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# **SUBMISSION BY THE *COMMONWEALTH HUMAN RIGHTS INITIATIVE* TO THE ADVISORY COMMITTEE CREATED TO REVIEW THE HUMAN RIGHTS ACT 1993**

## **Introduction**

This submission is concerned with various aspects of the Protection of Human Rights Act 1993 (the 1993 Act) made in response to the invitation put out by the high level Advisory Committee headed by the former Chief Justice of India, Justice A.M. Ahmadi and created to review the 1993 Act and recommend appropriate changes to it to the National Human Rights Commission (NHRC).

CHRI commends the NHRC for establishing the Committee and wishes to express its support for the inclusive and transparent manner in which the Committee is fulfilling its mandate. CHRI recognises the establishment of human rights commissions in India at both the national and state level as part of an international move by countries towards a more pro-active role in the protection of human rights. This trend has been welcomed and supported by CHRI because it is much easier to implement and enforce human rights at the local level. Indian commissions not only play an important role in the promotion and protection of human rights and freedoms in India but they are potential role-models and standards setters for other countries that may be considering the establishment of their own institutions. It is with this in mind that CHRI wishes to make the following submissions to the Advisory Committee.<sup>1</sup>

## **1. The Powers and Functions of Indian Human Rights Commissions**

### ***The 1993 Act***

The powers and functions of Indian commissions are set out in Sections 12-16 and 29 of the 1993 Act. Sections 16 and 29 of the Act provide the Commissions with the power of a civil court trying a suit under the Code of Civil Procedure 1908 whilst inquiring into complaints under the 1993 Act.

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<sup>1</sup> The following submissions with respect to the 1993 Act are consonant with standards and principles of international human rights law and practice.

## ***Comment and Critique***

The powers of the Commissions to obtain assistance from organs of State is unnecessarily restricted. Although the Commissions have the powers of a civil court, this is only whilst inquiring into complaints received under section 12(a). As stated in the United Nations *Principles relating to the status of national institutions* (the ‘Paris Principles’<sup>2</sup> - attached) a Human Rights Commission is to be vested with the competence to protect and promote human rights. The *Paris Principles* further state that a commission shall, within the framework of its operation, “hear any person and obtain any information and any documents necessary for assessing situations falling within its competence”. For example, the Act establishing the South African commission requires all state organs to “afford the commissions with such assistance as may be reasonably required for the effective exercising of its power and performance of its duties and functions”.<sup>3</sup>

The Indian commissions have been given numerous functions beyond that of inquiring into complaints.<sup>4</sup> It is the submission of CHRI that the Commissions be provided with greater powers with respect to these functions (such as reviewing the safeguards provided for under the Constitution or the study of international instruments and their implementation) by means of an additional provision within the 1993 Act stating that all government organs shall provide the commissions with such assistance as may be reasonably required for the effective exercising of their power and performance of their duties and functions. Such an amendment of the Act would not only increase the competence of the Commissions but it would also develop a greater culture of human rights within state organs because civil servants would be required to account and provide assistance to the human rights commissions. For example, the percentile of women within the Indian civil service, particularly in the higher ranks, has not improved greatly since Independence. This seems to indicate that the organs of the Indian State are far from aware of their international and constitutional obligations with respect to equality and equal opportunity.

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<sup>2</sup> Principles relating to the status of national institutions annexed to General Assembly resolution 48/134 of 20 December 1993

<sup>3</sup> Section 7(2) of the Human Rights Commission Act 1994 (South Africa).

<sup>4</sup> See Sections 12 and 29.

The Indian commissions need to be able to address this lack of awareness not only by means of education but by holding the State organs accountable. For instance a commission should have the power and competence to ask: “Why are there so few women in this department?”; “Where is your policy and practice with respect to equal opportunity?”; or “Why has this region not received access to water?”. All organs of state must be required by the 1993 Act to answer such vital questions.

## **2. The NHRC’s Investigative Powers and the Armed Forces - Section 19**

### ***The 1993 Act***

Section 19 of the Act states that when dealing with complaints of human rights violations by members of the armed forces, the Commission may, either on its own motion or on receipt of a petition, seek a report from the Central Government and, after receipt of the report, it may either not proceed with the complaint or make its recommendations to the government. The Government is then to inform the Commission of the action taken with respect to the recommendations made to it and the Commission is to publish its report together with the government actions taken.

### ***Comment and Critique***

As stated in the United Nations *Paris Principles*<sup>5</sup>, a Human Rights Commission is to be vested with the competence to protect and promote human rights and is to be given “as broad a mandate as possible”. Similarly, the 53rd Session of the UN Commission of Human Rights has encouraged UN members to strengthen national institutions for the protection of human rights<sup>6</sup>, while the UN General Assembly encourages states to prevent and combat *all* violations of human rights.<sup>7</sup> All of

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<sup>5</sup> Principles relating to the status of national institutions annexed to General Assembly resolution 48/134 of 20 December 1993

<sup>6</sup> UNCHR Resolution 1997/40 on National Institutions for the Promotion and Protection of Human Rights.

<sup>7</sup> General Assembly Resolution A/res./48)134

these international declarations support the view that national institutions must be provided with as wide a mandate as possible if they are to effectively promote and protect human rights.

The effect of section 19 of the 1993 Act is to remove the armed forces from the investigative purview of the NHRC. This not only narrows the mandate of the NHRC but it also implies that the armed forces are somehow exempted from acting in accordance with the fundamental human rights principles set out in Part III of the Indian Constitution. Part III binds “the State” of India, (the Government and Parliament of India and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India) to uphold the fundamental constitutional rights. To exclude the armed forces from the purview of the 1993 Act is to separate them from the rest of “the State”. The present situation therefore acts as a tacit admission that Indian citizens must pay for the cost of some higher self-defined ‘security’ with their constitutional rights.

On the other hand, if the NHRC were authorised to investigate alleged violations by the armed forces, the armed forces would be protected against any unfounded complaints or spurious allegations, which would in turn help to preserve morale. The existing military procedures, such as military trials and court martials are no justification for exempting the armed forces from the investigative powers of the NHRC. It is important to understand that military procedures will not be *replaced* by NHRC investigations. All findings of the NHRC based on its investigations are *recommendations only*. Just as the NHRC now recommends that Courts initiate prosecution in a particular case, the NHRC should have the power to investigate complaints made against members of the armed forces and to recommend that the armed forces initiate prosecution in line with the usual procedures. Certainly the provision of powers to the NHRC to investigate alleged violations of human rights by members of the armed forces subjects the armed forces to greater accountability, transparency and public confidence. However, it would not subject them to any new obligations or responsibilities than those which already exist under the Indian Constitution and international law. Nor would it disrupt the ‘chain of command’ as the investigative staff could work in conjunction with those officers within the forces already charged with internal investigations of a similar nature to ensure that a thorough, transparent and independent investigation is undertaken. Nor is it arguable that opening the armed forces to the jurisdiction of the NHRC would be detrimental to morale. The unsuccessful suppression of such human rights

violations or the investigation of such crimes by secretive military procedures only increases public hostility towards the military by the public and thereby reduces their operational capabilities because of a lack of public support and co-operation. Moreover, if the violators are allowed to go unpunished, it only encourages them to commit greater atrocities against citizens with impunity which further ruins the image of the military as a whole.

As an alternative submission, should it not be possible to include the armed forces within the investigative purview of the NHRC, then the definition of the armed forces as prescribed by the 1993 Act should be more reasonably defined. At present the definition of the Armed Forces unusually includes not only the naval, military and air forces but “any other armed forces of the Union”.<sup>8</sup> This means that sections of the police force, such as the Security Border Forces and other para-military units, are also excluded from the investigative powers of the NHRC, although they are headed by a different ministry and are subject to different policy decisions and responsibilities. These armed police forces deal directly with public security and the safeguarding of fundamental rights in sensitive areas where human rights violations are more often alleged. They must therefore be seen by both the Indian citizenry and international spectators as accountable and transparent actors.

In conclusion then, CHRI first submits that the armed forces as presently defined in the 1993 Act should fall within the investigative purview of the NHRC. Alternatively, if the first submission is not politically expedient, the definition of ‘armed forces’ should be amended to include only the military, naval and air forces.

### **3. The Appointment Process - Sections 4, 5, 6, 22, 23 and 24 of the 1993 Act**

#### ***The 1993 Act***

The Protection of Human Rights Act 1993 provides that the NHRC consist of 5 full-time members and 3 *ex officio* members. At present there are only 3 full-time members, including the Chairperson in addition to the *ex officio* members.

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<sup>8</sup> Section 2(1)(a).

The Chairperson and the four full-time members are appointed by the President of India by warrant under his or her hand and seal on the recommendation of a Committee consisting of:

- the Prime Minister (as Chairperson)
- Speaker of the House of the People
- Minister in Charge of the Ministry of Home Affairs
- Leader of the Opposition in the House of the People
- Leader of the Opposition in the Council of States
- Deputy Chairman of the Council of States.<sup>9</sup>

The Chairperson is to have been a Chief Justice of the Supreme Court and there must also be a member who is, or has been, a judge of the Supreme Court, and one who has been a Chief Justice of a High Court. Only two members need be “from among persons having knowledge of, or practical experience in matters relating to human rights. No sitting judge of the Supreme Court or of a High Court is to be appointed except after consultation with the Chief Justice of India (section 4).

Section 6 provides that on being appointed, the Chairperson and members shall hold office for a term of 5 years or until s/he attains the age of 70 years, whichever is earlier. A member is eligible for re-appointment for another term of five years.

The Chairperson and members are not accountable to anyone in regard to the discharge of their duties. The Chairperson/member can be removed from office by order of the President on the ground of proved misbehaviour or incapacity after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson/member ought to be on any such

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<sup>9</sup> Section 22 of the 1993 Act describes the composition of the Committee provided to appoint members of the state commissions. Section 21 describes the criteria of state commission members.

ground removed (section 5(1)). The President can also remove the Chairperson/member from office if s/he on the grounds set out in section 5(2).<sup>10</sup>

On ceasing to hold office, the Chairperson/members are ineligible for further employment under the Government of India or of any State (section 6(3))<sup>11</sup>. The salary and allowances and other terms and conditions of service of the Chairperson/members cannot be varied to their disadvantage following appointment.

The Chairpersons of the National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes and the National Commission for Women are deemed ex-officio members of the NHRC. These ex-officio members may discharge the functions and powers specified in section 12 of the Act except that power which allows the official members to inquire *suo moto* or on a petition presented to the commission by a victim, or any person on his/her behalf, into a complaint of a violation of human rights or abetment thereof or negligence in the prevention of such violation, by a public servant.

## ***Critique and Comment***

### **The Appointment Process**

The appointment process is a confidence-building exercise for both government and civil society. It provides an opportunity for the government to show its citizens that the establishment and composition of the commission is based on good faith and credibility. This can best be guaranteed if the selection process of commission members is transparent and democratic and allows for pluralistic representation within the commission; and by safeguarding the independence of the commissioners once they have been appointed.

The selection process must itself be a demonstration of constitutional principles of transparency, participation and plurality. The process should incorporate the ideas and experience of civil society, particularly of those concerned with the protection and promotion of human rights and

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<sup>10</sup> See Section 23 in relation to the removal of members of State commissions by the President.

<sup>11</sup> Section 24(3) in the case of state commissions.

who are closely linked to the vulnerabilities and needs of the communities such as those working in rural areas or at the grass root level. Through listening to the voices of skilled groups such as bar associations, working and retired judges, bureaucrats and policy makers, leaders of suitable interest groups and grass roots organisations and business and professional associations, a network of shared experience can be created which can form bridges between government administration, traditional leaders and human rights organisations.

Allowing public participation in the appointment process also provides a potential arena for educating the public as to the existence of human rights commissions and their functions. In contrast, excluding the public from the process leads to public belief that human rights commissions are government or quasi-government institutions rather than institutions owned by the citizens to bring the State to book.

At present in India, the 1993 Act authorises only the government and its opposition to be the sole appointing authorities. While the incorporation of Leaders of the Opposition in both Houses of Parliament may ensure that the appointees enjoy not only the confidence of the government of the day but also that of the leaders of the Opposition, it does not prevent the appointees becoming consensual political appointments. This process of consensual, political decision-making inevitably takes place in a political culture and may prevent a decision being made at all. Any *civil* participation is dependent on the *incidental* knowledge of civil groups and *parallel* advocacy and decision-making which may or may not influence the final decision of those mandated to appoint commission members by law.

There is an inherent conflict of interest embedded in a procedure whereby politicians are made the sole appointing panel. Human rights violations are by definition violations of the State, particularly the police, para-military forces, etc. Since politicians are either representing the State or, in the case of the Opposition, are aspiring to represent the State, it is arguably inevitable that they would seek to appoint those sympathetic to, or beholden to, themselves.

For example, the appointment of members to the South African Human Rights Commission was carried out by means of open invitations issued for nominations from interested bodies and individuals of the public in accordance with the Constitutional mandate that requires the National

Assembly (the Lower House) to facilitate public involvement in legislative and other processes.<sup>12</sup> These nominations were reviewed by a large panel of persons working in the field of human rights and social reform which placed a smaller number to the National Assembly which then elected 11 Commissioners, 7 full time and 4 part time. Presently the South African Human Rights Commission is composed of clergymen, lawyers, women, disabled persons and others so as to be broadly representative of society. Members together elect a chair. The popular participation component in the formation of the Commission not only lent credibility but provided South Africans with a sense of involvement in the commission right from its inception.

Similarly, in Malawi, the commissioners are appointed by the two *ex-officio* members, namely the Law Commissioner and the Ombudsman, from nominations submitted by reputable human rights NGOs following a public invitation for such nominations issued jointly by the two *ex-officio* members. The members are then formerly appointed by the President.

CHRI submits that the Committee provided for in sections 4(1) and 22(1) the 1993 Act be amended so that persons representing non-governmental society are included within the Committee, together with members of the Indian Law Commission and a member of the judiciary. No political representatives should be included within the appointing Committee. The nominees put forward by this Committee can then be appointed by the President as stipulated in Sections 4(1) and 22(1).

### **The Diversity of a Commission**

The success of a commission depends on its ability to listen to the voices of those whose rights are most likely to be violated. There is an assumption that by virtue of office, members of human rights commissions hold an expertise and empathy to human rights. This may be so, but such 'expertise' and empathy must be shown to be more than just a privately held belief - it must be a publicly demonstrated one. In other words, the appointment process must ensure that members of a commission have a proven expertise and competence in the field of protecting and promoting human rights, including work in relevant professional groups and the non-governmental sector

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<sup>12</sup> See sections 193(6) and 59(10(a) of The Constitution of the Republic of South Africa, 1996.

and a knowledge of, or experience in, various social, economic and cultural backgrounds representative of such sectors as minorities, the disabled and women. Plurality of experience, vocation, and gender are valuable because they ensure that diverse perspectives are brought to bear on any situation. Clearly, expertise and background must be coupled with an unequivocal and credible record of work as well as an understanding of human rights so as to ensure the credibility and effective functioning of the commission.

The above arguments are reflected in the section entitled ‘Composition and Guarantees of Independence and Pluralism’ in the United Nations *Paris Principles* which provide:

“1. The composition of the national institution and the appointment of its members whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective co-operation to be established with, or through the presence of, representatives of:

- Non-governmental organisations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organisations, for example, associations of lawyers, doctors, journalists and eminent scientists;
- Trends in philosophical or religious thought;
- Universities and qualified experts
- Parliament;
- Government departments (if they are included, these representatives should participate in discussions only in an advisory capacity).”

The fact that the 1993 Act provides that the Chairperson must always be someone who has been a Chief Justice of the Supreme Court and that there must also be a member who is, or has been, a judge of the Supreme Court, and one who has been a Chief Justice of a High Court can be criticised as limiting the selection to a narrow band of persons who may have reached the positions required due to meritorious and worthy reasons but other than as a result of their possessing any particular expertise or commitment to human rights. While it is true that the judiciary have committed themselves to human rights in swearing the constitutional oath, many others in society have been trained, worked and practised in human rights advocacy and own a substantive knowledge and commitment to human rights. The judiciary represents only one set of experiences born from the same generation of Indian society. In effect, the provision is favouring

a set of elites in a society already constrained by set hierarchies based on position, caste, age, gender and ethnicity.

Whilst the judges of India's superior courts enjoy a great reputation as persons of the highest integrity, character and independence, there are others within the community who share these qualities. By choosing a majority of persons with judicial experience, the legislation reduces the possibility of gaining valuable perspectives from diverse experiences within civil society. For example, given the male-dominated profile of the judiciary in India, it is unlikely that women will be chairing the NHRC, or even becoming members to the Commission in the near future. Similarly, those from lower castes or ethnic minorities are a minority in the judiciary and the same arguments can be made with respect to these groups. Although Chairpersons from the National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes and the National Commission for Women are deemed ex-officio members of the NHRC, these persons do not have the same powers and functions of inquiry and moreover, their ex officio status should not be viewed as a reason against expanding the criteria of all members of the commission.

The seniority of judges in terms of age also excludes certain younger members of society who may have an equal if not more inclusive, practical and informed knowledge of human rights law and its application. The ageist nature of such criteria is reinforced by the provision which excludes the Chairperson and members from holding government positions following their service in the NHRC because young persons would have to forego an entire area of future employment in order to accept the position within the Commission. This section should be repealed and other means of ensuring members of the Commission are kept free from improper influence and inducements should be found. Indeed, it is arguable that this section can be repealed without further amendments as the existing safeguards, such as found in section 5 referred to above, offer adequate protection. In any case, this section would appear to have been ignored by the government, given the appointment of Ms Fatma Bibi as Governor of Tamil Nadu despite her having been a member of the NHRC.

Section 51(3) of the Ugandan Constitution provides that the Chair of the Human Rights Commission shall be a judge of the High Court *or* a person qualified to hold that office. Both the

Chairperson and members of the Ugandan Commission have to be persons of high moral character and proven integrity. This allows a greater section of society to be eligible for the Chair while maintaining criteria to ensure a high quality of person. It is interesting to note, that notwithstanding this rather broad selection criteria, the Ugandan Commission includes members of the judiciary and the legal profession. In other words, it is not necessary to expressly limit the Chair and a majority of the membership of the Indian commissions to members of the Indian judiciary. If these individuals are the best candidates in terms of their integrity and human rights awareness and concern, then their appointment to the Commission will arise regardless of any legislative provision. There are various ways by which one can create awareness of human rights and to protect them. A legal background is certainly an asset but what is of greater importance is experience and concern. One may be a lawyer but have no expertise in human rights. Similarly, the judiciary may not necessarily have had training in human rights law. The work of many professionals - medical practitioners, teachers, academics, trade unions and other educators - deals with human rights issues. All of these professionals are particularly important in a Commission which is seeking to promote a culture of human rights. Professionals such as these possess valuable links to unrepresented groups and can strengthen the ability of a commission to inform strategic groups about human rights.

A further criticism CHRI has of the 1993 Act is that it does not require human rights commissions to set formal rules or policy outlining their commitment to equal opportunity of employment. Instead of setting a leading example in this way, the NHRC, for instance, merely follows the practice of other government institutes by implementing the Constitutional requirements with respect to reservations. This is no way to fulfil its mandate of promoting a human rights culture or of educating the wider public of acceptable practices.

CHRI therefore submits that sections 3(2) and 21(2) of the 1993 Act be amended to include as members of the commissions persons having a demonstrated specialised knowledge of, or experience in human rights advocacy, policy making or law and be fit and proper persons to hold the position of a human rights commissioner. The 1993 Act should further expressly state that the commissions are to reflect the ethnic, religious and gender composition of India and that this requirement is to be taken into account by the appointing Committee established under sections 4(1) and 22(1) of the Act.

## **Independence of Commissioners**

Once appointed, commissioners must be provided with the independence to make decisions in accordance with their mandate, without any restrictions, improper influence, inducements, pressures, threats or interferences from any persons or for any reason. This means providing the members with a stable mandate to ensure that the principles safeguarding the credibility and effectiveness of commissioners, such as pluralism and expertise, will not be threatened by insecurity of tenure and malpractice. Section 3 of the UN *Paris Principles* states:

“In order to ensure a stable mandate for the members of the institution, without which there can be no real independence, their appointment will be effected by an official act which shall establish the specific duration of the mandate. This mandate maybe renewable, *provided the pluralism of the institutions membership is ensured.*”<sup>13</sup>

CHRI wishes to emphasises the importance of diversity within a commission in relation to the independence of its members. Diversity provides a commission with greater independence because it creates an in-built system of checks and balances between a diverse set of experiences with respect to human rights. Although human rights advocates all have human rights as their ultimate goal, the rights of women, trade unions, the media, NGOs and the legal profession each have specificities which require a certain unique understanding and voice if they are to be properly upheld and protected. Therefore, guarantees of independence are needed to maintain diversity and diversity is required to ensure effective independence. An independent and diversely membered commission can avoid any charge of it being an elitist institution out of touch with the wider public.

It is CHRI’s submission that a stand-alone provision be inserted into the 1993 Act headed “Independence of the Commission and its Members and Staff” which would provide that:

(a) the Commission is an independent institution mandated to promote the observance of, respect for and the protection of human rights in India;

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<sup>13</sup> Italics added.

(b) Members of the Commission and members of the staff of the Commission shall serve impartially and independently in accordance with their mandate, in good faith, without any restrictions, improper influence, inducements, pressures, threats or interferences from any persons or for any reason;

(c) all organs of state shall provide the Commission with any assistance necessary for the preservation of its independence, impartiality and credibility.

#### **4. Vacancy of Commission Members - Sections 4 and 22**

##### ***The 1993 Act***

As stated in the above section, the 1993 Act provides that the Indian commissions consist of 5 full-time members and 3 ex-officio members. These members are to be appointed by the President upon the recommendation of a committee described in the 1993 Act.

##### ***Critique and Comment***

The Indian commissions suffer from too many complaints for too few commissioners. The number of pending cases is increasing. Of the total number of cases registered with the NHRC during the year of 1996-97, for example, only 10.91% of complaints had been disposed of with direction at the time of publishing the annual report.<sup>14</sup> To make matters worse, the NHRC has at present only 3 of a total of 5 full-time members, including the Chairperson because the appointing Committee provided for under sections 4(1) and 21(2) of the 1993 Act have not come together to nominate potential commissioners to the President. CHRI understands that the appointment process has suffered from a series of transitory governments. This cannot be used as an excuse to delay the appointment of commissioners, and thus obstruct the administration of justice. Instead, the unsuccessful functioning of the appointing panel established presently under the 1993 Act should be reason enough to amend the relevant sections and to develop a more open, democratic and effective means for the appointment of commissioners as described in this submission above.

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<sup>14</sup> 38.63% has been dismissed in limini while 19.25% were pending consideration and 31.21% were under consideration (National Human Rights Commission, *Annual Report 1996-97*, p 132).

However, CHRI believes that it is not enough to improve the efficiency of the appointment process. Further solutions to the problem of the ever increasing number of pending cases before the commissions must be found soon. If not, victims of human rights violations will be made to wait for years before their complaints are considered while evidence disappears and further violations are left to continue. The NHRC, for example, has moved from examining each complaint as a 5 member committee to examining complaints individually, only coming together to discuss complex and grave cases.

CHRI believes that each commission should be granted a larger number of commissioners or persons able to deal with particular kinds of complaints. For instance, a new tier of Assistant or Sub-Commissioners could be introduced into the commission framework to hear those complaints of a less serious, or more common or complex nature. Again, these persons should be representative of Indian society, as discussed above in relation to the appointment of commissioners. They should have experience in human rights and be qualified to hold a position of such seniority. This may be a question of commission policy rather than a basis for any amendment to the 1993 Act. Nonetheless, CHRI felt that it was an important point which needs to be at least borne in mind by the Advisory Commission when reviewing the current Act.

In addition, CHRI submits that an alternative or additional solution could lie in an amendment to the 1993 Act to allow a commission to continue to retain commissioners who would otherwise have completed their service in good faith until a replacement can be appointed.

It has also been suggested that the Commission be authorised to appoint its own *ad hoc* commissioners until the positions have been filled in accordance with the Act. CHRI believes that such a measure is *ad hoc* in nature and does not properly address issues of democracy, transparency, and diversity. If the commission were to appoint *ad hoc* commissioners, who, on the basis of present experience would remain with a commission for lengthy periods of time, the appointment process would only become narrower and less transparent and democratic.

## **5. The Employment of Commission Staff - sections 11 and 27**

### ***The 1993 Act***

Sections 11 and 27 of the 1993 Act provide that all investigative and police staff are to be provided to the commissions by government deputation or transfer. The 1993 Act also allows other kinds of staff to be deputed or transferred to a commission as well as authorising a commission to appoint further administrative, technical, and scientific staff as necessary *subject to rules made by the Central Government*. Currently the majority of staff are on deputation or transfer from other government departments. For instance, subject to the subordinate legislation of the Central Government, in addition to the staff on government deputation, the NHRC retains 3 further kinds of staff: consultants; Special Rapporteurs; and those who deal with specific complaints.

The consultants are retained largely to deal with the scrutiny of the large number of complaints received by the NHRC. Most of these persons are retired government officials. They are not paid full wages but are provided with a small amount to supplement their pensions. The Special Rapporteurs are “eminent persons” who are requested by the NHRC to investigate particular issues. For example, bonded labour, the Orissa famine, particular prisons and so forth. These people are not paid for their work although they do receive remuneration for their expenses. These people, like the consultants, are not representative of broader society, but are former members of the judiciary, government or police. Similarly, the third category of staff, those chosen to investigate specific complaints, such as a situation in a particular prison, are also former government servants. The reason given by the NHRC Secretary-General, Mr Pillai, for this lack of diversity is based on the need for the NHRC to protect its credibility in a country that is both large and diverse. The NHRC believes that this can best be done by retaining only ‘credible’ persons such as those formerly of the civil service, judiciary or the police. When asked if India did not also have ‘eminent and trusted’ persons outside of the government, the Secretary-General argued that such people were not apolitical but mostly representative of particular castes or religions and that they therefore would not ‘enjoy national support’. The Secretary-General did go on to say that the NHRC was nonetheless endeavouring to look beyond former government servants in their recruitment policies.

## ***Comment and Critique***

### **The Appointment of Staff**

Many positions within the commissions remain vacant because the relevant government is failing to provide the expertise to its commission from within its ranks. For example, the position of Director of Research within the NRHC has been vacant since its inception because the government has been unable to provide a qualified person willing to be deputed or transferred. The commissions should have the power to recruit from the wider public on terms not subject to Central or State Government rule-making.

For instance the present rules made by the Central Government for the NHRC are inadequate for numerous reasons. The rules made by the Central Government with respect to the recruitment of persons to the NHRC provide only that a person be a university graduate and that he or she should have at least 5 years of government service in a particular pay-scale. The rules do not require that appointees have any training or expertise in human rights. Thus the research and decision-making within the commission is undertaken by unqualified persons who may be capable of administering the work but who have little idea of the larger aims of the commissions needed to build a culture of human rights within India. While these rules are not the subject of the Advisory Committees present review, they are an example of how the effectiveness and independence of commissions is obstructed and weakened by the provisions in the 1993 Act providing for government involvement in the appointment of staff and weaken the argument of the NHRC Secretary-General referred to earlier that civil servants represent the best option in terms of staffing the commissions.

CHRI submits that Section 11(2) and 27(2) be amended to allow the commissions themselves, rather than the Central Government, to appoint the Secretary-General and to make rules regulating the appointment by the commissions of other staff as they may consider necessary.

### **Investigative Staff**

CHRI does recognise that the investigative staff of the commissions do need to be obtained from the police forces of India. While it is understandable that the commissions cannot be expected to train their own investigative staff, or make investigators of human rights advocates, they should at

least be required to train the police officers on deputation about human rights and the commission should only take on those officers with experience and expertise in investigation. Currently, most of the police deputed to the NHRC, for example, are from the Border Security Forces and other such armed forces rather than from the Central Bureau of Investigation or the state police forces which have investigative experience. If the commissions are to be subject to the governments for their investigative staff then the government should at least be obliged to provide only those staff with the correct expertise in investigation.

### **Human Rights Training**

CHRI further submits that the 1993 Act be amended to oblige the commissions to provide human rights training for all their staff. CHRI is particularly concerned that the investigative staff receive comprehensive human rights training given that these staff are members of the police force - a force which at present lacks credibility and training to deal with human rights issues. While it is understandable that the commissions cannot be expected to train their own investigative staff, or make investigators of human rights advocates, they should at least be required to train the police officers on deputation about human rights. The NHRC, for example, offers no human rights training to the police who are deputed to it, but only occasional sensitisation sessions.

### **Equal Opportunity**

CHRI is of the view that the appointment practices of Indian commissions stand in conflict with the UN *Paris Principles* which advocate pluralism and that the commissions are out of touch with international trends and the policy practice of many other national human rights institutions of the Commonwealth which enjoy a far greater diversity of staff. Instead, Indian commissions seem to conform to a wider Indian practice of exclusion.<sup>15</sup>

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<sup>15</sup> One need only look to the recent failure of the Government to even introduce the Women's Reservation Bill in Parliament for democratic discussion to see the general disregard for the equality of women for example. Similarly, the civil service of India has a poor record of equal opportunity employment when one looks to the lack of diversity and pluralism within its ranks.

CHRI urges the Committee to recommend that the 1993 Act be amended to expressly recognise the importance of equal opportunity and diversity in the employment of commission staff. All Indian commissions must have an express policy of equal opportunity and non-discrimination which incorporates wider principles of diversity and pluralism. Commissions must be required to appoint staff from all sectors of society including women, minorities, backward castes, the media, human rights organisations, academia, trade unions, teachers, and the medical profession. Indian commissions should be leading the way in anti-discrimination employment; not maintaining the *status quo*. Ideally, each commission should be obliged to fill 50% of available positions with female staff and have other similar reservations for Indian minorities and backward castes.

### **Pay-Scales**

With respect to the pay-scales of commission staff, CHRI believes that the 1993 Act should provide for a new wage structure to be framed which is unique to human rights commissions. The 1993 Act fails to recognise the special role of human rights commissions as independent bodies mandated to protect and promote human rights. Such a role requires persons of high calibre, motivation, specific human rights training and expertise and moral character. This should be reflected in the pay scale of its employees. An independent wage scale would reflect the fact that human rights commissions are not government bodies but independent statutory institutions. There is no reason to restrict the pay scales of commission employees to those set out for civil servants. The amendment of commission pay-scales would tie in well with CHRI's above submission that staff be recruited from the broader public as well as from the government. The pay-scale should be such that the wages offered for each position should be greater than that of a similar position within the civil service. This is particularly important in relation to the investigative staff of the commissions for two reasons. First, because the investigative staff deputed to a commission often lose other financial benefits provided to them in other postings and thus it is difficult for commissions to attract high quality staff. Secondly, the investigative staff of a commission are the staff most often out amongst greater Indian society. In order to promote the importance and fundamental nature of human rights, it is important that the investigative staff of commissions be seen to hold prestigious positions above that of comparable positions within the ordinary police force.

In light of the following, it is the submission of CHRI that Section 11 be amended to read as follows:<sup>16</sup>

11(1) The Chairperson and members of the Commission shall meet to appoint the Secretary-General of the Commission, who

(a) shall, in consultation with the Chairperson and members of the commission, make rules regulating the appointment by the omission of other staff as they may consider necessary for the effective operation of the Commission and its functions;

(b) shall be responsible for the management of and administrative control over the staff appointed in terms of paragraphs 1(a) and 2(a) of this section, and shall for those purposes be accountable to the Chairperson and members.

(c) shall, in consultation with the chairperson, members of the commission and the *ex officio* members of the commission, make rules providing for a policy of equal opportunity and non-discrimination on the basis of race, sex, ethnic or social origin, religion or language which shall include a system of reservations for women as well as reaffirming the system of reservations set out in the Constitution. These rules shall expressly recognise the need for the commission to reflect the gender, ethnic and religious composition of India and the need for the presence of representatives of non-governmental society.

11(2) The Central Government shall make available to the Commission

(a) such police and investigative staff of the Central Bureau of Investigation or the state police forces or such other persons with expertise and experience in investigative work under an officer not below the rank of a Director-General of Police with expertise in investigative work as may be necessary for the efficient performance of the functions of the Commission;

11(3) The salaries, allowances and conditions of service of the officers and other staff appointed under this section shall be such as may be prescribed by the Commission.

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<sup>16</sup> Section 27 should be amended similarly.

## **6. The Procedure for the Tabling of the NHRC's Annual Report - Section 20**

### ***The 1993 Act***

Section 20(1) of the 1993 Act provides that an annual report is to be submitted to the Central Government and to the State Government concerned. Section 20(2) then states that the concerned government shall table the report before Parliament or the State Legislature together with a memorandum of action taken or proposed to be taken on the recommendations of the commission and the reasons for the for non-acceptance of the recommendations. The annual report for the NHRC for 1996-97 was tabled before Parliament nearly 10 months after its submission to government. During those 10 months the NHRC was not permitted to release its report to the public. To do so, in the opinion of the then Attorney-General, would have been in contempt of Parliamentary privilege.

### ***Critique and Comment***

The fact that reports must be tabled before Parliament before being made public is contrary to the democratic principles of freedom of expression and the right to information. If the public does not have the right to know about the workings of its commissions, then one must ask who the commissions are supposed to benefit? Sections 12(g) and (h) of the 1993 Act mandate commissions to undertake and promote research in the field of human rights; spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means. In order to fulfil the mandates of promotion and education enumerated in section 12, a commission must be free to publicise its work and recommendations. This allows for the effective administration of justice by enabling the public to participate in a meaningful way to the work of the commissions. The public have a right to be kept informed of what government is doing to ensure the promotion and protection of their rights. CHRI is therefore of the view that a time limit needs to be set out in the Act to ensure that the annual reports are tabled before Parliament by the government within a certain number of weeks. After that period, the public's right to information should take precedence over Parliamentary privilege.

## **7. The Limitation Period - Section 36**

### ***The 1993 Act***

The limitation period of the Act only allows a commission to investigate violations of human rights which have occurred within 12 months of an alleged violation being brought to the attention of the Commission (section 36).

### ***Comment and Critique***

The victims of human rights violations are often unaware of any legal recourse or may be unable to reach a commission within the 12 month period due to financial, family, social or other restraints. The short 12 month period also makes it easier for the perpetrator of the violation, to prevent the victim from seeking redress from a commission.

Human rights are based on the inherent dignity of every human person. This dignity and the resulting rights to freedom and equality are inalienable and inderogable. They have precedence over all powers, including that of the State, which may regulate them but not derogate from them. Regardless of whether or not a human right has been incorporated into the law of the land, where a State has become party to an international treaty for the protection of a right or a right is part of customary international law, a State has a responsibility to promote and protect that right. While regional and international tribunals do exist before which an individual may bring a claim against his or her State for a violation of his or her rights, the more effective means is, if possible, to bring his or her complaint before a court or tribunal at the domestic level. The point is that a violation of a fundamental human right or freedom is a serious violation both at the international and national level. That being the case, those who have suffered from a violation of these rights or freedoms should enjoy a fair and reasonable period of time within which to seek justice and amends from the State.

It is the view of CHRI that a 1 year limitation period is insufficient, unfair and unreasonable. Just as each human rights violation is an offence which has a certain limitation period within which a person can seek redress from the courts, CHRI believes that these same limitation periods should apply with respect to bringing a complaint before a commission. For example, let us presume that there exists no limitation period within which a person can be prosecuted with the crime of

murder. Then there should also not exist a period of limitation within which a person can bring a complaint of murder as a violation of the right to life before a commission.

Alternatively, or in addition thereto, the Chairperson of the Commission may receive a complaint of a violation which occurred outside of the limitation period, at his or her discretion, if he or she believes that it would be unfair or unreasonable to bar the person's complaint and that person can show reasonable grounds as to why the complaint was not brought within the limitation period. CHRI believes, however, that the introduction of broad discretionary powers should be avoided where possible given the need for the commissions to maintain their reputation of independence and objectivity.

## **8. Co-ordination between the NHRC and the state commissions**

CHRI's first submission in this respect is that the NHRC should be empowered to establish its own regional offices throughout India. A large, developing country such as India requires state and/or regional commissions to cope with the enormous number of complaints and the lack of human rights awareness.

Secondly, CHRI is of the opinion that there needs to be a statutory framework created that regulates the administration and functioning of all the commissions, including the National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes and the National Commission for Women. There is an urgent need for greater co-operation and co-ordination between the commissions to increase efficiency, and to avoid duplication of work. However, there needs to be great caution when developing such a framework. CHRI is aware, for example, of the suggestion that the NHRC, which is currently overloaded with complaints, should have the power to transfer specific complaints back to the state commissions, such as those complaints dealing with violations which fall within the legislative power of the states. CHRI believes that this would create unnecessary delays in the administration of justice as an individual's complaint is transferred from one commission to the next. The individual should have the right to 'forum shop', especially in a country where some commissions may be better resourced, more trusted or more efficient than others. Rather than try to free the NHRC from its overload of cases by means of transferring cases back to the states, the Act should be amended to provide for more efficient commissions and greater accessibility at the regional level. Establishing

a federal framework of regional offices would also allow the central NHRC to delegate particular research projects to more appropriate regions or expert consultants, thus improving the focus of regional issues and coordinating efforts.

CHRI would like to highlight the need for future debate on the issue of the national coordination of state, central and regional human rights commissions. At present, it is left to the discretion of State Governments to constitute their own human rights commission.<sup>17</sup> CHRI recognises that it is impractical in terms of available state resources and, perhaps politically difficult, to seek an amendment to the 1993 Act which would require States to constitute their own commissions. It is with this in mind, that CHRI makes the submission that the NHRC be empowered to establish regional offices. Nonetheless, the issue of national coordination and central/state cooperation and collaboration must be addressed more fully in order to ensure the Indian citizen is not prejudiced with respect to his or her access to justice.

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CHRI thanks the Advisory Committee for considering our submissions. Please find attached a summary thereof. Should the Committee wish to discuss any of the above issues, please do not hesitate to contact either myself or our Human Rights Commissions Project Officer, Ms. Sneh Aurora..

Yours sincerely

Maja Daruwala  
Executive Director

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<sup>17</sup> Section 21.

## **Summary of CHRI's Submissions to the high level advisory committee headed by the former chief justice of India, Justice A.M. Ahmadi**

The *Commonwealth Human Rights Initiative* submits:

- that the 1993 Act be amended to include an express provision that government organs shall provide the commissions with such assistance as may be reasonably required for the effective exercising of their power and performance of their duties and functions;
- that section 19 be repealed and the armed forces be brought under the investigative powers of the NHRC; or alternatively, that the definition of 'armed forces' in the 1993 Act be amended to include only the military, naval and air forces;
- that sections 4(1) and 22(1) the 1993 Act be amended so that persons representing non-governmental society are included within the said appointing Committee, together with members of the Indian Law Commission and a member of the judiciary. No political representatives should be included within the appointing Committee. The nominees put forward by this Committee can then be appointed by the President as stipulated in Sections 4(1) and 22(1);
- that sections 3(2) and 21(2) of the 1993 Act be amended to include, as members of the commissions, persons having a demonstrated specialised knowledge of, or experience in human rights advocacy, policy making or law and be fit and proper persons to hold the position of a human rights commissioner. The 1993 Act should further expressly state that the commissions are to reflect the ethnic, religious and gender composition of India and that this requirement is to be taken into account by the appointing Committee established under sections 4(1) and 22(1) of the Act;
- that Sections 6(3) and 23(3) be repealed on the basis that they are ageist in nature;
- that a stand-alone provision be inserted into the 1993 Act headed "Independence of the Commission and its Members and Staff" which would provide that:
  - (a) the Commission is an independent institution mandated to promote the observance of, respect for and the protection of human rights in India;

(b) Members of the Commission and members of the staff of the Commission shall serve impartially and independently in accordance with their mandate, in good faith, without any restrictions, improper influence, inducements, pressures, threats or interferences from any persons or for any reason;

(c) all organs of state shall provide the Commission with any assistance necessary for the preservation of its independence, impartiality and credibility

- that each commission be granted a larger number of commissioners or an additional tier of commissioners to hear those complaints of a less serious, or more common or complex nature. These persons should be representative of Indian society and have experience in human rights; and/or that the 1993 Act be amended to allow a commission to continue to retain commissioners who would otherwise have completed their service in good faith until a replacement can be appointed;
- that Section 11 (and section 27 similarly) be amended to read as follows:

11(1) The Chairperson and members of the Commission shall meet to appoint the Secretary-General of the Commission, who

(a) shall, in consultation with the Chairperson and members of the commission, make rules regulating the appointment by the Commission of other staff as they may consider necessary for the effective operation of the Commission and its functions;

(b) shall be responsible for the management of and administrative control over the staff appointed in terms of paragraphs 1(a) and 2(a) of this section, and shall for those purposes be accountable to the Chairperson and members.

(c) shall, in consultation with the chairperson, members of the commission and the *ex officio* members of the commission, make rules providing for a policy of equal opportunity and non-discrimination on the basis of race, sex, ethnic or social origin, religion or language which shall include a system of reservations for women as well as reaffirming the system of reservations set out in the Constitution. These rules shall expressly recognise the need for the commission to reflect the gender, ethnic and

religious composition of India and the need for the presence of representatives of non-governmental society.

11(2) The Central Government shall make available to the Commission

(a) such police and investigative staff of the Central Bureau of Investigation or the state police forces or such other persons with expertise and experience in investigative work under an officer not below the rank of a Director-General of Police with expertise in investigative work as may be necessary for the efficient performance of the functions of the Commission;

11(3) The salaries, allowances and conditions of service of the officers and other staff appointed under this section shall be such as may be prescribed by the Commission.

- that the 1993 Act be amended to require all commission staff to receive human rights training before they commence work with a commission, despite any previous experience or qualifications in the area of human rights;
- that the 1993 Act be amended to incorporate a time limit within which the annual reports of commissions are to be tabled before Parliament or the House of the State Legislature, as the case may be, by the concerned government within a certain number of weeks, after which the public's right to information should take precedence over Parliamentary privilege.
- that the 1993 Act be amended so that the same limitation periods apply with respect to bringing a complaint before a commission as if it were a court of law dealing with that complaint; and alternatively, or in addition thereto, that the Chairperson of the Commission may receive a complaint of a violation which occurred outside of the limitation period, at his or her discretion, if he or she believes that it would be unfair or unreasonable to bar the person's complaint and that person can show reasonable grounds as to why the complaint was not brought within the limitation period.
- that the 1993 Act be amended to allow the NHRC to establish regional offices;
- that the 1993 Act be amended to create a statutory framework to regulate the administration and functioning and co-operation and collaboration of all the commissions and regional

offices, including the National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes and the National Commission for Women.