Role of the New Zealand Human Rights Commission in Pacific Islands including Tokelau, the Cook Islands and Niue

The purpose of this paper is to identify what role the New Zealand Human Rights Commission can play in the Pacific Realm countries, particularly Tokelau, Cook Islands and Niue, given the statutory limitations imposed by the Human Rights Act 1993 (HRA).

Pacific Realm Countries

The Realm of New Zealand is identified in the Letters Patent, the basic prerogative instrument of the New Zealand constitution. The Queen is Head of State in right of the Realm of New Zealand which is made up of the State of New Zealand, the self governing Cook Islands and Niue, Tokelau and the Ross Dependency. After the Queen, New Zealand is the second most important element of the Realm as it advises the Sovereign and provides the main link for the other four countries.

Tokelau

Tokelau is non-self governing and subject to constitutional control by New Zealand at executive and legislative level but has an administrative and law-making system that operates independently of New Zealand for most practical purposes.

The HRA does not apply to Tokelau even though the people of Tokelau are entitled to New Zealand citizenship under the Citizenship Act 1977. The long title to the HRA refers to “the better protection of human rights in New Zealand”. The Interpretation Act 1999 (which governs the principles and rules of interpretation of legislation) defines “New Zealand” - when used as a territorial description - as the “islands and territories within the Realm of New Zealand” excluding ... Tokelau, Cook Islands and Niue.

Although section 6 of the Tokelau Act 1948 states that the statute law of New Zealand is not applicable to Tokelau, Tokelau is subject to the major international
human rights treaties by virtue of its status as part of the State of New Zealand. If New Zealand is party to a treaty, the treaty usually applies to Tokelau – unless there is a specific exception as in the case of UNCROC.

However, in order for the treaties to apply domestically they need to be enacted in domestic law. In the case of Tokelau, Human Rights Rules were enacted in 2004 and are now incorporated in the Constitution. The rules enact the principles of the UDHR as domestic law and provide an administrative process to deal with human rights violations. Tokelau therefore has a human rights regime based on the UDHR.

As there is no reference to Tokelau in the HRA, the New Zealand human rights legislation does not apply.

**Niue**

Niue is self-governing. The relationship with NZ is one of free association and is set out in the Niue Constitution Act 1972. The key features of the relationship are in ss.3 and 4 and relate to external affairs, defence and citizenship.

The Constitution of Niue does not provide overarching protection for human rights and fundamental freedoms. Before the Constitution was amended in 1992, Art.31 required the Chief Justice to provide a certificate in respect of any legislative proposal which would impact on the criminal law or the status of persons. In the absence of a Bill of Rights this was the closest Niue got to a human rights requirement. Art.31 was repealed in 1992 with the result that there are only a few discrete human rights provisions (such as the right to vote) in the Constitution and some reference in ordinary statutes such as the Race Relations Act 1972 and laws such as the Trusts Act 1994. When the Constitution was changed in 1992 the Government of Niue considered whether to include human rights provisions but decided not to.

Niue has had full treaty making capacity since 1994. Prior to this Niue was party to treaties under the auspices of New Zealand i.e. if New Zealand was bound, Niue
was too unless there was express provision excluding it. The only international treaty that is reflected in domestic legislation in Niue is the Race Convention.

As with Tokelau, the HRA does not apply to Niue. The HRA only refers to New Zealand and Niue is excluded from the definition of "New Zealand" in the Interpretation Act. Until the enactment of the Constitution in 1974 the same laws applied as in New Zealand. Now Niue legislates for itself although it can adopt New Zealand laws. As the HRA post dates the Constitution and has not been specifically adopted in Niue, it does not apply.

Cook Islands

The Cook Islands is a self-governing State in free association with New Zealand. The relationship between New Zealand and the Cooks is set out in the Cook Islands Constitution Act 1964 and includes the right to New Zealand citizenship. The Cook Islands have the power to make their own laws but New Zealand has residual responsibility for the external affairs and defence of the Cook Islands.

Art.64 of the Constitution outlines the fundamental human rights and freedoms of the Cook Islands. Rules for interpreting legislation in accordance with protected human rights are set out in the Constitution at Art. 65(1). The rights and freedoms, while more extensive than in Niue, still fall short of what is available in New Zealand.

In relation to the international treaties, the situation is much the same as with Niue. The Government has “exclusive executive and legislative competence to implement treaties”. New Zealand’s Treaty actions do not extend to the Cooks unless expressly signed by New Zealand on their behalf.

Again, the HRA does not apply for similar reasons as above.

Despite the apparent protection for some human rights in the Realm countries, the 2010 Parliamentary Select Committee report, Inquiry into New Zealand's
relationships with South Pacific Countries, commented of the existing constitutional arrangements that:

... In many ways they are not working, and they need to be seriously reviewed at a Government-to-Government level, and in the communities of Cook Islanders, Niueans, and Tokelauans in New Zealand and in their home islands... we are deeply concerned that there are island communities of people with New Zealand citizenship who receive services of lower standard—particularly regarding health and education—than those available to people living in New Zealand in similar-sized population centres.

ROLE OF THE COMMISSION IN THE PACIFIC REALM COUNTRIES

While the New Zealand Commission does not have a statutory role in relation to the Realm Countries, it does not follow that it cannot provide assistance in relation to human rights matters. However, any assistance should only be provided if requested by the Government of New Zealand - presumably through MFAT - or the Governments of Tokelau, Cook Islands or Niue, or under the auspices of a UN body or regional body such as the Pacific Island Forum or Asia Pacific Forum. The NZHRC has no mandate to act unilaterally.

The Paris Principles confer on NHRIs the responsibility of encouraging ratification of the international human rights instruments or accession to these instruments and ensuring their implementation as well as co-operating with ... regional institutions and NHRIs in other countries in the promotion and protection of human rights. Clearly this anticipates NHRIs acting outside their specific statutory mandate and would be consistent with the Commission becoming involved in human rights capacity building in the Pacific Realm at the request of an NHRI, the APF or a UN Regional Body.

In addition all three countries are party to at least some of the international treaties and it is recognised that for smaller countries in particular the reporting obligations can be unduly onerous. The Commission has expertise in this area that could be of help if requested. This is particularly the case in relation to the UPR which contemplates collective efforts to realise human rights. The principles of consultation and co-operation between states are central to the UPR process and NHRIs have an important co-ordinating role.
It would seem anomalous if, because of certain constitutional arrangements, the countries of the Pacific Realm were unable to avail themselves of existing human rights expertise from one of the oldest and most respected NHRIs in the region - particularly given that New Zealand officially supports the establishment and strengthening of NHRIs in the Asia-Pacific area\(^1\). However, there is a need for the Commission to clarify its obligations in relation to the development of a regional human rights mechanism (which remains an ongoing issue) and strengthening NHRIs in the Pacific generally.