

# Chapter I

## Mode of Establishment

### 1.1 A National Project

- The process of establishing an NHRI should be seen, in itself, as critical to the success of the project.
- The establishment of an NHRI should be seen as a national project of the highest priority.
- The process should also:
  - be consultative, inclusive and transparent;
  - be led and supported at the highest level of government; and
  - involve and mobilise all relevant elements of the State and civil society.

The process of establishing an NHRI is as important as the actual creation of the institution. The establishment process, whether initiated by government or by civil society, must be transparent and include all relevant actors. It is essential that all stakeholders “buy-in” to the establishment process if the NHRI is to have the trust and confidence of both government and the people.

It is important that a wide variety of participants be included in the establishment process. One successful method of including the various interested groups has been to form a steering committee to guide the establishment process, comprised of, for example, ministers, members of parliament, officials of government departments, members of major political parties, relevant government agencies, human rights non-governmental organisations (NGOs), judges and jurists, trade unions and professional groups, human rights experts and academics. Including a diverse group of representatives in the establishment process will marshal many different sectors of society and promote transparency. A designated government agency can assist the steering committee by arranging consultations and generating essential publicity about the intention to create an NHRI.

It is likely that including civil society will make the establishment process more lengthy, but consultations and input from members of the public are essential for attaining public legitimacy. It will be hard to build trust if government creates an NHRI in a climate of secrecy.

Public consultations can be very useful for creating an NHRI, particularly if they address:

- ◆ the national human rights situation;
- ◆ the legal basis for the institution;
- ◆ the mandate and powers of the institution;
- ◆ measures to ensure independence, pluralism and adequate resources;
- ◆ the structure, staffing and geographical location of the institution; and
- ◆ the method of appointment of commissioners.

## 1.2 Legal Foundation

- The legal provisions which establish the NHRI and which guarantee its independence and funding should be entrenched in the constitution or clearly stipulated in the enabling legislation.
- The preferred method of establishing an NHRI is through incorporation in the constitution of a State.
- The less preferable, but acceptable, alternative is establishment by an act of parliament.
- Establishment other than by the constitution or an act of parliament, e.g. by a presidential decree, is undesirable.

The most certain way of preserving the independence of an NHRI is to incorporate its establishment and vested powers into the national constitution. The constitutions of most countries enshrine fundamental human rights. The constitutional establishment of an NHRI provides for the protection and promotion of those rights by creating a specialist body with a role parallel to and complementary to that played by courts.

Where the constitution of a country does not provide for the creation of a national human rights body and the process of constitutional amendment is rarely reverted to or so difficult as to be impractical, it is appropriate for the parliament to create an NHRI through statute. To guarantee the continued existence of an NHRI established by statute, the statute should have fixed provisions, amendable only by a special majority vote of the parliament, guaranteeing the existence and political, operational and financial independence of the national institution.

In some countries, NHRIs are created by an executive order such as a presidential decree. Executive orders are easily repealed or amended and thus afford no real guarantee for the continued existence or independence of an NHRI. The establishment of an NHRI through executive order is, therefore, not an acceptable alternative.