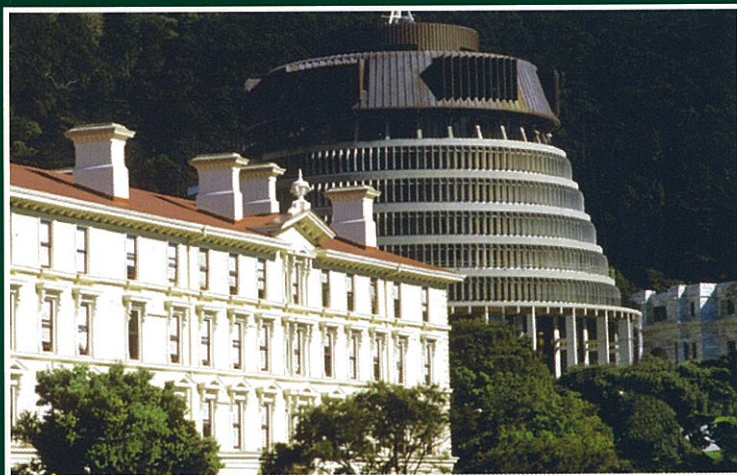


# *New Zealand Journal of Public and International Law*



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SPECIAL CONFERENCE ISSUE  
17TH ANNUAL ANZSIL CONFERENCE: THE FUTURE OF  
MULTILATERALISM IN A PLURAL WORLD

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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

His Excellency The Honourable Sir Anand Satyanand <small>CNZM QSO</small>	Colin Keating
Andrew Byrnes	Christopher Michaelson
Andrea Durbach	Jacqueline Mowbray
Roger S Clark	Catherine Renshaw
Christopher C Joyner	

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**Victoria**

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# HUMAN RIGHTS PROTECTION IN THE PACIFIC: THE EMERGING ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE REGION

*Catherine Renshaw, Andrew Byrnes and Andrea Durbach\**

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*At present, 64 of the 192 Member States of the United Nations have National Human Rights Institutions (NHRIs) – state-based institutions, with mandates to promote and protect domestic and international human rights. This article explores the current moves towards the creation of NHRIs within the Pacific region. It first reviews recent developments in human rights protection in the Pacific, in particular the discussions about the establishment of NHRIs in Pacific island states, and examines the external and national factors contributing to the increased momentum for the establishment of NHRIs in the region. The article then analyses the advantages a NHRI would offer for the better protection of human rights in Pacific island states, and the challenges posed for them by the need for NHRIs to comply with governing international standards for effective NHRIs (the Paris Principles). The paper then explores how NHRIs in the Pacific might be modelled to suit what are said to be the unique "legal, political and cultural particularities" of the region, while still complying with the Paris Principles. Finally, the article considers prospects for the establishment of a regional human rights mechanism for the Pacific. The paper concludes that in the field of human rights, regionalism presents an incomplete response to the needs of Pacific island states and that in the first instance energies should be directed toward the establishment of institutions within the state to promote and protect human rights.*

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## I Introduction

As of early 2010, 64 of the 192 Member States of the United Nations have National Human Rights Institutions (NHRIs) – state-based institutions, with mandates to promote and protect domestic and international human rights. Within the Pacific region, only three countries – Australia, New Zealand and Fiji – have established such institutions. Recently, interest in the establishment of NHRIs has gained significant momentum in the region, and a number of countries are actively exploring the advantages of and means for setting up such bodies, taking into account existing bodies, the limited resources available and the possible emergence of regional mechanisms for human rights protection.

This article explores the current moves towards the creation of NHRIs within the Pacific region. First, it briefly reviews recent developments in human rights protection in the Pacific, in particular the regional and national discussions taking place about the establishment of NHRIs in several Pacific island states. We then discuss the various factors which have triggered the increased interest in the establishment of NHRIs in the region, including those arising from external sources such as the United Nations, and those from national concerns to increase the level of human rights protection within Pacific states while maintaining sovereignty and preserving Pacific culture. This is followed by an analysis of the possible advantages a NHRI offers for the better protection of human rights at the national level. The article then discusses challenges posed by the governing international standards for effective NHRIs (the Paris Principles<sup>1</sup>), in particular their requirements of independence and adequate resourcing for NHRIs in the Pacific, and considers how NHRIs in the Pacific might be modelled to suit what are said to be the unique "legal, political and cultural particularities" that exist in the region, while still complying with the core elements of the Paris Principles. Finally, the article considers prospects for the establishment of a regional human rights mechanism for the Pacific and examines its potential to accommodate the structural challenges which are said to pose difficulties for the establishment of NHRIs in Pacific island states. The article concludes that in the field of human rights, regionalism presents an incomplete response to the needs of Pacific states and that in the first instance energies should be directed toward the establishment of institutions within the state to promote and protect human rights.

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1 The United Nations International Coordinating Committee of Institutions for the Promotion and Protection of Human Rights (ICC), accredits NHRIs on the basis of their compliance with the Paris Principles: *The Principles relating to the status and functioning of national institutions for protection and promotion of human rights (Paris Principles)*, endorsed by Comm Res 1992/54, E/CN.4/RES/1992/54 (1992) and GA Res A/RES/48/134 (1993). See Andrew Byrnes, Andrea Durbach and Catherine Renshaw "Joining the club: the Asia Pacific Forum of National Human Rights Institutions, the Paris Principles, and the advancement of human rights protection in the region" (2008) 14(1) AJHR at 63.

## *II Human rights protection in the Pacific: recent developments*

While many Pacific island states have ratified the Convention on the Elimination of All Forms of Discrimination against Women<sup>2</sup> and the Convention on the Rights of the Child,<sup>3</sup> the number of ratifications of, or accessions to, key treaties such as the International Covenant on Civil and Political Rights<sup>4</sup> and the International Covenant on Economic, Social and Cultural Rights,<sup>5</sup> remains comparatively low.<sup>6</sup> The perception of many people in Pacific island states is that ratification is more likely to lead to scarce resources being expended on reporting obligations to United Nations treaty bodies, than on making a difference in the everyday lives of the people.<sup>7</sup> But it is not only rights captured in international declarations and conventions that have failed to resonate in the lives of the people of the Pacific. Despite many of the constitutions of Pacific island states containing

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- 2 As of May 2010, all but Nauru, Palau and Tonga were parties to the Convention on the Elimination of All Forms of Discrimination against Women (opened for signature 18 December 1979, entered into force 3 September 1981).
  - 3 All 16 members of the Pacific Islands Forum were parties to the Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 January 1990).
  - 4 International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976).
  - 5 International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976). Only Australia, New Zealand, Papua New Guinea and Solomon Islands were parties to both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights; Samoa is also a party to the International Covenant on Civil and Political Rights. Australia, New Zealand, Papua New Guinea, Solomon Islands and Tonga are parties to the International Convention on the Elimination of All Forms of Racial Discrimination (opened for signature 7 March 1966, 4 January 1969). Only Australia and New Zealand are parties to the Convention against Torture (opened for signature 10 December 1984, entered into force 26 June 1987). Australia, the Cook Islands, New Zealand and Vanuatu have ratified the Convention on the Rights of Persons with Disabilities (opened for signature 30 March 2007, entered into force 3 May 2008).
  - 6 A recent joint publication by the Office of the High Commissioner for Human Rights and the Pacific Islands Forum Secretariat states that "[t]he Pacific region, compared with other regions of the world, has ratified the fewest number of core international human rights treaties, while at the same time nearly every Pacific island country guarantees basic civil and political rights through its Constitution." See "Ratification of Human Rights Treaties: Added Value for the Pacific Region" (2009) OCHCHR Regional Office for the Pacific Region <<http://pacific.ohchr.org>>.
  - 7 Dejo Olowu claims that there are three main arguments raised by opponents of the implementation of the UN human rights system: first, that human rights are already protected in the constitutions of Pacific states; second, the "fiscal incapacity" of South Pacific countries; third, the cultural peculiarities of South Pacific societies: "The United Nations Human Rights Treaty System and the Challenges of Commitment and Compliance in the South Pacific" (2006) 7(1) MelbJIL at 155.

bills of rights, a legacy of departing colonial powers, there is little application of these rights and they are infrequently invoked in court proceedings. Caren Wickliffe writes:<sup>8</sup>

National constitutions and institutions in the Pacific are not protecting the human rights of citizens of the Pacific. Human rights violations continue to occur. These violations include abuse of police powers, failure to meet minimal standards relating to the rights of prisoners, militarisation and its use against civilian communities, violence against women, abuse of children and young people, limitation of free speech and media freedom, discrimination based on gender, disability (including HIV/AIDS status), age, minority status or discrimination against immigrants, migrant workers or indigenous peoples. Other human rights violations are occurring in the economic, social and cultural sphere.

It is interesting, then, to observe recent momentum in the Pacific towards the establishment of NHRIs within Pacific states. The role of these institutions is to promote, monitor and implement domestic and international human rights law. Where states have ratified human rights treaties, national human rights institutions may play the role of encouraging government to pass legislation to give effect to international obligations and to scrutinise existing and new legislation for its conformity with human rights obligations. National human rights commissions may lobby for ratification of unratified international conventions and also monitor observance of the rights protected under national constitutions and laws. In the Asia Pacific region, most NHRIs have the power to investigate and conciliate complaints or to refer complaints to state agencies for prosecution. Commissions within the Asia Pacific region have also developed the practice of undertaking thematic investigations into issues that affect the enjoyment of human rights. For states with limited resources, where there exists great demand for redress of serious and widespread rights violations, thematic investigations have the potential to identify and address issues of systemic human rights abuse for the marginalised or disadvantaged.<sup>9</sup>

At the end of 2009, Fiji, Australia and New Zealand were the only members of the Pacific Islands Forum to have created national human rights institutions. But there are signs that the global momentum toward the establishment of NHRIs<sup>10</sup> is also reflected in the Pacific region.<sup>11</sup> The draft

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8 Caren Wickliffe "Human Rights Education in the Pacific: A Paper Prepared for the UNESCO Asia/Pacific Meeting on Human Rights Education" (1999) 3 *Journal of South Pacific Law* 1 quoted in Olowu, above n 7, at 161 n 18.

9 The regional network of NHRIs for the Asia Pacific, the Asia Pacific Forum of National Human Rights Institutions ("APF") has developed a core training programme that can be adapted to suit the legal context and training needs of individual member institutions. The programme examines the principles and standards that guide how human rights investigations must be conducted, along with the specific mandates for investigations that apply to national human rights institutions: see "Investigations Techniques" Asia Pacific Forum <[www.asiapacificforum.net](http://www.asiapacificforum.net)>.

10 As at November 2009, the number of UN member states in Europe was 52; of those, 20 had NHRIs with "A" status accreditation (are compliant with the Paris Principles). Out of 35 member states, the Americas had 15 "A" accredited NHRIs; Africa, with 53 UN member states, had 16 "A" accredited NHRIs and the



Constitution of Solomon Islands contains a provision for the establishment of a national human rights commission.<sup>12</sup> In April 2008, the Attorney-General of Samoa made a commitment to explore the establishment of a national human rights commission for Samoa,<sup>13</sup> and the Asia Pacific region's network of NHRIs, the Asia Pacific Forum of National Human Rights Institutions (APF), conducted a scoping mission on the establishment of a NHRI in Samoa in April 2009. Papua New Guinea has had draft legislation for the establishment of a commission awaiting consideration by Parliament since 2005.<sup>14</sup> At its appearance before the UN Human Rights Council Universal Periodic Review in May 2008, Tonga accepted France's recommendation that it establish a national human rights institution in accordance with the Paris Principles.<sup>15</sup> In August 2009, Nauru's Minister for Justice, the Hon Mathew Batsiua, requested that the APF and the United Nations Office of the High Commissioner for Human Rights ("OHCHR") conduct a Scoping and Consultancy Mission on the establishment of a NHRI in the Republic of Nauru, with the objective of reporting on the "type(s) of

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Asia-Pacific region had 13 "A" accredited NHRIs out of 52 UN member states. See "National Human Rights Institutions" National Human Rights Institutions Forum <www.nhri.net>.

- 11 Between 2006 and 2008, the New Zealand Human Rights Commission and the Pacific Islands Forum (PIF) Secretariat undertook a research project to identify "opportunities and challenges for human rights mechanisms" in the small Pacific states of Niue, Palau, Samoa and Tuvalu. For a comprehensive description of the project and analysis of its findings, see Joy Liddicoat "Human Rights Mechanisms in Small Pacific States: Implications for Dialogue about Regional Human Rights Mechanisms" (2009) 40 VUWLR at 279.
- 12 Draft Federal Constitution of Solomon Islands, art 238. Article 239(1) provides that the human rights commission has the functions of (a) promoting respect and general awareness for human rights and a culture of human rights (b) promoting compliance with international human rights treaties and obligations (c) promoting the progressive realisation of rights and freedoms (d) monitoring, assessing the observance of and realisation of human rights (e) adjudicating and ruling on human rights disputes and matters. Article 239(2) also provides that "the Human Rights Commission shall operate with the minimum of formality and shall be structured so that it is accessible to all persons and communities throughout the Republic".
- 13 This commitment was made at the conference, "Strategies for the Future: Protecting Rights in the Pacific", of 27-29 April 2008, in Apia, Samoa, organised by the New Zealand Centre for Public Law, Law Faculty of Victoria University Wellington and sponsored by the Commonwealth Secretariat, NZAID and the Federal Republic of Germany Foreign Office: see "Call for Pacific human rights mechanism" Asia Pacific Forum <www.asiapacificforum.net>.
- 14 In September 2009, the government of Papua New Guinea and the OHCHR hosted a week-long workshop on the establishment of a NHRI in Papua New Guinea.
- 15 *Report of the Working Group on the Universal Periodic Review: Tonga* A/HRC/8/48 (2008) at [63(24)]. When Tonga is again reviewed at the UPR in 2012, the basis of the review will be whether or not recommendations have been implemented. See Natalie Baird's discussion of Tonga's experience before the UPR in "Will the Universal Periodic Review make a difference in the Pacific?" (paper presented at conference Celebrating 60 years of the Universal Declaration of Human Rights, New Zealand Centre for Public Law, Victoria University of Wellington 9-10 December 2008).

NHRI best suitable to Nauru's legal, political and cultural particularities, having due regard to available resources and to necessary compliance with the Paris Principles.<sup>16</sup>

The Paris Principles, drafted by representatives of NHRIs at a meeting in Paris in 1991 and adopted by the United Nations General Assembly in 1993, detail minimum standards of independence from government (through establishment via constitutional or legislative text, financial autonomy, appointment processes through official acts establishing a stable mandate, freedom of action) and pluralism (in the composition of the NHRI and appointment of its members).<sup>17</sup> The Paris Principles also state that a NHRI should be given "as broad a mandate as possible". For small island states in the Pacific, the Paris Principles present a challenge; financial and human resources are scarce and rights issues are not always viewed as a government priority.<sup>18</sup>

### *III Establishing NHRIs – the role of the Office of the High Commissioner for Human Rights and the Asia Pacific Forum of National Human Rights Institutions*

Impetus for the creation of NHRIs comes from a number of sources. Sonia Cardenas has argued that the driving force behind the establishment of NHRIs has been the United Nations Office of the High Commissioner for Human Rights.<sup>19</sup> However, other international actors, such as the Commonwealth Secretariat and the United Nations Development Program, have also encouraged and supported the establishment of NHRIs with the promise of international engagement and development aid. In the Asia Pacific region, significant practical assistance to states wishing to establish NHRIs has come from the region's network of national commissions, the APF.

Pressure for the establishment of NHRIs also comes from within the state itself. Civil society often views NHRIs as a potentially valuable tool in securing state compliance with international human rights obligations and addressing domestic human rights violations.<sup>20</sup> Governments may

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16 Letter from the Hon Mathew Batsiua MP, Minister for Justice, Health and Sport, Republic of Nauru, to Mr Kieren Fitzpatrick, Director, Secretariat of the Asia Pacific Forum of National Human Rights Institutions (12 October 2009) copy on file with authors.

17 *Paris Principles*, above n 1.

18 These issues are further explored in Part V below.

19 Sonia Cardenas "Emerging global actors: the United Nations and national human rights institutions" (2003) 9 *Global Governance* 23.

20 In 2008, the Asian NGOs Network on National Institutions (ANNI) was established. In its first publication, the authors stated that "national human rights institutions hold an important role in the promotion and protection of human rights in the region, considering the fact that Asia has yet to set up a human rights mechanism that would cover the region....they also hold the potential of developing a regional jurisprudence on human rights that would conform to international human rights principles." ANNI "2008 Report on the Performance and Establishment of National Human Rights Institutions in Asia" (Asian Forum for Human Rights and Development, Bangkok, 2008).

view the establishment of a NHRI as a means of appeasing international and domestic critics without the sacrifice of sovereignty that follows acceptance of the jurisdiction of any supra-national human rights commission or court. Importantly in the Pacific, NHRIs have the potential to initiate and guide national dialogues on issues such as the relationship between culture and human rights. In this section of the paper, we discuss some of these sources of momentum.

## **A *The United Nations and NHRIs***

There has been growing recognition of the role and importance of national human rights bodies since the 1993 United Nations Vienna World Conference on Human Rights. The Vienna Declaration, which emanated from that conference, affirmed:<sup>21</sup>

the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights.

The Vienna Declaration stated that national bodies should comply with the Paris Principles, endorsed by the United Nations General Assembly in the same year as the Vienna Declaration.

National human rights institutions have come to be viewed as key instruments for improving a state's capacity to meet its commitments in implementing human rights. The significance attached to them reflects an understanding that, in the words of former United Nations High Commissioner for Human Rights, Louise Arbour, "states remain the primary actors, the key conduits through which respect for human rights must be realised. The obligation to respect and enforce human rights rests on states."<sup>22</sup> National human rights institutions, it is argued, can play an important role in ensuring that citizens actually have the ability to exercise civil and political rights and to enjoy, to the maximum extent that the resources of the state permit, economic, social and cultural rights.<sup>23</sup> The OHCHR has a vision of the world in which every nation possesses an independent national human rights institution.<sup>24</sup>

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21 United Nations World Conference on Human Rights *Vienna Declaration and Programme of Action* at [36] A/CONF.157/23 (1993).

22 "Statement by Ms Louise Arbour, United Nation High Commissioner for Human Rights, on the Opening of the 61st session of the Commission on Human Rights" (Geneva, 14 March 2005) <[www.unhchr.ch](http://www.unhchr.ch)>.

23 The provisions in some recent conventions (the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention against Torture, for example) ascribe a monitoring function to national human rights institutions.

24 Interview with Gianni Magazzeni, Office of the High Commissioner for Human Rights (Apia, 28 April 2009) copy on file with authors.

Since April 2008, the process of the Universal Periodic Review (UPR) of the UN Human Rights Council has been used to encourage states to establish national human rights commissions. In the first session of the UPR, 15 of the 16 states under review were asked, in advance written questions, whether they possessed a national human rights institution and whether this institution complied with the Paris Principles.<sup>25</sup> In each of the four subsequent sessions of the UPR up to mid-2009, questions about the existence and status of national human rights institutions have been a staple feature.

In May 2008, Tonga became the first Pacific island state to undergo the UPR. The United Kingdom submitted its standard advance question about the existence of a national human rights institution in Tonga and its compliance with the Paris Principles. The Permanent Representative of the Kingdom of Tonga to the United Nations advised the Review Committee that Tonga had no national human rights institution and that resource restrictions made the establishment of such an institution "impractical at the present time." Tonga's Permanent Representative informed the Committee that there was, however, "work in progress at a regional level for the establishment of human rights institutions in the countries of the Pacific under the Governance Pillar of the Pacific Plan".<sup>26</sup> Tonga supported the final recommendations of the UPR, which included "pursuing efforts to create a national human rights institution in accordance with the Paris Principles<sup>27</sup> or "to create, if not a national human rights institution, at least one at the level of the group of Islands it belongs to".<sup>28</sup>

Later that year, Tuvalu underwent the UPR procedure.<sup>29</sup> Again, the United Kingdom submitted its standard question about national human rights institutions. The Head of Tuvalu's Delegation to the United Nations responded that Tuvalu was aware of the need to establish a national human rights commission, and was "trying to find ways to implement this commitment realistically and without constraining other priorities". The Head of the Delegation advised that a proposal was being considered to "pool resources from Small Island States in the Pacific to a regional human rights facilitating institution overseen by the Secretariat of the Pacific Community and the Pacific Islands

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25 First Session of the Universal Periodic Review (7-18 April 2008).

26 *Report of the Working Group on the Universal Periodic Review: Tonga*, above n 15.

27 Ibid, recommendation 23 (Canada) and 24 (France).

28 Ibid, recommendation 25 (Algeria). In May 2009, Vanuatu underwent the UPR. Again, the United Kingdom submitted an advance question: "Could you please elaborate on the steps that the Government of Vanuatu is taking to develop a national human rights institution in Vanuatu in full compliance with the Paris Principles?" See *Report of the Working Group on the Universal Periodic Review: Vanuatu* A/HRC/12/14 and A/HRC/12/14/Add.1 (2009).

29 3rd Session of the UPR (1-15 December 2008); see *Report of the Working Group on the Universal Periodic Review: Tuvalu* A/HRC/10/84 (2009).

Forum" and that the government of Tuvalu was "pursuing dialogue with the Secretariat of the Pacific Community and the Pacific Islands Forum on the possibilities."<sup>30</sup>

The UPR is the cornerstone of the Human Rights Council's project to chart every state's progress toward realisation of universal human rights for all. It is clear that within this process, the existence, independence and effectiveness of an institution within the state, dedicated to implementing human rights, will be used to gauge a state's commitment to promoting and protecting human rights. At least within the forum of the UPR, Pacific island states are acknowledging that human rights promotion and protection via the establishment of national human rights commissions is optimal. It is the reality of small, diverse and geographically disparate island communities combined with scarce resources which makes the actualisation of the commitment difficult.

### ***B The Asia Pacific Forum of National Human Rights Institutions***

Practical support for Pacific states wishing to establish NHRIs has come from the Asia Pacific's regional organisation of national commissions, the APF. The APF supports the establishment and strengthening of independent commissions within the Asia Pacific by facilitating the sharing of expertise between commissions and providing technical assistance. The APF's Secretariat assists governments which are considering establishing NHRIs to pass legislation compliant with the Paris Principles requirements for independent and effective commissions. The Secretariat provides informal advice to NHRIs seeking membership of APF, so that necessary adjustments to their legislative basis, structure or mandate can be made.<sup>31</sup> The APF's Best Practice Principles, which outline the steps that should be taken by both governments and civil society in the pre-establishment phase of creating a national institution, have been fundamental to the successful establishment of the NHRIs of Afghanistan, East Timor, Malaysia, Mongolia and South Korea. Since 1996, APF has provided regular assistance and advice, on request, to the governments of Bangladesh,<sup>32</sup> Vietnam,<sup>33</sup> Japan, Cambodia and Taiwan in relation to the future establishment of NHRIs.

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30 Ibid.

31 For example, in 2002, the APF Secretariat provided detailed legislative and legal advice to the recently elected Constituent Assembly, NGOs, representatives of the East Timor Administration and the United Nations Transitional Administration in East Timor on the possible mandate, role and functions of a future NHRI. The NHRI of Timor-Leste was eventually established in 2004.

32 Sometimes, considerable time elapses between indication of a state's interest in establishing a commission and its actual establishment. In 1997, the Australian Human Rights Commission (then known as HREOC) and the New Zealand Human Rights Commission hosted a senior delegation from Bangladesh, who wished to establish a national human rights commission to promote and protect human rights. In June 1998 officers from the Human Rights Project Team of the Bangladesh Department of Law, Justice and Parliamentary Affairs commenced a human rights training internship in Australia for three months. The members of the Bangladesh team were placed within 3 functional units of the Australian Commission – conciliation, human rights and public affairs. This was combined with an academic coursework programme specially designed

The APF, in conjunction with the OHCHR and other bodies such as UNDP, has convened several workshops and consultations in the Pacific region on the development of NHRIs. In 2004, the APF, UNDP, the Commonwealth Secretariat and the OHCHR, held a Pacific Island Human Rights Consultation in Suva, Fiji. In the Concluding Statement, participants reaffirmed that:<sup>34</sup>

... the primary focus for the promotion and protection of human rights is at the national level and therefore it is the primary responsibility of States to ensure that human rights are promoted, protected and fulfilled.

In April 2009, government representatives from Palau, Nauru, Marshall Islands, Niue, Solomon Islands and Vanuatu, met in Apia and agreed upon the Samoa Declaration which recognised the need for Pacific island states to establish national human rights commissions.<sup>35</sup> The Samoa Declaration emphasised the importance of NHRIs making human rights values part of everyday life and language and their relevance as key actors in strengthening human rights promotion and protection and recognises the role of human rights mechanisms in empowering all people to understand and exercise their human rights.

While the significance of declarations made in workshops can be overstated, the Declaration represents an undertaking by high-level government representatives, in relation to which they can be held accountable and offers civil society a rallying point to demand government action. In addition, organisations such as the APF and OHCHR use the Declaration as a platform for offering further, practical and specific, assistance to states whose representatives have agreed to "the importance" of a particular issue.

But regardless of the level of international encouragement for the idea of establishing NHRIs, their creation is a matter for the state. The question of what motivates governments to establish institutions whose mandate includes scrutinising the government's own record on human rights is considered in the following section.

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by the APF in consultation with the University of Sydney. However, it was not until 2008 that Bangladesh established its human rights commission.

33 A group of experts from the Prime Minister's research group from Vietnam conducted a study tour to New Zealand from 2 to 9 November 1997, looking at a number of aspects of the New Zealand government's work on human rights, including its human rights commission. Vietnam is yet to establish a NHRI.

34 "Concluding Statement and Recommendations" (Pacific Island Human Rights Consultation, Suva, Fiji Islands, June 1-3 2004) <<http://pacific.ohchr.org>>.

35 *Samoa Declaration* (2009) 40 VUWLR 417; (2009) 8 *Revue Juridique Polynésienne* 417; Asia Pacific Forum <[www.asiapacificforum.net](http://www.asiapacificforum.net)>.

#### *IV The Domestic Appeal of NHRIs*

In this section, we suggest that three factors in particular are contributing to national momentum toward the establishment of NHRIs in the Pacific. The first is the recognition that rights are at present inadequately protected, and that there is a need for further measures to promote and protect human rights.<sup>36</sup> The second is recognition that an ongoing dialogue is required on the subject of human rights and culture, and that shepherding this dialogue is a role that could be played by an independent national body, informed by international norms but situated within the state and close to the people. The third is the fact that state sovereignty remains a principal concern for nations of the Pacific, and regionalism is viewed as merely a supplement to national efforts.

##### *A Human Rights in the Pacific*

There is awareness on the part of political leaders and NGOs across the Pacific that the rights of inhabitants – particularly women and children – are at present not sufficiently protected. For example, prior to the 2004 human rights consultation in Suva, attended by representatives of the Pacific Islands Forum Secretariat, governments of the region and civil society leaders,<sup>37</sup> the organisers conducted an extensive survey of government and non-governmental participants, in an attempt to identify the issues which they perceived as the most serious or urgent human rights problems of their respective states. Some responses were distinctive to the state in question: Fiji identified racial discrimination by the Government against Indo-Fijians and the lack of thorough investigations and prosecution of all those who plotted and actively supported the coup of 2000; the Cook Islands and Palau raised the issue of discrimination against foreign workers; Tonga identified the need for revision of the Constitution to provide for peoples' participation in decision-making and democratic reform; Samoa identified a lack of understanding within rural communities on the rights of people to choose their religion, evident in the rise of cases in the Lands and Titles Court concerning the Village Fono Act and the Constitution.<sup>38</sup>

There were also some responses which were common to all Pacific island states, such as the lack of respect for the rule of law, the absence of institutional accountability and transparency within

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36 Liddicoat makes the observation that although existing mechanisms within Pacific states provide "a broad, if fragmented, infrastructure for human rights protection and promotion," they operate with "relatively restricted resources" and are burdened by an increasing, often "unrealistic", allocation of responsibilities without a concomitant increase in financial and human resources. See Liddicoat, above n 11, at 283-285.

37 See "Concluding Statement and Recommendations", above n 34. The Pacific Islands Human Rights Consultation (2004 Suva Consultation) was hosted by the Fiji Human Rights Commission and was attended by the Pacific Islands Secretariat and over 80 participants. The consultation was coordinated by the APF and the OHCHR. Financial support for the consultation was also received from the Commonwealth Secretariat, the UNDP and the Government of New Zealand.

38 Ibid.

government and the police force, discrimination against women and violence against women and children, and the under-representation of women in government.

The 2004 Auckland Declaration, in which Pacific Island leaders adopted the Report of the Eminent Persons Group commissioned to review the functions and effectiveness of the Forum, demonstrates that there is a regional aspiration to further promote human rights.<sup>39</sup> The Declaration states:<sup>40</sup>

... the Pacific region can, should and will be a region of peace, harmony, security and economic prosperity, so that all of its people can lead free and worthwhile lives. We treasure the diversity of the Pacific and seek a future in which its cultures and traditions are valued, honoured and developed. We seek a Pacific region that is respected for the quality of its governance, the sustainable management of its resources, the full observance of democratic values, and for its defence and promotion of human rights.

## ***B Human Rights and Culture in the Pacific***

Such pronouncements signal a shift in the debate about human rights in the Pacific, from an assertion of cultural relativism and a questioning of the relevance of "universal" standards, to the question of how best to achieve effective implementation of rights within the cultural context of the Pacific.<sup>41</sup> Transposing universally endorsed rights into their local context is an ongoing process;<sup>42</sup>

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39 *Auckland Declaration* (Pacific Islands Forum, Special Leaders' Retreat, Auckland, 6 April 2004). The Eminent Persons Group (EPG) convened to review the Pacific Islands Forum, which was chaired by Sir Julius Chan, former Prime Minister of Papua New Guinea, and comprised several prominent members: Dr Langi Kavaliku of the Kingdom of Tonga, Teburoro Tito, former President of Kiribati, Maiava Iulai Toma, the Samoan Ombudsman, and Robert Cotton, a former Australian diplomat. It consulted at both government and civil society levels. The EPG reported to a special Forum summit in Auckland in April 2004. The Auckland Forum endorsed the EPG report in the Auckland Declaration: see George Fry "Whose Oceania? Contending Visions of Community in Pacific Region-building" (Working Paper 2004/3, Department of International Relations, Australian National University, October 2004) at 21.

40 *Auckland Declaration*, above n 39, at 2. Of the four major suggestions of the EPG on human rights, three were adopted for immediate implementation (ratification and implementation of international and regional human rights instruments, harmonisation of traditional and modern values and structures, and development of strategy for participatory democracy and consultative decision-making), while the fourth one (regional human rights mechanism) was tabled for further analysis. The Eminent Persons Group had identified the establishment of "national human rights machinery" as a priority for Pacific states. The EPG suggested that Pacific island states engage with the regional network of national human rights commissions, the Asia Pacific Forum of National Human Rights Institutions (APF). Australia, New Zealand and Fiji were, at that time, members of the APF.

41 See Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006).

42 See for example *Samoa Declaration*, above n 35. For a recent study of the process of bringing rights into the discourse of the Pacific, see Sue Farran *Human Rights in the South Pacific: Challenges and Changes* (Routledge-Cavendish, Abingdon, United Kingdom, 2009).



some cases, such as *Teonea v Kaupule*, discussed below, illustrate particularly well the chasm that can exist between the international community's conception of a right and the idea of the right as it exists within traditional communities.<sup>43</sup> We suggest that NHRIs, described as a "the bridge between the ideal and its implementation" may be an institution well-suited to negotiating this divide.<sup>44</sup>

In 2008, Tuvalu underwent the Universal Periodic Review. Many of the Member States which questioned Tuvalu raised the case of *Teonea v Kaupule*,<sup>45</sup> decided in the High Court of Tuvalu in 2005. In that case, the High Court of Tuvalu upheld the decision of the Nanumaga Falekaupule, or traditional assembly, to ban all religions other than the Ekalesia Kelisiano Tuvalu (EKT), from the island of Nanumaga. The court held that:<sup>46</sup>

... the identity of the community on Nanumaga has, for many decades, been based on the unity of a single denomination, the EKT. The evidence the Court has heard has demonstrated that the erosion of that unity of belief by the introduction of new religions has resulted in a corresponding loss of unity in the community as a whole.

The Jehovah's Witnesses in Tuvalu, the Brethren Church (whose leader, Mase Teonea, was the applicant in the case), and the Legal Literacy Project of the Tuvalu National Council of Women, all submitted reports to the United Nations Human Rights Council,<sup>47</sup> recommending that a Court of Appeal be convened as soon as possible, so that a final determination might be made as to the extent of traditional authorities' power to curtail the exercise of fundamental freedoms and to bring about amendments to the Falekaupule Act so that the relationship between the Bill of Rights in the Constitution and the customary authority of the *Falekaupule* was more clearly defined and understood. The report of the various groups clearly made an impression on questioning parties in the Human Rights Council, many of whom urged the government of Tuvalu to establish a Court of Appeal, so that the High Court's decision could be reviewed. Apparently, questioning states assumed that the result of such an appeal would be a decision upholding the freedom of religion over the *Falekaupule's* restriction of new religions.

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43 Liddicoat, above n 11, at 286-287.

44 Cardenas, above n 19.

45 *Teonea v Kaupule* [2005] TVHC 2.

46 Ibid, at 15.

47 These reports, as well as those of Amnesty International and other NGOs, are available at Office of the High Commissioner for Human Rights <[www.ohchr.org](http://www.ohchr.org)>.

The Constitution of Tuvalu explicitly preserves the place of Tuvaluan values and culture. The Preamble to the Constitution states that:<sup>48</sup>

... the stability of Tuvaluan society and the happiness and welfare of the people of Tuvalu, both present and future, depend very largely on the maintenance of Tuvaluan values, culture and tradition, including the vitality and the sense of identity of island communities and the attitudes of co-operation, self-help and unity within and amongst those communities.

The Constitution recognises the right to worship, or not to worship, in whatever way the conscience of the individual tells him, but s 29 also provides that:<sup>49</sup>

- (3) Within Tuvalu, the freedoms of the individual can only be exercised having regard to the rights or feelings of other people, and to the effect on society.
- (4) It may therefore be necessary in certain circumstances to regulate or place some restrictions on the exercise of those rights, if their exercise:
  - (a) may be divisive, unsettling or offensive to the people; or
  - (b) may directly threaten Tuvaluan values or culture.

While the subject of much critical commentary internationally,<sup>50</sup> the *Teonea* decision received support from within the Pacific. In an address to Australian and New Zealand Society of International Law in 2006, the then Director of the Fiji Human Rights Commission, Shaista Shameem, stated that:<sup>51</sup>

...the case is not about freedom of religion but about the implications of the practice of a religion that could have a negative impact on the survival of a community – the community's right to life itself.

The Commentary accompanying the decision in the Pacific Human Rights Law Digest, published by the Regional Rights Resource Team (RRRT), is equivocal. It states: "from a purely human rights perspective, advocates may have concerns about this decision and the disadvantage suffered by the applicant. What must be remembered is that rights exist in a context and have to be considered

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48 Constitution of Tuvalu, preamble at [3]. The Principles set out in the preamble are adopted as part of the basic law of Tuvalu, "from which human rights and freedoms derive and on which they are based": Constitution of Tuvalu, s 13.

49 Ibid, s 29(3)-(4)

50 See for example Dejo Olowu "When Unwritten Customary Authority Overrides the Legal Effect of Constitutional Rights: A Critical Review of the Tuvaluan Decision in *Mase Teonea v Pule O Kaupule & Another*" (2005) 9 Journal of South Pacific Law <[www.paclii.org](http://www.paclii.org)>.

51 Shaista Shameem, Director of the Fiji Human Rights Commission (speech to the Australia and New Zealand Society of International Law 14th Annual Conference, Wellington, 29 June-1 July 2006) at 6, quoted in Law Commission, above n 41 at 118.

against that background."<sup>52</sup> Nor is the issue one that is to be seen as a problem posed by the intersection of universal human rights values and non-Western culture.<sup>53</sup>

Seen in the broader human rights context, while restrictions on proselytising are infringements of the freedom to manifest one's religion, such restrictions may be justified in a limited range of circumstances, as the case law of the European Court of Human Rights shows.<sup>54</sup> Limiting proselytism to protect the "rights of others" has been upheld as permissible in situations involving some form of coercion, but the restriction might be argued to extend beyond such circumstances.

Legitimate and lasting change in countries where concepts of culture, religion, gender and human rights are keenly contested does not come from pronouncements of international organisations in world forums, though these have their place. Pacific leaders have recognised that what is required is dialogue about change, a process of engagement, the juxtaposition of opposing views, consideration of other viewpoints and, in the context of the *Teonea* case, discussion of how different faiths might be practised in one community and the benefits of pluralism enjoyed, while retaining the bonds of community. The forum for this process is ideally a body embedded in the community, familiar with its history and the context in which people live their lives, but cognisant of the need for independent judgment and of the body of law representing universally acknowledged human rights. This is part of the work of national human rights commissions; to ensure that human rights are not seen as extraneous to the cultural values which preserve the cohesiveness of the community. The legitimacy which flows from framing laws in culturally appropriate ways encourages voluntary compliance - crucial in the Pacific, where enforcement mechanisms are expensive and sparse, or do not exist.

In relation to vexed issues such as the rights of women and rights to religious freedom, there is an argument that the transposition of international human rights into the local context, is most effectively explored by the nation through painstaking processes of long-term education and dialogue, best conducted by an institution within the state, supported by government. The New Zealand Law Commission has described human rights and culture in the Pacific as "converging currents,"<sup>55</sup> but as the *Teonea* case illustrates, there are complex undertows to be negotiated before some rights are fully understood, accepted and upheld. For example, the Chief Executive Officer of

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52 P Imrana Jalal and Joni Madraiwiwi "Religion" 2 Pacific Human Rights Law Digest 83 at 84-85.

53 A number of European countries have constitutional restrictions on proselytism of different types: Renáta Uitz "Freedom of Religion in European Constitutional and International Case Law (Council of Europe, Strasbourg, 2007) at 63-64.

54 For example, *Kokkinakis v Greece* [1993] ECHR 20 (see the dissenting opinion of Judge Valticos and the joint dissenting opinion of Judges Foighel and Louizou), and *Larissis v Greece* [1998] ECHR 13. See generally Paul M Taylor Freedom of Religion: *UN and European Human Rights Law and Practice* (New York, Cambridge University Press, 2005) at 64-77.

55 Law Commission, above n 41.

the Public Service Commission of Samoa, Beth Onesemo, identified a "contradiction" between Samoan culture, which is "not supportive of women being leaders and men being in the same field, it's supportive of women being leaders in fields that women have traditionally been leaders in, tending to households, raising children", and "the fundamentals of CEDAW and CRC, which are sometimes compromised because of the need to be culturally sensitive".<sup>56</sup> Reframing "contradictions" such as the one identified by Onesemo, is the work of NHRIs, which can be "the practical link between international standards and their concrete application."<sup>57</sup>

### *C Human Rights and Sovereignty in the Pacific*

Another factor influencing Pacific leaders to endorse the establishment of NHRIs is the importance of state sovereignty. NHRIs are institutions dedicated to implementing international human rights, but they are embedded firmly within the state; they do not threaten sovereignty, the preservation of which is an issue of concern for both smaller and larger Pacific island states. Sovereignty is often raised as an impediment to establishment of a regional human rights institution, which advocates have offered as a solution to the problems of resourcing and ensuring the independence of national institutions.

In the Polynesian states of Tonga and Samoa, there is clear sense of national identity and a wish to preserve the distinctive cultural characteristics of these relatively well-endowed and relatively stable political systems.<sup>58</sup> The Samoan Attorney General, the Hon Ming Leung Wai, commented in response to a question about the potential benefit of a Pacific regional human rights mechanism:<sup>59</sup>

There is an assumption that everyone in the Pacific region is the same and that all our countries are the same. While we have common problems, we are very different people in the Pacific. In terms of human rights, I think it will be much better if we focus on setting up our own national institution, so that it is more relevant to our country, so that the resources that we put in will be used for our country and it will be a Samoan institution. Selling the idea [of a national human rights institution] to our country is not easy, but to sell the idea of a regional human rights body, I think that would be even harder.

While there are cultural values commonly identified within the Pacific (Elise Huffer identifies "solidarity and reciprocity; the fostering and maintenance of kinship networks and relationships;

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<sup>56</sup> Interview with Beth Onesemo (Apia, Samoa, 28 April 2009) copy on file with authors.

<sup>57</sup> Cardenas, above n 19.

<sup>58</sup> In relation to Tonga, recent political instability has resulted from demands for political liberalisation of the constitutional monarchy. Samoa, on the other hand, is "a well functioning democracy and socially a very cohesive society": Biman Chand Prasad "Institutions, Good Governance and Economic Growth in the Pacific Island countries" (2008) 35 *International Journal of Social Economics* 12.

<sup>59</sup> Interview with the Hon Ming Leung Wai, Attorney-General of Samoa (Apia, Samoa, 28 April 2009) copy on file with authors.

attachment to land and sea; respect and care for others; the upholding of human dignity and consultation and shared leadership"),<sup>60</sup> there is resistance in the Pacific to the idea of the region as a culturally homogeneous zone. As Ward CJ stated in the *Teonea* case:<sup>61</sup>

Each of the eight island communities of Tuvalu has much in common with the others but each also has its own unique traditions. Some are preserved better than others and some communities hold to theirs more tenaciously than others ... Where our Constitution is different is that it is firmly founded on the desire of the legislature, as an expression of the wish of the people, to hold to their traditions even if to do so means that some individual rights may be curtailed or restricted.

For smaller states such as Nauru, there is a perception that the practical advantages of ceding sovereignty to a central regional body may be inadequate compensation for any loss of national autonomy. The Hon Matthew Batsiua, Nauru's Minister for Justice, Health and Sport, has stated that:<sup>62</sup>

The underlying issue with concepts of regionalism is the sovereignty issue, who's controlling the agenda: this is not exclusive to the Pacific. If we take the EU for example, these kinds of sovereignty issues come into play as well...it [regionalism] should not be discounted as an idea but we have to manage those concerns; they're not insurmountable in my personal view.

In Solomon Islands, there is a sense that regional institutions may be inadequate reflections of national interests. One Solomon Islands' government representative stated:<sup>63</sup>

... national mechanisms and domestic bodies are responsible to the people, whereas where is the accountability in a regional mechanism? If there is a regional mechanism, somehow it must be accountable and must prioritise national concerns.

The Pacific Plan placed "human rights" on the agenda of Pacific Island leaders. In public forums and as part of the Universal Periodic Review, Pacific leaders have acknowledged that national human rights institutions are key instruments for improving a state's capacity to meet its commitments in implementing human rights. They have cautiously endorsed the establishment of such institutions, given concerns about costs, cultural considerations, issues of sovereignty, the relative benefits, and competing priorities. In the next section, we explore possible models of human rights institutions that might answer the distinct needs of Pacific states.

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60 Elise Huffer "Regionalism and Cultural Identity: Putting the Pacific Back into the Plan" in Stewart Firth (ed) *Globalisation and Governance in the Pacific Islands* (ANU E-press, Canberra, 2006) 43 at 50.

61 *Teonea v Kaupule*, above n 45, at 13.

62 Interview with Hon Mathew Batsiua, Minister for Justice, Health and Sport, Nauru (Amman, Jordan, 6 August 2009) copy on file with authors.

63 Interview with George Hoa'au, Assistant Secretary, Foreign Affairs and Trade, Solomon Islands Government (Apia, Samoa, 28 April 2009) copy on file with authors.

## *V Problems of Resourcing and Maintaining the Independence of NHRIs - possible models for the Pacific*

There are two key concerns with the establishment of NHRIs in the Pacific. The first is a practical concern about resource constraints. Particularly for small island states such as the Cook Islands, Nauru, Tuvalu, the Republic of the Marshall Islands, Kiribati, Palau and Niue, the question is whether the dedication of scarce financial and human resources to a human rights institution can be justified and, if so, what is the most effective and cost-efficient form that an institution might take. Related to this is the issue of whether this institution would meet the requirements of the Paris Principles. The second is a concern about maintaining the independence of the institution within the context of the small, closely-connected communities of the Pacific. Here, the story of the Fiji Human Rights Commission, discussed below, is salutary. The final part of this section explores other measures that might assist in maintaining independence of NHRIs.

### *A Paris Principles Requirements for NHRIs and Models of NHRIs*

In order to become a member of the Asia Pacific Forum of National Human Rights Institutions and to be accredited with "A" status by the United Nations International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, national commissions must meet Paris Principles standards of financial and political independence from the state and demonstrate a broad based mandate and representativeness.<sup>64</sup>

The 1993 United Nations Vienna Declaration on Human Rights states that "it is the right of each State to choose the framework which is best suited to its particular needs at the national level".<sup>65</sup> Despite this statement, to date, national human rights institutions across the Asia Pacific region have, in the main, all been cast in a similar mould. The functions of NHRIs in the region cover a range of activities, such as:<sup>66</sup>

- (a) advising Government and Parliament on issues related to legislation or administrative practices, or proposed legislation, or policies or programmes within their jurisdiction;
- (b) enlisting civil society in the performance of its functions;
- (c) educating the public and members of the executive (police, prison officials, the military) and the judiciary about human rights and disseminating information about human rights;

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<sup>64</sup> "A" status institutions meet the criteria of the United Nations Paris Principles: see discussion of the Paris Principles, above n 1. The ICC also accredits institutions as "B" or "C" institutions, where there is not full compliance with the Paris Principles.

<sup>65</sup> *Vienna Declaration*, above n 21, at [36].

<sup>66</sup> Brian Burdekin *National Human Rights Institutions in the Asia Pacific Region* (Martinus Nijhoff Publishers, Leiden, 2007).

- (d) monitoring compliance by Government, government agencies and the private sector on international human rights treaty obligations;
- (e) promoting the ratification of human rights treaties and advising on the development of new international human rights instruments;
- (f) contributing to government reports to international Treaty Bodies and following up and disseminating reports by the Treaty Bodies;
- (g) co-operating with the United Nations, other NHRIs and national and international NGOs;
- (h) inspecting custodial facilities and places of detention;
- (i) receiving and investigating complaints of human rights violations, conciliating such complaints or providing other remedies;
- (j) compelling the attendance of witnesses and production of documents where necessary to conduct effective enquiries or investigations and taking evidence on oath or affirmation; and
- (k) conducting national enquiries into systemic violations of human rights.

The New Zealand Human Rights Commission (NZHRC) has identified the principal challenges for Pacific states in establishing national human rights institutions.<sup>67</sup> One of the key questions identified by the NZHRC is how could small island states within the Pacific Islands Forum staff and fund such an institution? The larger Pacific island nations – Vanuatu, Solomon Islands, Papua New Guinea, Tonga, Samoa and the Federated States of Micronesia – could arguably sustain a NHRI. But for Tuvalu, with a population of 10,000; the Republic of the Marshall Islands, with a population of 54,000, Palau, with a population of 20,000, Nauru, with a population of 12,000, Kiribati, with a population of 88,000, the Cook Islands, with a population of 19,000 and Niue with a population of 1,650, resourcing such an institution presents a considerable challenge.<sup>68</sup>

One response to resource constraints has been for states to establish single issue commissions – for example, Women's Commissions or Children's Commissions – to promote the rights of these groups and to assist the state to fulfil the requirements of international conventions to which they have become a party (in the Pacific, most commonly the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women).<sup>69</sup>

In recent years, however, there has been a turning away from the establishment of single-issue commissions and a move toward the "mainstreaming" of women's and children's rights within

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67 Pacific Islands Forum Secretariat and New Zealand Human Rights Commission *National Human Rights Institutions Pathways for Pacific States* (Pacific Human Rights Issues Series 1, 2007).

68 These figures are taken from the official website of the Pacific Islands Forum Secretariat <[www.forumsec.org.fj/](http://www.forumsec.org.fj/)>.

69 Countries as diverse as India, Hong Kong and the United Kingdom have at various times established dedicated Women's Commissions; in the Pacific, Samoa has also established a Women's Commission.

institutions with a broad-based mandate.<sup>70</sup> In terms of the institutional protection of rights, especially in cases where resources are limited, United Nations committees such as the Committee on the Rights of the Child have suggested that:<sup>71</sup>

Where resources are limited, consideration must be given to ensuring that the available resources are used most effectively for the promotion and protection of everyone's rights, including children's, and in this context development of a broad-based NHRI that includes a specific focus on children is likely to constitute the best approach. A broad-based NHRI should include within its structure either an identifiable commissioner specifically responsible for children's rights, or a specific section or division responsible for children's rights.

In states such as Nauru, where even government Ministers hold multiple portfolios, the vision of "an identifiable commissioner specifically responsible for children's rights" within a multi-commissioner NHRI, is unrealisable.

The options currently being considered by the Republic of Nauru are illustrative of the issues under consideration by many small island states. Nauru is currently undergoing a constitutional review process, a wide-ranging reconsideration of the document adopted by the Republic when Nauru attained independence from Britain in 1968. The process is being funded by UNDP.<sup>72</sup> The Commonwealth Human Rights Initiative's submission to the Independent Commission on Constitutional Review included the suggestion that Nauru consider the establishment of a NHRI.<sup>73</sup> The Nauru Island NGO Association has advocated the establishment of a hybrid Ombudsman/human rights commission, which would combine the functions of administrative scrutiny and promotion and protection of human rights. However the Independent Commission's initial recommendation was that human rights could effectively be promoted through state-run

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70 From January 2009, Sweden abolished its four specialised anti-discrimination ombudsmen and replaced them with one Equality Ombudsman. In Ireland, a report has recommended that Ireland's Children's Ombudsman and other institutions be merged into the Ombudsman's institution: Linda Reif "The Strengths and Limitations of NHRI Institutional Design" (paper presented to Harvard University and New York University Law School Workshop on National Human Rights Institutions, 10-11 September 2009) copy on file with authors.

71 *The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child* CRC/GC/2002/2 (2002).

72 Graham Hassall has questioned the processes for constitutional reform in the Pacific: see "The Legal Politics of Constitutional Reform in the Pacific" (paper presented at the Australasian Law Reform Agencies Conference, Port Vila, 10-12 September 2008).

73 Commonwealth Human Rights Initiative "Nauru Constitutional Review: CHRI Submission" (2006) <[www.humanrightsinitiative.org](http://www.humanrightsinitiative.org)>.



educational programmes in schools and training institutions. Justice Minister, the Hon Matthew Batsiua has stated that:<sup>74</sup>

Reform in Nauru so far has really been driven by the people's agenda, we are responding to the people's call for better systems of government in Nauru and frankly the call for a human rights institution hasn't been that strong compared to the call for an ombudsman, for example. We do value the need to consider a human rights institution, but we just have to advance it in a practical way.

One practical way might be, as Batsiua has identified, to "piggy-back" the functions of a NHRI onto an ombudsman's role. The "hybrid human rights ombudsman," which combines elements from the classical human rights commission and the traditional ombudsman, has been adopted in Portugal (*Provedor de Justiça*), Spain (*Defensor del Pueblo*), Timor Leste (*Provedor de Direitos Humanos e Justiça*) and several small states of the Caribbean, which share Pacific concerns about resources, size and government's ability to support independent institutions.<sup>75</sup> Reif describes human rights ombudsmen as always having:<sup>76</sup>

... the power to investigate public complaints, and many have additional powers such as own-motion investigations, the right to inspect facilities where persons have been detained involuntarily, taking cases to constitutional and other courts, prosecution of public official, research and education.

Reif notes the "cost effectiveness of giving two or more horizontal accountability mechanisms to one institution."<sup>77</sup> Beyond issues of cost-effectiveness, there is a convincing conceptual basis for marrying the functions of promoting and protecting human rights, with the function of safeguarding public administration and preventing corruption. Maladministration and corruption have direct effects on the administration of justice (realisation of civil and political rights) and the distribution of resources (realisation of economic and social rights, as well as having an impact on civil and political rights).<sup>78</sup>

As important as adequate resourcing is the issue of independence. The experience of national commissions in the region has been that perceived and actual "independence from government" is

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74 Interview with the Hon Mathew Batsiua, above n 62. Batsiua's view is echoed by the chairperson of the Commission, parliamentarian Ruby Thoma, who stated that "[t]he clear message from the public is that they have lost trust in their public institutions and they expect much greater accountability". See "Politics/Nauru: New Constitution to Address Accountability" Islands Business <[www.islandsbusiness.com](http://www.islandsbusiness.com)>.

75 Reif, above n 70. Reif identifies the following countries in Latin America and the Caribbean as having a human rights ombudsman: Argentina, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Venezuela, Jamaica, Haiti, and Belize.

76 Ibid.

77 Ibid.

78 C Raj Kumar "Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia" (2007-8) 16 Michigan State Journal of International Law at 475.

critical to effectiveness. Human Rights Commissioners perform important functions of providing policy advice, reviewing legislation and conducting inquiries at the request of governments and at their own initiative. Accordingly, their ability to work with governments is a key aspect of their role – as is their capacity to be critical of government. Independence may prove a challenge in small Pacific island states, with their closely-connected communities, where loyalties to family and village predominate, and where there is often no independent media.

The example of the Fiji Human Rights Commission stands as a continuing reminder of the challenge of independence in circumstances where politics, business and power are intertwined.<sup>79</sup> In 2000, Fiji became the first Pacific state (other than Australia and New Zealand) to establish an independent human rights commission. The Fiji Human Rights Commission (FHRC) weathered the coup of 2000 and for the following six years, directed itself to encouraging legislative compliance with Fiji's international human rights obligations, to human rights education programmes, to hearing and resolving complaints of human rights violations arising from breaches of the extensive rights set out in the Fiji Constitution and to appearing in court as *amicus curiae* in cases with human rights implications. It was a credible and effective national human rights body. Then in 2006, the Fiji Human Rights Commission publicly supported the coup d'état of Commodore Frank Bainimarama, discrediting itself internationally and leaving those within Fiji without one of the principal methods of redress for human rights violations carried out by the military.<sup>80</sup> Clearly, in the case of Fiji, institutional design was not enough to safeguard the independence of a NHRI; the enabling statute for the FHRC was irreproachable in terms of legislative measures to safeguard independence.

Ultimately, the independence of the institution rests on the characters of the individuals appointed to it. As the Hon Matthew Batsiua puts it:<sup>81</sup>

At the end of the day you can create good laws but you have to ensure that there is discipline at all levels of government to ensure that systems work. As current legislators we'll do as much as we can to ensure that independence is at least protected by law.

In terms of protecting independence by law, ideally NHRIs should be established by constitutional provisions. For example, Timor-Leste's Office of the Provedor (Ombudsman) for Human Rights and Justice, which has a mandate to cover human rights, good governance, maladministration and anti-corruption matters, is established under s 27 of the Constitution of Timor-Leste. Section 27 provides that:

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79 Catherine Renshaw, Andrew Byrnes and Andrea Durbach "Implementing Human Rights in the Pacific Through the Work of National Human Rights Institutions: the Experience of Fiji" (2009) 40 VUWLJ at 251.

80 Ibid, 262-267.

81 Interview with the Hon Mathew Batsiua, above n 62.

... the Ombudsman shall be an independent organ in charge to examine and seek to settle citizens' complaints against public bodies, certify the conformity of the acts with the law, prevent and initiate the whole process to remedy injustice ... [t]he activity the Ombudsman shall be independent from any means of grace and legal remedies as laid down in the Constitution and the law.

The statute that establishes the Office of the Provedor affirms the independent status of the office: "[t]he Office shall operate as an independent statutory body and shall not be subject to the direction, control or influence of any person or authority."<sup>82</sup>

The Paris Principles attempt to secure actual independence by requiring a "stable mandate" for office holders and transparent processes of appointment and dismissal. In the case of Timor-Leste, the appointment process for the Ombudsman is also set out in the Constitution, which states that "the Ombudsman shall be appointed by the National Parliament through absolute majority votes of its members for a term of office of four years." In the Maldives, the appointment process also involves selection by the legislature or the "People's Majlis", but selection is from a list of candidates presented to the People's Majlis by the President. In some states, independence of NHRI members is enhanced by the participation of civil society in the selection processes, which is also seen as addressing the Paris Principles requirement of "pluralism" in a NHRI.<sup>83</sup> Civil society's involvement is particularly important in the creation of a NHRI; former Australian Human Rights Commissioner Brian Burdekin writes that:<sup>84</sup>

The international experiences in this aspect are very clear. If you give birth to a human rights commission in a climate of ignorance and lack of understanding, potential hostility and suspicion, this will prove to be problematic; people will not understand the role of such a commission.

The experiences of NHRIs within the Asia Pacific region will prove helpful to states within the Pacific as they draft laws establishing their own bodies. Experience in the region suggests, for example, that independence of commissioners is enhanced by appointment to a full-time position,

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82 Law No. 7/2004, approving the Statute of the Office of the Ombudsman for Human Rights and Justice, which established the Timor-Leste Provedor de Direitos Humanos e Justiça (the Office of the Ombudsman for Human Rights and Justice), art 5.

83 The legislation governing the Human Rights Commission of Thailand, for example, provides for a Selection Committee for commission members comprising the President of the Supreme Court, the President of the Supreme Administrative Court, the Prosecutor-General, the Chairman of the Law Council, Rectors or representatives of higher education institutions which are juristic persons; these members elect five representatives of private organisations in the field of human rights to sit on the Committee.

84 Brian Burdekin, "Basic Concepts of a National Human Rights Commission: An International Perspective" in S Sothi Rachagan and Ramdas Tikamdas (eds) *Human Rights and the National Commission* (Hakam, Kuala Lumpur, 1999) 65 at 67.

for at least three years.<sup>85</sup> But as the history of the Fiji Human Rights Commission illustrates, even the most careful drafting of enabling statutes to ensure inclusiveness and transparency in appointment processes for commissioners, cannot guarantee that the vagaries of politics or personality will not mar the actual and perceived independence of a NHRI.

The history of the APF since 1996 suggests that belonging to a network of NHRIs has helped to support the independent attitude of individual commissioners. Commissioners view themselves, by virtue of membership of a regional organisation of similar institutions, as belonging to a group with certain shared values (commitment to addressing human rights violation, autonomy from the state). The "socialization" of commissioners occurs through regular interaction at meetings, conferences and workshops and through the easy access to information about one another's reputation, achievements and failures. The review of the FHRC by the APF's members, after its support for the military's assumption of power in 2006, illustrates the network function of the APF; "the recalcitrant individual can be ostracized, and the cooperative individual can be invited into the centre of the charmed circle".<sup>86</sup> Networks such as APF provide practical support to NHRIs, but they also provide a forum for reinforcing norms of independence and integrity amongst members.

## VI *A Pacific Regional Charter of Human Rights?*

The difficulty of ensuring the independence of a national body is one of the reasons offered for the creation of a "regional human rights commission" for the Pacific.<sup>87</sup> It is argued that such a body, standing above the state, would be impervious to local influence and pressure. The proposal is not a new one; over the past twenty-five years, enthusiasm has waxed and waned for a "Pacific Charter of Human Rights", and a regional Commission or Court to oversee its implementation. In the 1980s, such a charter was drafted under the auspices of the Law Association of Asia and the Pacific (LAWASIA). LAWASIA's charter was closely modelled on the African Charter of Human and Peoples' Rights; indeed, drafters took the African Charter and merely "modified it as appropriate for the Pacific Island region".<sup>88</sup> The African Charter's inclusion of economic, social and cultural rights

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85 In 2008, the ICC put SUHAKAM, Malaysia's Human Rights Commission, on notice that its "A" status accreditation was in jeopardy. Among the reasons given for the possible demotion of the institution was the short tenure of its Commissioners (2 years). Malaysian NGOs, who have been critical of SUHAKAM, have also pointed to the part-time status of Commissioners, who, NGOs argued, were unable to commit the time necessary to fulfil their functions as Commissioners; see ANNI, above n 20.

86 Mancur Olson *The Logic of Collective Action* (Shocken, New York, 1965) at 61, cited in Anne-Marie Slaughter *The New World Order* (Princeton University Press, Princeton, 2004) at 199.

87 On regional mechanisms, see especially Kathryn Hay "A Pacific Human Rights Mechanism: Specific Challenges and Requirements" (2009) 40 VUWLR 195; Valmaine Toki and Natalie Baird "An Indigenous Pacific Human Rights Mechanism: Some Building Blocks" (2009) 40 VUWLR at 215; P Imrana Jalal "Why Do We Need a Pacific Regional Human Rights Commission?" (2009) 40 VUWLR at 177.

88 Jon M Van Dyke "Prospects for the Development of Intergovernmental Human Rights Bodies in Asia and the Pacific" (1988) 16 Melanesian Law Journal at 28.

as well as civil and political rights, was deemed appropriate for the Pacific. So too, were references to the rights of "peoples" and "indigenous peoples", as well as the notion of duties owed by the individual to the group, community, and society. It was thought that the inclusion of such provisions would succeed in negating the individualistic conception of Western rights that was viewed as clearly at odds with Pacific culture.<sup>89</sup>

In the early 1990s, there appeared to be no appetite on the part of Pacific leaders for LAWASIA's charter. This is perhaps unsurprising; the charter was drafted primarily by Australian and New Zealand academics and embodied a European history of legal implementation of rights, with a nod to the collective rights of post-colonial Africa. When, before the United Nations in 1970, Ratu Sir Kamisese Mara, Fiji's first Prime Minister, spoke of "the Pacific Way",<sup>90</sup> part of his intent was to differentiate the Pacific from other regions of the world and to distinguish Pacific states from other developing countries, with a clear message that metropolitan countries should not confuse Pacific states with Africa. LAWASIA's initiative floundered, suffering from a perception that it was an initiative conceived by and executed by outsiders, without sufficient support from, consultation with or involvement of the people of the Pacific islands. There was no sense of "ownership" of the initiative, no sense that the Charter was needed by the Pacific islands, and no sense that it would improve living conditions or economic opportunities, which were (and remain) the priority for most Pacific islanders.

In the LAWASIA archives lies the response of a New Zealand government to the Draft Pacific Charter.<sup>91</sup> New Zealand's comments from twenty years ago have resonance today. Under "General Comments", we find:

- (a) The ideas of the Charter are acceptable but they relate to the law and that is a problem; large numbers of people in the South Pacific are unfamiliar with/do not like law;
- (b) The Charter is based on a number of underlying Western assumptions about the law in the western sense and its place in society;
- (c) If honoured in its present form by large numbers of groups in the South Pacific, it would create cultural and economic burdens;
- (d) Is this the document which groups within the communities in the region would themselves have produced; or is it a new form of imperialism?

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89 See Draft Pacific Charter of Human Rights, arts 27-29.

90 Kate Fortune "The Pacific Way" in Brij V Lal and Kate Fortune (eds) *The Pacific Islands: An Encyclopedia* (University of Hawai'i Press, Honolulu, 2000) 486. The speech, to the 25th session of the United Nations General Assembly is reproduced in Kamisese Mara *The Pacific Way: A Memoir* (University of Hawai'i Press, Honolulu, 1997) appendix 4.

91 Draft Pacific Charter: NZ Responses, copy on file with the authors. The authors are grateful to Nick O'Neill, for provision of LAWASIA material.

Despite opposition to the LAWASIA draft two decades ago, at a regional human rights conference in Apia in 2008, present-day proponents of a Pacific regional charter revived LAWASIA's draft and suggested it be used as the basis for a contemporary charter for the Pacific. The reasons for the present revival of the idea include:<sup>92</sup>

- (a) the emergence of a regional human rights body in the ASEAN region, which highlights the Pacific as one of the world's only regions without such a body;
- (b) the size of and resources available to small Pacific states indicate that a regional body is the only effective means of providing oversight;
- (c) the language of "human rights" is now more common in the Pacific, with increasing ratification of international treaties and increasing references to human rights in case law; and
- (d) truly independent oversight of state action is difficult to achieve in the Pacific, where proximity between government, business and the governed, taxes the concepts of distance and impartiality in human rights monitoring.

In 1993, Australia, New Zealand and other Pacific island states endorsed the Vienna Declaration, which includes the statements that "[r]egional arrangements play a fundamental role in promoting and protecting human rights" and "[t]he World Conference on Human Rights reiterates the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist."<sup>93</sup> In late 2008, in a Parliamentary response to this call to consider regional human rights arrangements, the Australian Parliament's Joint Standing Committee on Foreign Affairs and Trade convened an Inquiry into Human Rights Mechanisms and the Asia Pacific.<sup>94</sup>

Almost all submissions to the Inquiry rejected the idea of a human rights mechanism for the Asia Pacific region as a whole, on the grounds that the region did not share sufficient geographic, historical, political or cultural homogeneity to render a regional convention feasible or desirable. There were, however, several positive submissions about the prospect of the Pacific establishing a

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<sup>92</sup> See Jalal, above n 87.

<sup>93</sup> *Vienna Declaration*, above n 21, at [37].

<sup>94</sup> Australian Parliament Joint Standing Committee on Foreign Affairs and Trade "Inquiry into Human Rights Mechanisms and the Asia-Pacific" Parliament of Australia Joint Committee <[www.aph.gov.au](http://www.aph.gov.au)>. In its final report, the Committee considered that in its engagement in the region Australia "should take its lead from organisations already established in the region, seek to address issues in which Australia has expertise or a shared interest, and infuse human rights standards and its practical application into relationships within the Asia-Pacific region." One of the Committee's key recommendations was that the Australian Government "appoint a special envoy for Asia-Pacific regional cooperation on human rights" whose mandate might include "undertaking high-level political consultations about the establishment of a Pacific subregional human rights mechanism and a wider Asia-Pacific regional mechanism." Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade *Human Rights and the Asia-Pacific: Challenges and opportunities* (2010) [6.89].

sub-regional human rights charter, on the basis of the cultural commonalities of the Pacific and practical imperatives (such as the limited resources of small island states).<sup>95</sup> Advocates of a sub-regional mechanism pointed to a greater sense of regional identity and self awareness in the wake of the Pacific Plan, a greater awareness of human rights, evidenced through increasing rates of ratification of the principal human rights treaties by Pacific states and a growing body of case law that attempts to marry Pacific values with the human rights principles embodied in many Pacific island charters. They also pointed out that the question of what form the architecture of human rights protection in the Pacific should take, need not be reduced to either "national" or "regional"; these mechanisms were complementary and mutually reinforcing.<sup>96</sup>

Pacific leaders have endorsed the importance and relevance of the Pacific Plan.<sup>97</sup> The Pacific Plan includes the concept of regionalism, but in a very muted form:<sup>98</sup>

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95 See for example Sydney Centre for International Law "Submission on the Inquiry into Human Rights Mechanisms and the Asia-Pacific" Parliament of Australia Joint Committee <[www.aph.gov.au](http://www.aph.gov.au)>.

96 See for example submission of the Pacific Regional Rights Resource team, part of the Secretariat of the Pacific Community (SPC), *ibid*.

97 Kiribati's Makurita Baaro was commissioned by the Pacific Islands Forum Secretariat to consult stakeholders and draft a report for the Pacific Islands Forum Secretariat on progress toward regional cooperation in the first three years of the Pacific Plan. The 36-page report contains the following assessment of the Plan: "In all the consultations, there was expressed support all around for the Pacific Plan as a symbolic regional document; referred to as a 'flagship' in the most recent meeting of the Pacific Plan Action Committee, which enshrines for the rest of the world, Forum Leaders and the region's commitment and resolve to work together to address common challenges that are best addressed collectively. No-one in the consultations has come out to say the Pacific Plan has no relevance." Islands Business News <[www.islandsbusiness.com](http://www.islandsbusiness.com)>. We note the criticism of some commentators that the Pacific Plan is the work of bureaucrats and not leaders. Elise Huffer writes that "[i]t should first be noted that there has not been extensive debate about the purpose, range and forms regionalism should take in the future in spite of the plan's consultation process." Huffer, above n 60, at 45.

98 Pacific Islands Forum Secretariat "The Pacific Plan for Strengthening Regional Cooperation and Integration" Pacific Islands Forum <[www.forumsec.org.fj](http://www.forumsec.org.fj)>, endorsed by leaders at the Pacific Islands Forum meeting in October 2005. Three forms of regionalism and three tests for regional approaches were set out:

- (1) The "Market test;" is the market providing a service well? If so, involvement by national governments and/or regional bodies should be minimal.
- (2) The "Subsidiarity test": can national or local governments provide the service well? If so, involvement by regional bodies should be minimal.
- (3) The Sovereignty Test: does the proposed regional initiative maintain the degree of effective sovereignty held by national governments? Regional initiatives should shift only the management of services to regional bodies, not policy-making as well. Countries, not regional bodies, should decide priorities.

The Pacific Plan is based on the concept of regionalism: that is, countries working together for their joint and individual benefit. Regionalism under the Pacific Plan does not imply any limitation on national sovereignty. It is not intended to replace any national programmes, only to support and complement them. A regional approach should only be taken if it adds value to national efforts.

While some of the functions conducted by NHRIs are the same as functions that could be carried out by regional human rights commissions (receiving and investigating complaints into rights violations, conducting enquiries, inspecting prisons), we suggest that some NHRI functions can only effectively be carried out at a national – or even sub-national – level. The educational and promotional functions of NHRIs are examples. The experience in the Asia Pacific region has been that these functions are ones best carried out when an institution is close – physically, institutionally and culturally – to the government and to the people who need to access its services. In many countries in the region, it has been necessary to establish field offices in outlying provinces to enable adequate access to a commission's services and to effectively fulfil human rights promotion functions.

### *VII Conclusion*

The idea of national and regional human rights commissions for Pacific island states has been promoted by the United Nations (the Office of the High Commissioner and UNDP) through numerous regional workshops held since 2003. The idea has also been promoted through the activities of the Asia Pacific Forum of National Human Rights Institutions, three of whose members – Australia, New Zealand and Fiji – have established national commissions. The governments of Samoa, Papua New Guinea, Palau, Solomon Islands, Nauru and the Cook Islands are at present working with the Asia Pacific Forum and the Office of the High Commissioner for Human Rights to establish national institutions. In this paper we have suggested that it is within the capacity of small island states to establish a national institution in the form of an ombudsman, with a human rights mandate that includes educative and monitoring functions. The work of this institution is translating the plethora of internationally recognised rights into the fabric of society; reviewing legislation, ensuring compliance with or recommending changes to laws so that they comply with international rights, educating the public and government officials on the content and meaning of rights. The effectiveness of such a body will lie in its ability to reach communities in ways that resonate with the different traditions and cultures that exist across the Pacific.