International Coordinating Committee Sub-Committee on Accreditation (ICC-SCA) – National Human Rights Commission of Nepal (NHRC Nepal)
Stakeholders’ Submission

Submission by:
The Asian NGO Network on National Human Rights Institutions (ANNI)*
Informal Sector Service Center (INSEC)**
Submitted on 30 June 2014

* The Asian NGOs Network on National Human Rights Institutions (ANNI) was established in December 2006. It is a network of Asian NGOs and human rights defenders working on issues relating to National Human Rights Institutions (NHRIs). ANNI is composed of members that are national organizations from all over Asia. ANNI currently has 30 member organizations from 17 countries or territories. The work of the ANNI members focus on strengthening the work and functioning of Asian NHRIs to better promote and protect human rights as well as to advocate for the improved compliance of Asian NHRIs with international standards, including the Paris Principles and General Observations of the Sub-Committee on Accreditation (SCA) of the International Coordinating Committee (ICC).

The Asian Forum for Human Rights and Development (FORUM-ASIA) is the Secretariat of ANNI. FORUM-ASIA has Consultative Status with the ECOSOC (UN Economic and Social Council) since 2004.

**Informal Sector Service Centre (INSEC) is a non-governmental organization working for the protection and promotion of human rights in Nepal. INSEC was founded in 1988. It is continuously campaigning and advocating against violation of human rights at local, national and international level. INSEC has been playing an influential and leading role to protect and promote human rights through lobby and advocacy work at different levels. It has been working with different national and international networks and coalitions. INSEC has its presence in all the 75 districts of Nepal. In all the five development regions it has its regional offices, 24 district offices and district representatives in each of 75 districts.

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Introduction

This stakeholder information is jointly submitted by the Asian NGO Network on NHRIs (ANNI) and the Informal Sector Services Center (INSEC, Nepal) for the accreditation review of the National Human Rights Commission of Nepal (NHRC Nepal).\(^1\) This submission recalls the issues raised and assesses the progress made since the previous joint last submission on 28 February 2013. This submission also provides an update of emerging issues affecting the effective work and functioning of the NHRC Nepal.

They include:

- Independence and autonomy of the NHRC Nepal;
- Restriction of the mandate of the National Human Rights Commission (NHRC) following the enactment to the NHRC Act (2012);
- The failure to fill the vacancies despite the expiration of term of previous members since September 2013.

ANNI and INSEC acknowledge that the NHRC Nepal continues to operate in an environment that creates significant operational challenges for the discharge of its duties. There have also been concerted attempts by the government to undermine its independence and effectiveness since 2012. Since the abolition of absolute monarchy in 2007, elected governments have been unable to fulfill the primary task of writing the Constitution. This is exacerbated by repeated attempts to undermine the democratic gains and the transitional justice process after decades of civil conflict by enacting laws which perpetuate impunity and a lack of accountability.

Context and Overview of Human Rights Situation

Elections to the second Constituent Assembly (CA) were held peacefully in November 2013 by the government led by Chief Justice Khil Raj Regmi. However, the reporting coverage period (2013-2014) saw scant progress made in the human rights and transitional justice situation of the country.

In January 2014, a landmark judgment by the Supreme Court of Nepal ruled that the Truth and Reconciliation Ordinance (TRC Ordinance) adopted by the President calling for formation of Commission on Truth and Reconciliation as well as the Commission of Inquiry into Disappearances in its proposed form was unconstitutional. It then issued a directive for an amendment of the Ordinance to be in compliance with international standards.\(^2\) This follows the seminal ruling in 2013 where the Supreme Court ordered the suspension of the Ordinance pending further consultation and inputs from civil society, rights institutions and victims.

However, there is still evidently a lack of respect for the rule of law and little regard for the judiciary in Nepal as the elected Legislature-Parliament persisted in its efforts to grant blanket amnesties to perpetrators of grave human rights violations in the

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\(^1\) ANNI is a network of human rights organizations and defenders engaged with national human rights institutions (NHRIs) in Asia advocating for the effective work and functioning of these bodies for the promotion and protection of human rights.

\(^2\) The Supreme Court ruled that any mechanism for transitional justice must conform to international limit for filing cases contravene fundamental rights guaranteed by the Constitution of Nepal, its justice system and international law.
conflict period. It passed the TRC Act on 25 April 2014, which was then approved by the President on 11 May 2014.

Independence

In the previous submission to the ICC-SCA, ANNI and INSEC raised the issue of compromised independence of the NHRC Nepal due to financial restrictions exercised by the government. Section 20 (2) of the NHRC Act (2012) stipulates that all expenses have to be approved by the government. These include requiring approval for the issuance of funds for NHRC Nepal activities, altering of budget codes/headings as well as prior approval for expansion of its work in new geographic areas.

Furthermore, any urgent missions or inquiries that require travel to other regions to investigate human rights violations are also subject to approval from the government. The NHRC Nepal’s organogram must also be approved by the government, which renders the recruitment of staff unduly difficult and bureaucratic.

Worryingly, there is no provision at all in the NHRC Act that refer to the funding of the NHRC Nepal, such as setting out what the funds of the Commission shall consist of and where they are sourced and mechanisms to ensure that the NHRC is funded adequately, among others. This gives further credence to the argument that the government is systematically trying to cripple the NHRC Nepal’s operational independence.

To date, there has been no effort to amend or address the lack of financial independence of the NHRC Nepal since the enactment of the NHRC Act (2012).

Fulfillment of Human Rights Mandate & Restrictions Imposed

The previous joint submission called to attention two specific laws that severely compromised the ability of the NHRC Nepal to adequately fulfill its human rights mandate.

The Interim Constitution (article 132 (4)) prohibits the NHRC Nepal from intervening in matters under the jurisdiction of the Army Act. Cases of torture and enforced disappearance, which were especially endemic during the conflict period and perpetrated by both State and non-State actors, cannot be investigated by the NHRC. This seems to be a political compromise made by the administration and other political parties to pardon all violations of human rights by warring factions.

However, there is a considerable degree of confusion as it further states that this does not proscribe against undertaking proceedings concerning human rights or humanitarian law violations. This creates uncertainty with regard to the NHRC Nepal’s ability to investigate alleged human rights violations, including those perpetrated by army and combat personnel.

The enactment of the NHRC Act (2012) included several glaring procedural flaws that, if allowed to remain, significantly will undermine the promotion and protection of human rights in Nepal. Section 10 (5) of the NHRC Act stipulates that victims must lodge complaints within a six months time limit. While it appears sound to
impose a time limit certain limits so that the NHRC Nepal is not confronted with backlog of cases (especially many years after the occurrence), the situation in Nepal necessitates that people often take longer than the prescribed period. Reasons include geographical accessibility, awareness of the mechanism, the culture of impunity that marked the conflict era and remains today, among others.

Instead, discretion should reside with the NHRC Nepal to establish an appropriate filtering process in its investigation of complaints.

Section 17 (10) of the Act is also of particular concern. It explicitly gives the Attorney General the power not to implement certain NHRC recommendations, namely that the government initiate legal action against alleged perpetrators of human rights violations, as long as the NHRC is informed in writing about the reasons for non-implementation.

Section 10 (5) and Section 17 (10) were declared null and void by the Supreme Court on 6 March 2013. It ruled that the NHRC Nepal, as a constitutional body, was capable and empowered to decide if the issue was justiciable and that the Attorney General cannot overrule the NHRC’s decision to try cases in court. Despite the Supreme Court’s ruling that upholds the powers and mandate of the NHRC, however, the legislation has not yet been amended to reflect this ruling.

Selection and appointment process

The appointment process of the NHRC Nepal, set out in Article 131 of the Interim Constitution, does not stipulate an open call for application and appointment of members into the Commission. The Prime Minister appoints the Chairperson and the Members of the NHRC on the recommendation of the Constitutional Council.

With regard to appointment in the decision-making body of the NHRC Nepal, there is a worry in the current transition phase that political parties may politicize the process by exerting their influence in favour of their preferred candidates. The Secretary of the NHRC Nepal is also appointed by the Executive arm of the government. There is a marked lack of safeguards against such attempts to erode any guarantees of functional independence.

The ICC has stressed in its General Observations that appointment decisions which are largely dominated by the Executive have a potential to undermine the independence of an NHRI. Furthermore, there is no stipulation for consultations with civil society or for the possibility of public nominations.

The tenure of the Chief Commissioner and the commissioners ended on September 2013, effectively rendering the constitutional human rights body leaderless and literally dysfunctional. Prior to elections in November 2013, with no functioning parliament (which normally would hold a hearing and public consultations for new Commissioners’ appointments) and the country heading towards polls, it was technically difficult to make new appointments. Now that elections have been held and a new parliament is in place, appointments to the NHRC should be a matter of highest priority.
The NHRC Nepal remained without Commissioners after their six-year tenure terminated on September 15, 2013. The NHRC Nepal is operating under the powers formally delegated to the Acting Secretary as Secretary Bishal Khanal completed his five-year term at the Commission on February 2013. Though commissioners were appointed in other constitutional bodies like the Election Commission Nepal and Commission of Investigation of Abuse of Authority (CIAA) through/on the advice of the Constitutional Council, the membership of the NHRC Nepal remains vacant. This can be inferred to reflect the lackadaisical attitude displayed by the government towards human rights in the country.

Delays in the appointment of NHRC Commissioners will also hamper the formation of the TRC, which in turn negatively affects the transitional justice process in Nepal because the membership and constitution of the TRC requires nomination by the NHRC chairperson/Commissioners.

**Recommendations**

To the government of Nepal:

1. Promptly fill the vacancies in the NHRC Nepal in compliance with the standards and practices in the Paris Principles and ensure that members should be selected on the basis of proven expertise, knowledge and experience in the promotion and protection of human rights.

2. Appointments should be made following an open and transparent process with the involvement of civil society and free of political deal-making. Commissioners should also be representative of society, including women and people from minority groups.

3. Remove any limitations to the jurisdiction of the NHRC Nepal and ensure that it is able to investigate all allegations of violations by all branches of the State and all types of actors, including armed forces on all sides of the conflict. Clarify the ambiguous provisions on jurisdiction in relation to the Army.

4. The NHRC Nepal should be provided with adequate resources, financial, material and human, as well as with the necessary autonomy to propose and manage their own budgets and recruit their own staff, including the position of Secretary. Ensure that such procedures are clearly stated and secured in the regulatory framework.

5. Ensure the effective and meaningful participation of the NHRC Nepal in the truth and reconciliation process and ensure that any mechanism for transitional justice must conform to international standards.

6. Ensure that the NHRC Nepal has clear powers to refer cases for prosecution directly to the AG’s office either through an amendment to the NHRC Act or through a policy directive.

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3 The Constitutional Council is the body that recommends appointments for all other Constitutional bodies as well.
7. Amend the NHRC law in compliance with the Supreme Court verdict of 6 March 2013 relating to the functional independence and statute of limitations of complain.

To the NHRC Nepal:

8. Advise the new government and legislators on draft and existing legislation and submit recommendations to the Parliament to resolve human rights violations.

9. Monitor government compliance with human rights treaty obligations, in particular the International Covenant on Civil and Political Rights and ensure that recommendations from the Human Rights Committee are implemented.

10. Analyze all existing and proposed legislation, in particular the TRC Act, and make recommendations regarding consistency with international human rights norms.

11. Involve and ensure meaningful civil society participation in the drafting process of the new Constitution to be in line with international human rights treaties that Nepal has ratified or is party to.
ANNEX 1: Summary of List of Recommendations

Nepal: National Human Rights Commission (NHRC)

- November 2013: The SCA recommended that the review of the NHRC be deferred to its first session 2014.
- March 2014: The SCA recommended that the Special Review of the NHRC be deferred to its second session 2014.

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<th>Selection and appointment</th>
<th>Recommendation</th>
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<tr>
<td>* refer to Paris Principle B.1 and to ICC-SCA General Observations 1.7 on ‘Ensuring Pluralism’ and 1.8 on ‘Selection and appointment of the governing body’</td>
<td>A clear, transparent and participatory selection process that promotes merit based selection, ensures pluralism and promotes the independence of, and public confidence in, the senior leadership of the NHRC (2007, 2008, 2009, 2010, 2013 &amp; 2014)</td>
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<td>To formalise selection and appointment process in relevant legislation, regulations or binding administrative guidelines, as appropriate (2013)</td>
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<td>To engage with relevant stakeholders including the new Constituent Assembly to adopt an appropriate selection process and ensure the timely selection and appointment of new members in compliance with the Paris Principles (2013)</td>
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To advocate for improvements to the enabling law to ensure there is a comprehensive selection process which includes the requirements to (2014):

- Publicize vacancies broadly;
- Maximize the number of potential candidates from a wide range of societal groups;
- Promote broad consultation and / or participation in the application, screening and selection process;
- Assess applicants on the basis of pre-determined, objective and publicly available criteria; and
- Select members to serve in their own individual capacity rather than on behalf of the organization they represent.

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<tr>
<th><strong>Staffing</strong></th>
<th>To engage with relevant stakeholders including the Cabinet and the new Constituent Assembly to ensure that the draft bill on recruitment of staff is approved and signed into law (2013)</th>
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<td>To provide the SCA with information on how these changes have addressed the NHRC’s difficulties in employing and maintaining an appropriate level of staff (2013)</td>
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<th><strong>Cooperation and interaction</strong></th>
<th>To increase its cooperation with statutory institutions for the promotion and protection of human rights as well as civil society organizations (2007, 2008, 2009 &amp; 2010)</th>
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* refer to ICC-SCA General Observation 1.5 on ‘Cooperation with other human rights institutions’ and 1.4 on ‘Interaction with the
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<th>international human rights system’</th>
<th>To continue its cooperation with OHCHR and the Asia Pacific Forum of NHRIs (2011 &amp; 2012)</th>
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<td><strong>Adequate Funding</strong></td>
<td>To include in provision of adequate funding by the state (2007, 2008 &amp; 2009):</td>
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<td>- Salaries and benefits awarded to its staff comparable to public service salaries and conditions;</td>
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<td>- Remuneration of Commissioners (where appropriate)</td>
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<td>To have complete financial autonomy (2007, 2008 &amp; 2009)</td>
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