

## 4

# The Independence of Human Rights Institutions

Gillian Triggs

National Human Rights Institutions (NHRIs) are seen as an integral part of the protection of human rights in the 21st century. These institutions play a remarkably unique role within human rights frameworks, both globally and within individual states. Yet the importance and effectiveness of NHRIs are closely linked to how independent they are from states, in both form and practice. This chapter considers the role of NHRIs and their effectiveness in maintaining independence.

### **The role of NHRIs**

Since the formation of international human rights agreements in the 20th century, states have become parties to various treaties and conventions that require them to protect and promote human rights.<sup>1</sup> The establishment of NHRIs is a means by which states seek to ensure these rights are respected and upheld domestically. They are an important innovation in global governance, marking a significant step in the implementation of international human rights law in domestic legislation. In effect, NHRIs are a means of giving practical effect to the ideals set out in the 1948 *Universal Declaration of Human Rights*.

State institutions vested with the task of governing a country (executive), forming laws (legislature) and administering justice (judiciary), may have secondary functions that involve the protec-

tion of various human rights.<sup>2</sup> An NHRI, by contrast has an exclusive mandate to protect and promote human rights. This core mission places NHRIs in a unique and valuable position.

As '[bodies] established by a Government under the constitution, or by law or decree', it is largely an NHRI's manner of formation that determines its power and functions.<sup>3</sup> The law that establishes the NHRI will define its jurisdiction by specifying what conduct the NHRI can investigate or act on.<sup>4</sup> It is important to note that there is no particular model that works in every context. The structure and functions of an NHRI should take into account local circumstances.<sup>5</sup>

The institutional diversity of NHRIs reflects their relatively recent place in the international human rights framework. The Australian Human Rights Commission was one of the first NHRIs, being established in 1986. Since then, there has been a steady growth of NHRIs across the Americas, Africa and the Asia Pacific, most of which were formed in the 1990s.<sup>6</sup>

Over the years, many different institutions have been recognised as NHRIs to fit the unique requirements of national situations. The most common of these are human rights commissions and ombudsmen. NHRIs can also be institutions with a focus on particular rights, institutions with specific expertise regarding human rights research and institutions that combine characteristics from different kinds of NHRIs.

Despite jurisdictional differences, there are common functions that are incorporated into the mandate of most NHRIs. The inquiry function grants an NHRI the ability to consider the laws and policies of its state in order to identify shortcomings and recommend improvements. This may involve an investigation of specific breaches of human rights by the state or a systematic consideration of policies that appear to breach human rights. The inquiry function is unique in that it gives an NHRI a discretionary power to question and challenge state practices without the explicit approval of the government.

Depending on the applicable legislation, an ‘inquiry’ power may compel the production of evidence by states or relevant authorities as it relates to the NHRI’s investigation. For example, the Australian Human Rights Commission can compel persons to produce information and documents that are relevant to an inquiry under the *Australian Human Rights Commission Act 1986* (Cth). The ability to initiate inquiries on its own accord, with compellable investigative powers, is an important measure of the overall strength and effectiveness of an NHRI.<sup>7</sup> This is particularly true in circumstances where human rights breaches have affected individuals or groups who lack the social or financial resources to investigate.<sup>8</sup>

Another common function of an NHRI is to receive and investigate complaints by individuals regarding human rights violations under domestic law. The complaint function is facilitated by the power to obtain evidence and to facilitate conciliation or arbitration. The subjects of complaints vary depending on national legislation. Complaints can range from allegations of violations of civil and political rights by government, to complaints regarding discrimination in the workplace. While NHRIs often do not have the authority to impose legally binding outcomes, their enabling legislation generally allows them to attempt resolution of complaints. Where this is unsuccessful, complaints may sometimes proceed to a tribunal or court for determination. In some jurisdictions, NHRIs are also able to pursue complaints at court on behalf of complainants.

The power of an NHRI to advocate for human rights is a critical function. Human rights cannot be realised solely through legislation and administrative functions. NHRIs can, as a means of promoting education about human rights, include producing and distributing human rights publications. The NHRI may also use the media to promote understanding and awareness of human rights in the general community. Additionally, targeted educative efforts

may be made directed at groups such as schools, businesses and government departments.<sup>9</sup>

An educative function recognises that the promotion and protection of human rights cannot occur without the requisite social and political will. The movement from normative recognition of human rights to actual enforcement requires a significant leap, one that necessitates state support. Through the work of NHRIs, domestic human rights obligations and commitments can be elevated on the national agenda and become a priority in national debates.<sup>10</sup>

As NHRIs vary considerably from state to state, it became imperative that an internationally accepted set of standards be developed to achieve global legitimacy.

## The Paris Principles

The 'Paris Principles' set out the international standards for NHRIs and are the accepted benchmark against which NHRIs are assessed.<sup>11</sup> They are the minimum conditions that must be met for an NHRI to be considered credible by its peer institutions and within the UN system.

Under the Paris Principles, an NHRI is required to be:

- vested with competence in order to fulfil its mandate to promote and protect human rights;<sup>12</sup>
- vested with adequate powers of investigation to achieve its mandate;<sup>13</sup>
- pluralistic in its membership with guarantees of independence;<sup>14</sup>
- independent and autonomous from government;<sup>15</sup> and
- adequately resourced.<sup>16</sup>

The Paris Principles require that NHRIs be given effective authority and ability to fulfil their mandates. Of fundamental importance is the requirement of the Paris Principles that NHRIs

are independent from the governing state, in both form and substance.

Part of the enduring value of the Paris Principles is that they were developed by NHRIs themselves. In 1991, the UN Centre for Human Rights (now the Office of the High Commissioner for Human Rights) convened the first conference of NHRIs. The conference consisted of all NHRIs in existence at the time, with the purpose of defining common attributes that new or existing NHRIs should possess. At the conference, the Australian Human Rights Commissioner proposed a set of draft standards that eventually evolved into a revised version that was adopted by a UN General Assembly resolution in 1993.<sup>17</sup> Today, they are broadly accepted as the test of an institution's independence and effectiveness, and have become part of the human rights lexicon.

The Paris Principles are used by the International Coordinating Committee (ICC) of National Institutions for the Promotion and Protection of Human Rights to determine the international accreditation status of NHRIs. NHRIs that are assessed as being fully compliant with the Paris Principles are given an 'A-status', while those deemed partially compliant are accredited as 'B-status'. Those not compliant with the Paris Principles are given a 'C-status'.

Only A-status NHRIs are afforded participation rights at UN human rights mechanisms. A-status NHRIs are able to:

- provide submissions to various human rights mechanisms including human rights treaty bodies, the universal periodic review and special procedures. These submissions are incorporated into relevant UN documents for the state under review;
- make oral statements under all substantive agenda items of the Human Rights Council;
- participate through video messages in the Human Rights Council plenary debates;

- organise relevant parallel events at the Human Rights Council; and
- attend (as observers) sessions of the Human Rights Council and sessions of human rights treaty bodies.<sup>18</sup>

As at May 2015, 72 NHRIs were deemed to be fully Paris Principles compliant (A-status), 26 partly compliant (B-status) and 10 non-Paris Principles compliant (C-status).<sup>19</sup> The process for NHRIs to achieve accreditation occurs through the ICC's Sub Committee on Accreditation (SCA). Each NHRI undergoes a re-accreditation process with the SCA every four to five years to ensure that they are still adhering to the Paris Principles. The SCA has used the knowledge gained through this accreditation process to develop a body of jurisprudence around the content and scope of the Paris Principles.<sup>20</sup>

The importance of an A-status accreditation, as a means of attaining international credibility, has given states the impetus to strengthen the mandates of NHRIs. In this way, the UN and its organs have played a crucial role in creating and strengthening NHRIs. The Office of the High Commissioner for Human Rights, has done this by setting standards, helping states build capacity, facilitating networks and granting membership.<sup>21</sup> A similar process of capacity building is offered by the human rights regional network of each region.<sup>22</sup> Additionally, the UN Human Rights Council's process of Universal Periodic Review (UPR), has been used to encourage states to establish and strengthen their own NHRIs.<sup>23</sup> By defining NHRIs as valuable to states and helping equip states with the means to form and strengthen their NHRIs, UN bodies have been a driving force, promoting the role of NHRIs.

While the Paris Principles are central to the functioning of NHRIs, it remains true that human rights principles must be given effect at the national level. Incorporation of human rights principles in domestic laws depend on state action.

## Maintaining independence

State support remains vital to the independence of NHRIs. The paradoxical position of the state is that it is both responsible for protecting human rights and is often the violator of these rights.<sup>24</sup> As independent state institutions exclusively concerned with human rights, NHRIs are frequently touted as ‘the solution to the Janus-faced state in the area of human rights’.<sup>25</sup>

While effective NHRIs should be capable of acting independently of states in holding inquiries and making recommendations, this does not require a complete lack of connection to government. It is legislation that distinguishes an NHRI from a non-government organisation (NGO). With ‘a measure of qualified independence’,<sup>26</sup> NHRIs can and do produce positive human rights change as a bridge between governments and civil society. Previous national inquiries in Australia demonstrate the potential of NHRIs to challenge human rights violations and contribute to legislative and policy change for the protection of human rights.<sup>27</sup> Endorsed by the Australian government in 2008, *Closing the Gap* is an example of policy change in response to the work of the Australian Human Rights Commission through its *Social Justice Report 2005*.<sup>28</sup> The Report highlighted Indigenous disadvantage with respect to life expectancy, child mortality, access to early childhood education, educational achievement and employment outcomes. *Closing the Gap* is a formal commitment arising out of these findings to achieve Indigenous health equality within 25 years.

According to the UN, an effective NHRI is ‘capable of acting independently of government or party politics and of all other entities and situations which may be in a position to affect its work’.<sup>29</sup> This is problematic because the mandate and funding of an NHRI is determined by the sovereign will of the state.<sup>30</sup> The dependency of NHRIs on the state creates an inherent contradiction and prompts criticism that NHRIs are merely an arm of the state; difficult to access and bound by bureaucracy.<sup>31</sup> Without

organisational independence from the government, and an adequate base of sustainable resources, NHRIs can become ineffective and complicit with government human rights violations.<sup>32</sup>

Another potential tension in the relationship is that states may not wish to be held accountable by a well-resourced, independent body that is able to critique their actions.<sup>33</sup> As a result, the power of an NHRI can wax and wane depending on government support. States have the ability to limit the formal powers and resources of the NHRI, rendering the NHRI weak or unable to create substantive change.<sup>34</sup> Alternatively, an NHRI may have its funding tied to specific projects of particular political interest to the government of the day. The lack of discretionary funding thus can prevent an NHRI from fulfilling its core mandate.

Even more problematically, a state may create an NHRI to function as a 'smokescreen' to 'deflect international criticism of its rights record'.<sup>35</sup> This perversion of the function of an NHRI can have the unintended consequence of heightening social expectations of human rights protection, when governments are in fact unwilling or unable to meet these expectations.<sup>36</sup>

In recognition of these issues, the Paris Principles set out clear standards that provide a benchmark for independence, autonomy and effectiveness. Therefore, an incorporation of these principles are the surest sign that an NHRI is an independent organisation. The imperative to achieve and maintain an 'A-status' accreditation, forces NHRIs to be vigilant of the challenges that have been listed above. An NHRI is therefore compelled to consider the Paris Principle in all of their policies and practices. From a state's perspective, international credibility may be tied to how its human rights record is perceived globally. For this reason, states try to ensure their NHRIs conform to the Paris Principles.

Though policy and practices are important, enshrining the Paris Principles in legislation is the surest safeguard for maintaining independence. As public support can often be unpredictable,



especially in states with poor human rights records, legislation that is not easily amended can be relied upon to maintain a minimum level of independence and autonomy. A broad human rights mandate and investigative powers protected by law instils an ethos within an NHRI that is in line with the Paris Principles. Similarly, mandated periods of appointment for members of NHRIs provides a check on states from exercising influence on decision makers within the organisation. Commissioners that are statutorily appointed can fulfil their mandate without prejudice or fear of termination.

It remains true that the impetus of legislating for NHRIs, or preventing interference of their functions, lies with states. A key factor in ensuring the independence of any specific NHRI is the strength of cultural and social expectations within the community. A strong, normative, expectation of human rights protections can act as a safeguard from political pressure. States which have well known and respected human rights frameworks are less likely to interfere, or to be seen interfering, with the workings of NHRIs. An NHRI's accompanying legislative mandate is also less likely to be adversely amended if there is likely to be considerable political or community backlash.

Conversely, if an NHRI is born into a climate of 'ignorance and lack of understanding, potential hostility and suspicion', this can challenge effective independence.<sup>37</sup> This is so, not only because a state can limit funding and resource allocation but also because the general public will not understand the role of the NHRI. If so, the public's engagement with the NHRI will be limited. Thus, the level of human rights 'literacy' within the public can play a vital role in ensuring continued independence of the NHRI.

## Conclusion

NHRIs are often described as 'being somewhere in between state and non-state actors'<sup>38</sup> or 'semi-official' organisations.<sup>39</sup> The precarious nature of their independence as a result of this position is an

inevitable tension. But it is not a tension that necessarily harms effectiveness, so long as states respect the role and functions of NHRIs. It will not always be politically palatable for states to do so, particularly where uncomfortable realities of violation, discrimination and loss are revealed, and states are held to account for human rights abuses. For change to occur, states should not shirk from these findings or attempt to interfere with the workings of NHRIs. Rather, states should use NHRIs to engage in dialogue with affected communities. In an open and informed context of accountability, NHRIs can drive the internalisation of human rights. States can engage with this process by defending and accommodating human rights claims. In this way independent NHRIs can be highly effective in achieving human rights in modern democracies.

## Endnotes

- 1 See, for example, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *International Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981); *International Convention for the Elimination of all forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).
- 2 C Raj Kumar, 'National human rights institutions and economic, social and cultural rights: toward the institutionalization and developmentalization of human rights', *Human Rights Quarterly*, vol. 28, no. 3, pp. 755–779, 2006.
- 3 UN Centre for Human Rights, *National human rights institutions: a handbook on the establishment and strengthening of national institutions for the promotion and protection of human rights*, UN Doc HRP/PT/4, 1995, [6].
- 4 *Ibid* [7].
- 5 Global Exchange on National Human Rights Institutions, *The road to rights: establishing a domestic human rights institution in the United States, A post-conference report from the global convening on National Human Rights Commissions*, Columbia Law School and The Leadership Conference, p. 77, 2010.
- 6 Office of the High Commissioner for Human Rights (OHCHR), *Survey of national human rights institutions: report on the findings and recommendations of a questionnaire addressed to NHRIs worldwide*, 2009.

- 7 UN Centre for Human Rights, see note 3, [8].
- 8 Ibid.
- 9 Ibid.
- 10 C. Raj Kumar, see note 2.
- 11 G De Beco & R Murray, *A commentary on the Paris Principles on national human rights institutions*, Cambridge University Press, 2008.
- 12 *Principles relating to the status and functioning of national institutions for the protection and promotion of human rights* (the Paris Principles), 85th mtg, UN Doc A/RES/48/134 85th plenary meeting , 20 December 1993; Competence and Responsibilities [2].
- 13 The Paris Principles, see note 12; additional principles concerning the status of commissions with quasi-jurisdictional competence.
- 14 The Paris Principles, see note 12; composition and guarantees of independence and pluralism.
- 15 Ibid.
- 16 The Paris Principles, see note 12; additional principles concerning the status of commissions with quasi-jurisdictional competence.
- 17 The Paris Principles, see note 12.
- 18 Office of the High Commissioner for Human Rights, *NHRI participation: information note for national human rights institutions*, 2015, available at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/NHRIParticipation.aspx>
- 19 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, ‘Chart of the Status of National Institutions’, 29 May 2015.
- 20 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), ‘ICC SCA General Observations’ (May 2013).
- 21 S Cardenas, ‘Emerging global actors: the United Nations and national human rights institutions’, *Global Governance*, vol. 9, no. 1, pp. 23–42, 2003.
- 22 See the Network of African National Human Rights Institutions, the Network of National Institutions for the Promotion and Protection of Human Rights in the Americas, the Asia-Pacific Forum of National Human Rights Institutions and the European Group of National Institutions for the Promotion and Protection of Human Rights.
- 23 C Renshaw et al., ‘Human rights protection in the Pacific: The emerging role of national human rights institutions in the region’, *New Zealand Journal of Public International Law*, vol. 8, no. 1, pp 117–144, 2010.
- 24 K Meuwissen, ‘NHRIs and the state: new and independent actors in the multi-layered human rights system?’, *Human Rights Law Review*, vol. 15, no. 3, pp. 441–484, 2015.
- 25 Ibid.
- 26 UN Centre for Human Rights, see note 3, [10].

- 27 T Risse & K Sikkink, 'The socialization of international human rights norms into domestic practices: introduction', in T Risse et al. (eds), *The power of human rights: international norms and domestic change*, Cambridge University Press, 1999.
- 28 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social justice report 2005*, Australian Human Rights Commission, 2005.
- 29 UN Centre for Human Rights, see note 3, [10].
- 30 K Meuwissen, see note 24.
- 31 C Raj Kumar, see note 2.
- 32 S Cardenas, see note 21.
- 33 M Brodie, 'Uncomfortable truths: protecting the independence of national human rights institutions to inquire', *UNSW Law Journal*, vol. 38, no. 3, pp. 1215–1260, 2015.
- 34 *Ibid.*
- 35 *Ibid.*
- 36 S Cardenas, see note 21.
- 37 B Burdekin, 'Basic concepts of a national human rights commission: an international perspective', in S Sothi Rachagan & R Tikamdas (eds), *Human rights and the National Commission*, Hakam National Human Rights Society, Kuala Lumpur, 1999.
- 38 G De Beco & R. Murray, *A commentary on the Paris Principles on National Human Rights Institutions*, Cambridge University Press, 2014.
- 39 R Murray, *The role of national human rights institutions at the international and regional levels: the experience of Africa*, Hart Publishing, 2007.