

REPUBLIC OF KOREA

(South Korea)

Amnesty International's comments on the National Human Rights Commission Act: Towards an Autonomous, Effective National Human Rights Commission

Amnesty International welcomes the inauguration of the National Human Rights Commission (NHRC) in the Republic of Korea (South Korea hereafter) on 25 November 2001. The NHRC symbolises an important step in the monitoring of human rights violations, in reporting and addressing of these violations; by doing so, it is hoped that the NHRC will contribute to the better protection of human rights and increasing awareness of human rights in South Korea.

Establishment of NHRCs to ensure independence and effective action

NHRCs must be independent from the executive functions of government and its founding charter should reflect this. It is essential therefore that NHRCs should be established by law or, preferably, by constitutional amendment. In this respect, Amnesty International welcomes the fact that the NHRC in South Korea is being established by the National Human Rights Commission Act passed by the National Assembly in May 2001.

Founding legislation: purposes and definitions of the National Human Rights Commission Act

Amnesty International welcomes the purpose of the National Human Rights Commission Act which aims to “contribute to the embodiment of human dignity and worth as well as to the safeguard of the basic order of democracy, by establishing the NHRC to ensure that inviolable fundamental human rights of all individuals are protected and the standards of human rights are improved.” (Article 1)

Amnesty International notes and welcomes the definition of the term “Human Rights” to include “liberties and rights which are guaranteed by ... international human rights treaties to which the Republic of Korea is a party and international customary law”. Amnesty International also welcomes Article 3 of the National Human Rights Commission Act which ensures the independence of the NHRC “with matters which fall under its jurisdiction”. Amnesty International notes Article 4 which states that the jurisdiction of the National Human Rights Commission Act and by implication the NHRC will apply to citizens of South Korea and to foreigners residing therein.

However, Amnesty International has concerns regarding whether the framework of the NHRC set out in the National Human Rights Commission Act provides for the NHRC to carry out its aims and functions effectively.

Membership of the Commission: good intentions but flawed selection procedure, ineffective powers

Representation of Society: Good Gender Balance

With reference to the organization of the Commission, Amnesty International welcomes the provision for impartiality and independence in the appointment of the Commissioners and the

requirement that at least four commissioners will be women (Article 5 (5)).

Selection procedures and consultation

Amnesty International would like to express concern that only four of the eleven commissioners are full-time commissioners. With as many as seven of the commissioners being part-time, Amnesty International is concerned that the NHRC will not be able to function effectively.

Another issue of concern is the direct nomination of some commissioners by the President of South Korea. Such an appointment may negatively affect the independence and impartiality of the NHRC. Amnesty International calls for the method of selection and appointment of the members of the NHRC to be fair and transparent, so as to afford all necessary guarantees of independence. Broad representation is also important, and steps should be taken to guarantee this – for example – by allowing members of civil society to nominate possible candidates for membership of the NHRC.

Amnesty International calls on the members and staff of the NHRC to ensure its independence, and thereby its effectiveness. In its report “National Human Rights Institutions: Amnesty International’s recommendations for effective protection and promotion of human rights” (IOR 40/007/2001, p.6), Amnesty International had recommended that

(t)he members and staff of the NHRC should consist of men and women known for their integrity and impartiality of judgment who shall decide matters before them on the basis

of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences from any quarter or for any reason, for example, allegiances to political parties, or strong links with the executive part of the government.

Effective support to fulfil tasks: an autonomous, adequately funded and resourced NHRC with free access to all appropriate government organs

Amnesty International calls on the South Korean government to ensure that the powers of the NHRC are clearly included within the law or the South Korean constitution, in order to ensure the autonomy of the NHRC. Amnesty International is concerned by the vaguely worded Article 18 which provides for the organization of the NHRC to be based on the Presidential Decree. If the powers of administration are to be based on the “draft Presidential decree” (Article 6 (4)), it could lead to political considerations in the future affecting the functioning of the Commission. The ambiguous wording of the clause could provide for a wide scope for interference from the executive and negatively affect the independence of the working of the NHRC.

The NHRC should be able to report to all appropriate organs of the government and to all authorities that the NHRC considers appropriate. The NHRC should have formal access to the executive, including the Ministry of Justice and other relevant Ministries. Such

access and reporting is important for the NHRC for two reasons: (a) it would ensure that its recommendations are communicated effectively; (b) there would be high-level discussion about implementation of its recommendations.

Amnesty International would also like to emphasize that the South Korean government must provide the NHRC with adequate funding and resources in order for the Commission to be able to fully carry out, and without restrictions and limitations, the aims and functions set out within the mandate, and particularly, to address the demands of the caseload that has been brought to its attention. The NHRC should have all necessary human and material resources to examine, thoroughly, effectively, speedily and throughout the country, the evidence and other case material concerning specific allegations of violations reported to it.

The secretariat of the NHRC, it appears, is expected to be fully functional from April. In its report, "Proposed Standards for a National Human Rights Commission (ASA 25/16/98)" (p.5), Amnesty International had recommended that "(t)he Commission should have all necessary human and material resources to examine, thoroughly, effectively, speedily and throughout the country, the evidence and other case material concerning specific allegations of violations reported to it." Amnesty International calls for the secretariat of the NHRC to be sufficiently staffed with the best possible personnel, that adequate resources will be provided to support the Commission effectively.

Amnesty International welcomes the provision by the National Human Rights Commission Act for the establishment by the NHRC of subcommittees. The provision fulfills Paris Principles Article C5 which states that the NHRC should “establish working groups from among its members as necessary.”

Amnesty International welcomes the establishment of an advisory organ whose members could provide important and effective policy and research support to the Commission.

Guarantee for adequate publicity for NHRC proceedings

It is very important to publicise the proceedings of the NHRC as provided in Article 14 of the Act which ensures the presumption in favour of the Commission acting publicly whether this involves hearings, investigations, or reports. Amnesty International had in its report “Proposed Standards for a National Human Rights Commission” recommended to the South Korean government that “Investigations initiated by the Commission should be adequately publicized, especially at the regional and local levels, to enable and encourage witnesses to come forward to testify.”

However, Amnesty International would like to express its concern on the potentially very wide exemption on the NHRC, as provided for in Article 29(4), for reporting on national security or in publicising of “which is restrained by any other Act”.

The obligation for related entities to respond on non-observance of NHRC recommendations and the right for NHRC to publicise findings, non-observance of its recommendations

Amnesty International welcomes the fact that the NHRC will be presenting opinions on proceedings liable to affect the protection and improvement of human rights to courts and the Constitutional Court. Amnesty International notes that Article 25 (1) guarantees that

the NHRC “should be able to, if deemed necessary to protect and improve human rights, recommend related entities to improve or rectify specific policies and practices or present opinions.” To ensure the effectiveness of this guarantee, the NHRC should be able to respond or report to any appropriate authority, not just the President and the National Assembly. The NHRC should for instance be able to make direct recommendations to the police, security forces, among other authorities.

Amnesty International welcomes the requirement (Article 25(3)) that “in case the heads of related entities receiving any recommendation ... fail to implement the said recommendation, they shall clarify the reasons for such failure to the NHRC in writing,” and that the Commission can publicize its recommendations and presented opinion and the reasons given by the government for not fulfilling NHRC recommendations. (Article 25(4)). Amnesty International, in its “Proposed standards for a National Human Rights Commission (ASA 25/16/98)” has stated that “The government should undertake an obligation to respond, within a reasonable time, to the case-specific as well as the more general findings, conclusions and recommendations made by the Commission. The government’s response should be made public.”

Provisions defining mandate and duties of the NHRC: welcome clauses hampered by possibilities of non-observation by state organs

Amnesty International welcomes the provisions provided in Article 19 which define the mandate and duties of the NHRC.

The NHRC in South Korea is encouraged to “promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation” and also to “encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation” (Articles A3(c) of the Paris Principles).

The provision for consultation by the NHRC with state organs (Article 20 of the National Human Rights Commission Act) is welcome but the term “justifiable reason” does provide the state organs with wide scope to justify non-cooperation.

Questionable Power of the NHRC to “require” witnesses, evidence for its investigations

Amnesty International welcomes the provision (Article 22) in the National Human Rights Commission Act for the NHRC to have the power to “require” the submission of relevant material and witnesses to help in its investigations. The hearings of “the representative of the related entity, the interested persons” appears to depend on the rules set down by the Commission (Article 23), however it is not clear if the requirement by the Commission will have binding powers.

Participation of the NHRC in the International Human Rights system

Amnesty International welcomes Article 21 of the National Human Rights Commission Act¹ that provides for state organs to consult with the NHRC during the preparation of a governmental report under provisions of any international treaty on human rights. The Commission should, as stated by the Paris Principle Article A 3 (d), “contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations, and, where necessary, to express an opinion on the subject, with due respect for their independence.”

¹Article 21 states that, “If a related state organ prepares a governmental report under the provisions of any international treaty on human rights, it shall hear opinions of the Commission.”

Free access for the NHRC to investigate detention facilities

Amnesty International welcomes Article 24 which provides for the NHRC to investigate detention facilities. It is very important that the NHRC has wide powers to visit detention facilities, be able to make recommendations on conditions of detention and on ways to prevent torture or ill-treatment. The NHRC should be able to visit all places of detention freely and at any time, have access to all parts of the place of detention and to interview any detainee without witnesses, in private and in complete confidentiality, with interpreters if required. These requirements should be unconditional. Hence in AI's opinion, Article 24(5) defeats the very purpose of this right of visits by the NHRC staff to detention facilities. The staff of the detention facility should not be present in any way at the interview between the Commissioner or staff of the NHRC and the inmate of the detention facility. The presence of staff of the detention facility in the interviews would only prevent detainees from speaking freely to the Commissioners.

A welcome provision on human rights education

Amnesty International particularly welcomes the proposals for the NHRC to be involved in human rights education (Article 26) as also the proposal that the NHRC will be establishing a human rights library and database (Article 27).

Limited nature of NHRC powers relating to its investigation of Human Rights Violations

Amnesty International is concerned about the limited nature of the provisions listed out in Article 30 of the Act dealing with matters subject to investigation by the NHRC. A person should be able to appeal against or file a complaint about any breach of any right set out in the international treaties that South Korea is a signatory.

If a detainee held in any confinement or caring facility intends to file a petition to the NHRC, it is not clear why the detainee cannot directly send the petition to the NHRC. The role of the staff or "public official" of the facility as a middleman between the detainee and the NHRC, as mentioned in Article 31, appears to be vaguely-worded and it is open to abuse.

Amnesty International welcomes the explicit obligation stated in Article 32 (1.10.4) on the NHRC to inform the unsuccessful petitioner reasons for the rejection by the Commission of his petition. However, Amnesty International expresses deep concern at

the vaguely worded Article 32 (1.7) which states that the NHRC can reject a petition which it deems to be “improper to investigate”. The vaguely-worded nature of this provision has the potential to open it to abuse, especially arising from political pressure. There should be no time restriction as mentioned in Article 32 (1.4)².

Amnesty International calls on the NHRC to make the decision independently as to when and by whom its investigation is to be referred to appropriate judicial bodies (Article 33) and that these bodies appropriately deal with the complaint. The NHRC should ensure that the investigation is not taken over by the other bodies with the aim or effect of denying an effective investigation or remedy for genuine human rights violations.

Amnesty International is concerned at the vaguely-worded Article 35. Clause 1 states that the NHRC will “not impede the performance of functions of state organs in the course of its investigation.” Clause 2 of the same Article restricts the NHRC from making investigations which would infringe “on the privacy of any individual” or in “unduly participating either in the proceedings in pending or in the prosecution for any case the criminal investigation of which is in progress.” The privacy restriction appears to be vague and open to abuse. A criminal investigation maybe the context in which Human Rights have been violated, for example - the use of torture to secure evidence. Criminal investigators may therefore be a serious matter of concern to the NHRC. The NHRC should have the power to work on its own mandate without any restrictions and interventions.

Article 50 uses the “privacy” factor to restrain publicity of results by the NHRC if “it is likely to infringe on the privacy of any individual.” Amnesty International calls on the South Korean government to develop guidelines to reduce the vagueness of the term “privacy”. There also appears to be a need for more rules and guidance about the kind of occasions in which it would be appropriate to make such deliberation public.

The provisions for the methods of investigation (Article 36 of the NHRC Act) could be improved by inclusion of provisions allowing the Commissioners to use the services of specialist investigation staff like forensic doctors and scientists, forensic pathologists, psychiatric doctors, experts in sexual abuse or ballistic experts.

Amnesty International notes Article 40 which states that

With respect to any petition the investigation of which is in progress or completed, the Commission (NHRC) may propose a remedy necessary

²According to Article 32 (1.4), the NHRC “shall reject a petition (which) ... is filed after one or more years have elapsed since the facts causing the petition happened.”

for the fair solution of the case concerning the petition to both parties concerned to make a compromise.

Article 41 provides for a “conciliation committee” which is comprised of three members to be established under the NHRC “to ensure the speedy and fair settlement of conciliation” of cases referred to it by the NHRC. Given that the conciliation will have the same effect as settlement at court, Amnesty International calls on the NHRC to ensure that the Conciliation Committee ensures that the decision is taken fairly and independently. Amnesty International also calls on the NHRC to ensure that the conciliation settlements should not facilitate impunity.

Amnesty International welcomes Article 45 regarding “accusation and recommendation of disciplinary action”, especially Article 45(2) where lesser charges below criminal charges could have recommendation for disciplinary measures. The recommendations that military suspects be investigated and prosecuted by the Ministry of National Defence or head of military unit of the soldier who made allegation, is a matter of concern for Amnesty International as these investigations may not be impartial. Amnesty International also welcomes Article 46 allowing respondents with the opportunity to state their opinions before the final decision is taken by the NHRC. The provision for legal aid (Article 47) and the provision for interim measures by the NHRC to ensure that no further harm is caused are positive steps forward in the protection of human rights in Korea.

Supplementary provisions: welcome but often too vaguely worded

Among the Supplementary Measures, Amnesty International is concerned about the vagueness of the term “secrets”, especially those that are mentioned in Article 52 which prohibits Commissioners and staff of the NHRC to disclose secrets. Another important area of concern is the possibility of limitation of investigative activities as the NHRC Act does not give commissioners and staff members the privilege of exemption from liability regarding defamation of character (libel action) for statements made in the course of their work. There is a need for some measure of protection to allow them to raise genuine concerns without being prosecuted.

Amnesty International welcomes Article 55 which provides for the protection of witnesses; by prohibiting unfair treatment against the witness for testifying to the NHRC. Amnesty International notes Article 55 (2) which gives the NHRC the right to provide “necessary support or reward to a person who either reveals ... any violation of human rights or finds and presents relevant evidence or materials.”

Amnesty International's Recommendations

- (1) The NHRC should be provided with adequate funding and resources in order for it to be able to fully carry out, without restrictions and limitations, the aims and functions set out within the mandate, and particularly, to address the demands of the caseload that has been brought to its attention.
- (2) *The effectiveness of the NHRC will be improved if more commissioners than the present four are made full-time commissioners. Additionally, the members and staff of the NHRC should consist of men and women who shall decide matters before them on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences from any quarter or for any reason.*
- (3) *The method of selection and appointment of the members of the NHRC should be fair and transparent, so as to afford all necessary guarantees of independence. The present arrangement where the President of South Korea directly nominates some commissioners could negatively affect the independence and impartiality of the NHRC.*
- (4) *The secretariat of the NHRC should be sufficiently staffed, with adequate resources to support the Commission effectively.*
- (5) The Commissioners and staff of the NHRC should be able to visit all places of detention freely and at any time, have access to all parts of the place of detention and to interview any detainee without witnesses, in private and in complete confidentiality, with interpreters if required. These requirements should not be limited or be made conditional.
- (6) Detainees should be able to make complaints directly to the NHRC.

- (7) The National Human Rights Commission Act should ensure that the NHRC should have the power to work on its own mandate without any restrictions and interventions. There is a need for some measure of protection from liability regarding defamation of character (libel action) for commissioners and staff members of the Commission to allow them to raise genuine concerns without being prosecuted.
- (8) The National Human Rights Commission Act should include the following important powers in order to remain autonomous, and yet credible and effective. These include the power to investigate allegations of abuses by security forces. On wider issues of concerns regarding human rights, including patterns of violence, the National Human Rights Act should ensure that the NHRC can receive complaints from any sources. The NHRC should be able to conduct studies, make recommendations for changes in the law on the basis of information it receives from any source. The NHRC should be given access to monitor trials with an importance for human rights.
- (9) The National Human Rights Commission Act should ensure that the NHRC cooperates freely and unconditionally with domestic and international NGOs.
- (10) The National Human Rights Commission Act should ensure that its staff are well trained and possess a good grasp and understanding of international human rights standards. The Conciliation Committee members, for instance, should receive proper gender sensitivity training. The NHRC should also be given adequate resources to train security and law enforcement officials.