiling on the compensation that the NHRC can recommend to a maximum of three hundred thousand rupees. It may be better to include such details in internal regulations rather than the central Act. Furthermore, it should also be clarified in Section 16(4) that restrictions on the provision of compensation can only apply in relation to prior compensation payments made in relation to an NHRC decision issued in accordance with this Bill. The fact that a victim has received a nominal payment for a limited aspect of the damage incurred under another legislative regime should not harm the ability to seek the full appropriate compensation under this Act. Furthermore, the Bill should make it clear that, in the case of the death of a victim, compensation is provided to the successor of the victim, consistent with the Nepali law of succession. It is also important that the power to issue orders of compensation is broader including other forms of reparation as defined in international instruments, including restitution, rehabilitation, satisfaction and guarantees of non-repetition.¹¹

11. Protection of Complainants and Witnesses

It is vital that complainants and witnesses, including their relatives or associates, feel secure to provide the Commission with information

¹¹ See U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147 (2006), principles 15-23.

and evidence regarding human rights violations without fear of harm or negative repercussions for doing so. While the protection of witnesses is the responsibility of the state, specific provisions should be included in the Bill to afford protection to persons who have made use of their rights under the Act and provided information to the NHRC.

To enhance the protection measures for victims, there should be a provision that allows for anonymity in certain circumstances. An example can be found in sub-section 14(2) of the Australian Human Rights and Equal Opportunity Commission Act 1986.¹²

12. Reports to Parliament and Communication with the Government

Commission obligations relating to the provision of an annual report would reside more appropriately in the Bill than the Constitution as it is currently the case (article 133 Interim Constitution). It is important that the NHRC annual report also covers all of the Commission's activities, with the freedom to report as the Commissioners deem appropriate, and the Bill should be drafted as such.

The current Constitutional provisions do not provide for a process in which the annual reports have to be debated by the Parliament. Consistent with international best practices it would be preferable if the NHRC had an explicit power to table reports in Parliament and in so doing to promote action by the legislature. At a minimum, the provisions could be improved upon by including the requirement for the Prime Minister to table the report for a debate. This would be of particular use in cases where State agencies or departments have failed to comply with recommendations of the NHRC. A provision requiring the NHRC to hold a public meeting about its annual report could also be useful in publicising findings and promoting debate. The Mongolian HRC undertakes such meetings, and there is a specific provision in the Fiji law requiring its NHRI.¹³ It is also recommended that the provision should also include the NHRC's competence to

¹² 'Where the Commission considers that the preservation of the anonymity of a person: (a) who has made a complaint to the Commission; or (b) who: (i) has furnished or proposes to furnish information; (ii) has produced or proposes to produce a document; (iii) has given or proposes to give evidence; or (iv) has made or proposes to make a submission; to the Commission or to a person acting on behalf of the Commission; is necessary to protect the security of employment, the privacy or any human right of the person, the Commission may give directions prohibiting the disclosure of the identity of the person.'

¹³ The Fijian law states that: "Following the tabling of the Annual Report in both Houses of the Parliament, the Commission must hold a public meeting at a time and place it fixes to discuss the contents of the Annual Report and the carrying out of its functions during the year".

prepare other reports which – at the Commission’s discretion – are to be tabled in Parliament.

It is also important that the NHRC has the competence to directly communicate with the concerned Government ministries, agencies or officials, as this contributes to expediting NHRC procedures, reducing delays and promoting dialogue and remedial action. Section 31 should thus be amended to enable direct communication, with the NHRC providing a copy of such communications to the Office of the Prime Minister and the Council of Ministries, rather than having to communicate through a particular ministry or official.

13. Cooperation with other organisations

The Paris Principles state that an NHRI should “cooperate with the United Nations and any other organisation in the United Nations system, the regional institutions and the national institutions that are competent in the areas of the promotion and protection of human rights”. A successful NHRI will not function alone but will establish and strengthen cooperation and collaboration with a broad range of human rights partners.

In this regard, section 20(3) of the draft Bill, which states that “if any foreign institution wants to conduct programmes on the protection and promotion of human rights in Nepal, they shall have to seek consent of the Commission”, is inappropriate. *The language in the Constitution and the NHRC Act should stress the need for cooperation and engagement with international human rights bodies and national human rights related bodies.* Given the complementary nature of human rights work, it would be preferable to replace this provision with one that requires such institutions to work in coordination with the NHRC and vice-versa.

III. Consultation process

The founding law of an NHRI is crucial for the future effectiveness of the institution and should therefore reflect the Paris Principles both in terms of substance and process. The establishment of a successful NHRI requires a consultative, inclusive and transparent process, involving and mobilising all relevant elements of the State and civil society. Public

consultation is an important element and should include consultation on the human rights situation and priorities for the country, the legal basis of the institution, as well as the mandate and powers of the NHRI, measures to ensure its independence, pluralism, adequate resources, the structure, staffing and geographical location of the institution and the method of appointing its members. It is therefore desirable for the Legislature-Parliament to make the Bill public and to seek the views of the general public on its contents, as provided under the Constituent Assembly (*Legislative Functions*) Rules.

IV. Conclusions

A national human rights institutions can play a pivotal role in the national human rights protection mechanism of a state, and with the passage of an appropriate new legislation the NHRC in Nepal can continue to develop with strength. To enhance and strengthen the Commission, the new law should be fully consistent with the Paris Principles and with the highest international standards and best practices. NHRC and OHCHR's recommendations set out in this paper highlight the need for the current draft Bill to be expanded in a number of important areas to provide for an independent and pluralistic institution, properly funded, with a sufficiently broad mandate to undertake concrete human rights protection and promotion activities. A law which is in accordance with the Paris Principles will further contribute to recognition of the Commission by the International Coordinating Committee of NHRIs and to the NHRC attaining national, regional and international legitimacy.

Summary of Recommendations

1. **Constitutional status:** The NHRC should be clearly provided for in the Constitution with provisions to: (i) establish the Commission; (ii) guarantee its independence and pluralism; (iii) provide it with a broad mandate; and (iv) provide for its membership and staffing. More specific details regarding its operation should be located in the enabling legislation.
2. **Lack of independence:** The current Bill does not secure the independence of the NHRC. Independence and autonomy are the cornerstones of all NHRIs and key to the NHRC's ability to promote and protect human rights, they must be guaranteed in the law.

3. Provided mandate is too narrow:

- a. The term “human rights”, as defined in the Bill does not meet the requirement for a “broad mandate” as required under the Paris Principles. Reference should be made to all human rights instruments, not only those ratified by Nepal.
- b. The advisory function of the NHRC as currently stipulated, is weak. The Government should be obligated to seek the Commission’s opinion on drafting or amending laws regarding or affecting human rights and on matters relating to Nepal becoming a party to international or regional human rights treaties. Furthermore, the law should enshrine the duty of State officials to cooperate with the NHRC and provide powers of sanction against those who obstruct the work of the Commission.
- c. Under the current draft, the NHRC only has the power to resolve complaints through the punishment of officials or awarding of compensation. This should be augmented with the power to suggest steps that a State body should take to provide a remedy for the cause of complaints, which will go further in resolving the grievance in question and in preventing its repetition in the future.
- d. Consistent with highest international standards and best practices, the Commission should be afforded the explicit power to directly table reports in Parliament and thus be able to advocate for the appropriate action to be taken.

4. Procedure of appointment: The appointment procedure should be revised in the New Constitution and also included in the Bill, to avoid the process being dominated by the government, with the engagement of a representative and inclusive committee and with a broad consultation of the public and civil society. The procedure should also ensure inclusive representation amongst the Commissioners.

5. Lack of guarantees of independent staffing and sufficient funding: It is important that the Commission is afforded sufficient operational independence as required by the Paris Principles. The NHRC should be able to recruit its own staff, including its Secretary, and should be obligated to guarantee that its staffing reflects the diversity of Nepali society. There should be a provision to provide adequate funding to the NHRC. Furthermore, the requirement of approval of the

Finance Ministry on agreements involving financial matters impedes the Commission's independence and should be removed. The ministry should be informed of such agreements.

- 6. Inadequate complaint procedure:** Some aspects of the complaint handling tasks of the Commission, as defined in the Bill, need to be reconsidered. Of particular concern is a new statutory limitation of six months after the violation was committed for the filing of complaints.. Taking into consideration the inherent difficulties in filing complaints and the prevailing culture of impunity, such a requirement is unsuitable in Nepal.
- 7. Ambiguous provisions on jurisdiction in relation to the Army:** The NHRC's jurisdiction in relation to the Nepal Army must be clarified in the Bill ensuring that the Commission can investigate all alleged human rights violations, including those alleged to have been perpetrated by Army personnel.
- 8. Unclear nature of recommendations:** The status of NHRC recommendations should be clarified as binding decisions, ideally with a procedure through which these can become binding decisions of the court if necessary.
- 9. Inadequate process of awarding compensation:** There are a number of problematic provisions with regard to awarding compensation, including the fact that the Bill gives an arbitrary maximum ceiling amount for compensation and that interim relief received by a victim would be deducted from subsequent compensation. These provisions should be amended to allow for a separate mechanism to calculate appropriate compensation and a clear distinction between interim relief and compensation.
- 10. Lack of protection of complainants and witnesses:** The law requires a specific provision to protect complainants and witnesses, including their relatives or associates, who have made use of their rights under the Act or given information or evidence to the Commission.
- 11. Inadequate provision on cooperation with other human rights institutions:** In accordance with the Paris Principles, an NHRI should

cooperate with national and international human rights partners. Therefore, it is inappropriate for “foreign institutions” to be required to “seek consent of the Commission” to be able to undertake human rights programmes in Nepal. More preferable would be a clause that emphasised collaboration with all human rights actors and a requirement for such bodies to work in coordination with the NHRC.

12. Structure of the Bill: The structure of the Bill should be reorganised so that all *functions* of the NHRC are included in the same chapter.



Reference Materials

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