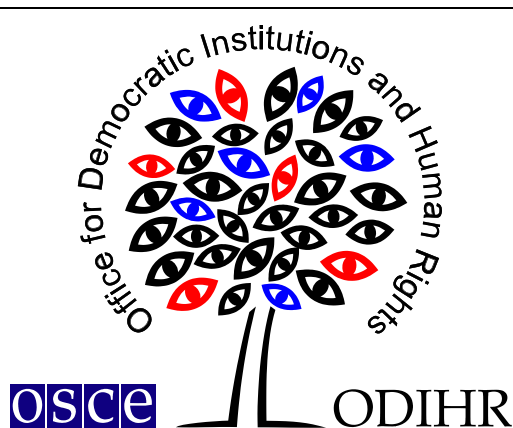


Warsaw, 6 February 2017

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**OPINION**

**ON THE DRAFT ACT ON THE INDEPENDENT**

**NATIONAL HUMAN RIGHTS INSTITUTION OF**

**ICELAND**

**based on an unofficial English translation of the Draft Act commissioned by the OSCE**  
**Office for Democratic Institutions and Human Rights**

*This Opinion has benefited from contributions made by Mr. Marek Antoni Nowicki,  
former international Ombudsperson in Kosovo and by  
the National Institutions and Regional Mechanisms Section of the Office of the United Nations  
High Commissioner for Human Rights (OHCHR)*

OSCE Office for Democratic Institutions and Human Rights  
Ulica Miodowa 10 PL-00-251 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605

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**Annex: Draft Act on the Independent National Human Rights Institution of Iceland**

## **I. INTRODUCTION**

1. *On 21 December 2016, the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) received a request from the Ministry of Interior of Iceland to review the Draft Act on the Independent National Human Rights Institution of Iceland (hereinafter “the Draft Act”).*
2. *On 22 December 2016, the OSCE/ODIHR Director responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Draft Act with international human rights standards and OSCE commitments.*
3. *This Opinion was prepared in response to the above-mentioned request.*

## **II. SCOPE OF REVIEW**

4. The scope of this Opinion covers only the Draft Act submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the protection and promotion of human rights and fundamental freedoms in Iceland.
5. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on areas that require amendments or improvements than on the positive aspects of the Draft Act. The ensuing recommendations are based on international and regional standards and practices governing national human rights institutions (NHRIs), as well as relevant OSCE commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. Moreover, in accordance with the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the Opinion analyses the potentially different impact of the Draft Act on women and men.<sup>1</sup>
6. This Opinion is based on an unofficial English translation of the Draft Act commissioned by the OSCE/ODIHR, which is attached to this document as an Annex. Errors from translation may result.
7. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion does not prevent the OSCE/ODIHR from formulating additional written or oral recommendations or comments on the respective legal acts or related legislation pertaining to the legal and institutional framework on the protection and promotion of human rights in Iceland in the future.

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<sup>1</sup> See par 32 of the OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004), available at <http://www.osce.org/mc/23295?download=true>.

### **III. EXECUTIVE SUMMARY**

8. At the outset, it should be noted that the Draft Act on the Independent National Human Rights Institution of Iceland is extremely welcome, as it seeks to create a legal framework for the establishment of an independent NHRI for Iceland, in compliance with the Paris Principles. This is a significant first step in addressing recommendations made to Iceland previously by various human rights monitoring bodies.<sup>2</sup>
9. At the same time, it may be advisable to include in the proposed Draft Act several important aspects pertaining to the NHRI and its functioning, especially those at the core of the institution's basic guarantees of independence. In particular, the drafters may consider introducing in the Draft Act relevant provisions to protect the members of the Board of Directors and the NHRI's staff from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacities ("functional immunity"). The Draft Act should further be supplemented to ensure the institution's financial independence and autonomy in human resources management. The provisions relating to the NHRI's mandate and modalities of appointment of the Board of Directors could be enhanced or specified more clearly in the Draft Act, in particular to protect this body's independence and to ensure its pluralist and gender-balanced composition at all levels.
10. In order to ensure full compliance of the Draft Act with international standards on NHRIs and good practices, the OSCE/ODIHR makes the following key recommendations:
  - A. to supplement Article 3 of the Draft Act by expanding the NHRI's mandate as follows:
    - expressly state that the NHRI will serve as the National Implementation and Monitoring Mechanism for the UN Convention on the Rights of Persons with Disabilities; [par 21]
    - include an explicit mandate to cover acts and omissions of both the public and private sectors, and encourage the ratification or accession to international instruments; [par 30]
    - specify more clearly aspects relating to the promotion of human rights, including co-operation with civil society and non-governmental

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<sup>2</sup> See in particular Recommendations 115.26 to 115.39 of the *Second Cycle Report of the Working Group on the Universal Periodic Review (UPR) for Iceland*, A/HRC/WG.6/26/L.4, 15 November 2016, unedited version available at [https://www.upr-info.org/sites/default/files/document/iceland/session\\_26\\_-\\_november\\_2016/a\\_hrc\\_wg.6\\_26\\_l.4\\_iceland\\_0.pdf](https://www.upr-info.org/sites/default/files/document/iceland/session_26_-_november_2016/a_hrc_wg.6_26_l.4_iceland_0.pdf); UN Committee on the Elimination of Discrimination against Women, *Concluding Observations on Iceland*, CEDAW/C/ISL/CO/7-8, 10 March 2016, paras 13-14, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/ISL/CO/7-8&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/ISL/CO/7-8&Lang=En); UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations on Iceland*, E/C.12/ISL/CO/4, 11 December 2012, par 7, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/ISL/CO/4&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/ISL/CO/4&Lang=En); UN Human Rights Committee, *Concluding Observations on Iceland*, CCPR/C/ISL/CO/5, 31 August 2012, par 5, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/ISL/CO/5&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/ISL/CO/5&Lang=En); UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on Iceland*, CERD/C/ISL/CO/19-20, 25 March 2010, par 13, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/ISL/CO/19-20&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/ISL/CO/19-20&Lang=En); UN Committee against Torture, *Concluding Observations on Iceland*, CAT/C/ISL/CO/3, 8 July 2008, par 6, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fISL%2fCO%2f3&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fISL%2fCO%2f3&Lang=en). See also the preliminary conclusions of the Council of Europe's Commissioner for Human Rights following a visit to Iceland from 8 to 10 June 2016, available at <http://www.coe.int/en/web/commissioner/-/iceland-ratify-the-disabilities-convention-and-strengthen-the-human-rights-protection-system?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2Fpersons-with-disabilities>.

organizations, and with the UN and other international/regional human rights mechanisms, as well as capacity development, public outreach and advocacy on human rights issues; [par 31]

- B. to specify the relationships between the NHRI and other domestic human rights institutions, the division of competences between all of these bodies, and modalities of their co-operation; [par 22]
- C. to remove from Article 2 of the Draft Act reference to the possibility for the Presidium of the Althingi (Parliament) to request reports from the NHRI; [pars 26-27]
- D. to add under Article 7 that sanctions should be imposed for the failure to provide the NHRI with the requested information and that the NHRI shall be granted unannounced and free access to inspect and examine any public premises, documents, equipment and assets without prior written notice; [pars 38 and 40]
- E. to supplement Article 4 as follows:
  - specify the selection criteria and incompatibilities for becoming a member of the Board of Directors; [pars 43-44]
  - state that out of the five members, no more than three Directors (and alternates) should be of the same sex, while considering additional modalities to ensure pluralism in the composition of the Board; [pars 45-47]
  - provide that vacancies for members of the Board of Directors shall be publicized broadly; [par 47]
  - specify whether the term of office of the members of the Board shall be renewable or not, and the parliamentary majority required for such appointments, while stating that at least the majority of Board members shall be remunerated full-time; [pars 48-49]
- F. to outline the criteria and procedures for terminating the mandates of the members of the Board of Directors and of its Chairperson, including in cases of dismissals, as well as the consequences arising from such termination; [pars 53-56]
- G. to clearly specify in the Draft Act that the members of the Board of Directors and NHRI staff shall benefit from functional immunity, even after the end of their mandate or employment with the NHRI, while also specifying clear rules and procedures for lifting such immunities; [pars 62-67]
- H. to add provisions clearly stating that the qualification requirements, selection criteria and modalities, as well as employment conditions for NHRI staff, should ensure gender balance and diversity at all staff levels; [pars 70-71] and
- I. to include provisions regarding the NHRI's financial autonomy, implying that the allocated budgetary funds – contained in a separate budget line – should be such as to ensure the full, independent and effective discharge of the responsibilities and functions of the institution, while considering the introduction of safeguards to protect against unwarranted budgetary cutbacks. [pars 73-78]

***Additional Recommendations, highlighted in bold, are also included in the text of the opinion.***

## **IV. ANALYSIS AND RECOMMENDATIONS**

### **1. International Standards on National Human Rights Institutions**

11. NHRIs are independent bodies with a constitutional and/or legislative mandate to protect and promote human rights. They are considered to constitute a “key component of effective national human rights protection systems and indispensable actors for the sustainable promotion and protection of human rights at the country level”.<sup>3</sup> Thus, NHRIs link the responsibilities of the State stemming from international human rights obligations to the rights of individuals in the country. Although part of the state apparatus, NHRIs’ independence from the executive, legislative and judicial branches ensures that they are able to fulfil their mandate.
12. The main instrument relevant to NHRIs at the international level are the United Nations Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (hereinafter “the Paris Principles”).<sup>4</sup> While they do not prescribe any particular model for NHRIs, these principles outline minimum standards in this respect, including a broad human rights mandate, autonomy from government, guarantees of functional and institutional independence, pluralism, adequate resources and adequate powers of investigation, where applicable. The ensuing recommendations are also based on the General Observations of the Global Alliance of National Human Rights Institutions (hereinafter “GANHRI”),<sup>5</sup> formerly the International Coordinating Committee for National Human Rights Institutions (ICC), developed by its Sub-Committee on Accreditation of NHRIs, which serve as interpretive tools of the Paris Principles.<sup>6</sup>
13. The need for effective, independent, and pluralistic NHRIs has also been reiterated by numerous resolutions adopted by the UN General Assembly and the UN Human Rights Council.<sup>7</sup>

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<sup>3</sup> See UN High Commissioner for Human Rights, *Report to the UN General Assembly* (2007), A/62/36, par 15, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

<sup>4</sup> The UN Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (hereinafter “the Paris Principles”) were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris (7-9 October 1991), and adopted by UN General Assembly Resolution 48/134 of 20 December 1993, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

<sup>5</sup> The Global Alliance of National Human Rights Institution (GANHRI), formerly known as the International Coordinating Committee for National Human Rights Institutions (ICC), was established in 1993 and is the international association of national human rights institutions (NHRIs) from all parts of the globe. The GANHRI promotes and strengthens NHRIs in accordance with the Paris Principles, and provides leadership in the promotion and protection of human rights. Through its Sub-Committee on Accreditation (SCA), it also reviews and accredits national human rights institutions in compliance with Paris Principles. The GANHRI may also assist those NHRIs under threat and encourage the reform of NHRI statutory legislation and the provision of technical assistance, such as education and training opportunities, to strengthen the status and capacities of NHRIs. See <http://nhri.ohchr.org/EN/Pages/default.aspx>.

<sup>6</sup> The latest revised General Observations of the Sub-Committee on Accreditation, as adopted by the ICC Bureau (hereinafter “General Observations”) at its meeting in Geneva on 6-7 May 2013, are available at <http://nhri.ohchr.org/EN/AboutUs/JCCAccreditation/Documents/SCA%20GENERAL%20OBSERVATIONS%20ENGLISH.pdf>.

<sup>7</sup> See e.g., UN General Assembly, *Resolution no. 70/163 on National Institutions for the Promotion and Protection of Human Rights*, A/RES/70/163, adopted on 17 December 2015, available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/70/163](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/163); *Resolutions nos. 63/169 and 65/207 on the Role of the Ombudsman, Mediator and Other National Human Rights Institutions in the Promotion and Protection of Human Rights*, A/RES/63/169 and A/RES/65/207, adopted on 18 December 2008 and on 21 December 2010 respectively; *Resolutions nos. 63/172 and 64/161 on National Institutions for the Promotion and Protection of Human Rights*, A/RES/63/172 and A/RES/64/161, adopted on 18 December 2008 and 18 December 2009 respectively; and *Resolution no. 48/134 on National Institutions for the Promotion and Protection of Human Rights*, A/RES/48/134, adopted on 4 March 1994 – all available at <http://www.un.org/en/sections/documents/general-assembly-resolutions/index.html>. See also the *Resolution no. 27/18 on National Institutions for the Promotion and Protection of Human Rights of the UN Human Rights Council*, A/HRC/RES/27/18, adopted on 7 October 2014, available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/27/L.25](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/27/L.25).

14. At the Council of Europe (hereinafter “CoE”) level, the key role of NHRIs and main principles regulating their establishment and functioning, including compliance with the Paris Principles, are highlighted in various documents.<sup>8</sup> In particular, CoE Parliamentary Assembly Recommendation 1615 (2003) underlines a number of characteristics considered essential for any Ombudsman<sup>9</sup> institution.<sup>10</sup>
15. Finally, in the 1990 Copenhagen Document, OSCE participating States have committed to “facilitate the establishment and strengthening of independent national institutions in the area of human rights and the rule of law”.<sup>11</sup> The OSCE/ODIHR has also been specifically tasked to “continue and increase efforts to promote and assist in building democratic institutions at the request of States, *inter alia* by helping to strengthen [...] Ombudsman institutions”,<sup>12</sup> which should be impartial and independent.<sup>13</sup>
16. Other useful reference documents of a non-binding nature are also relevant in this context, as they contain a higher level of practical details including, among others:
  - the UNDP-OHCHR’s *Toolkit for Collaboration with National Human Rights Institutions* (2010);<sup>14</sup>
  - the *Compilation of Venice Commission Opinions concerning the Ombudsman Institution* (2016);<sup>15</sup> and
  - the OSCE/ODIHR’s *Handbook for National Human Rights Institutions on Women’s Rights and Gender Equality* (2012) which provides useful guidance regarding measures and initiatives to strengthen NHRIs’ capacity and practical work on women’s rights and gender equality.<sup>16</sup>

## 2. General Comments

17. At the outset, it is noted that the Draft Act under review is quite brief and contains only ten articles. Perhaps for this reason, it does not contain several important aspects pertaining to the institution and its functioning, especially those at the core of the institution’s basic guarantees of independence. General Observation 1.1 of GANHRI’s Sub-Committee on Accreditation specifically states that relevant NHRI legislation should specify in detail the Institution’s role, functions, powers, funding and lines of

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<sup>8</sup> See e.g., CoE Committee of Minister, *Recommendation Rec(97)14E on the Establishment of Independent National Institutions for the Promotion and Protection of Human Rights*, 30 September 1997, available at <https://wcd.coe.int/ViewDoc.jsp?id=589191>; Parliamentary Assembly of the Council of Europe (PACE), *Recommendation 1615 (2003) on the Institution of Ombudsman*, 8 September 2003, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17133&lang=en>; PACE, *Recommendation 1959 (2013) on the Strengthening the Institution of Ombudsman in Europe*, adopted on 4 October 2013, available at <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20232&lang=en>.

<sup>9</sup> For the purposes of this Opinion, and while acknowledging that the Scandinavian term “Ombudsman” is considered to be gender-neutral in origin, the term “ombudsperson” is generally preferred, in line with increasing international practice, to ensure the use of gender-sensitive language (see e.g., [https://www.unescwa.org/sites/www.unescwa.org/files/page\\_attachments/1400199\\_0.pdf](https://www.unescwa.org/sites/www.unescwa.org/files/page_attachments/1400199_0.pdf)).

<sup>10</sup> See *op. cit.* footnote 8 (PACE Recommendation 1615 (2003)).

<sup>11</sup> See par 27 of the OSCE Copenhagen Document (1990), available at <http://www.osce.org/odihr/elections/14304?download=true>.

<sup>12</sup> See par 10 of the Bucharest Plan of Action for Combating Terrorism (2001), Annex to OSCE Ministerial Council Decision on Combating Terrorism, MC(9).DEC/1, 4 December 2001, available at <http://www.osce.org/atu/42524?download=true>.

<sup>13</sup> See e.g., *op. cit.* footnote 2, par 42 (second indent) (2004 OSCE Action Plan for the Promotion of Gender Equality). See also the Joint Statement from the Expert Meeting on Strengthening Independence of National Human Rights Institutions in the OSCE Region held on 28 and 29 November 2016 in Warsaw, available at <http://www.osce.org/odihr/289941>.

<sup>14</sup> UNDP-OHCHR, *Toolkit for Collaboration with National Human Rights Institutions* (December 2010), available at <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>.

<sup>15</sup> Available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2016\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)001-e).

<sup>16</sup> OSCE/ODIHR, *Handbook for National Human Rights Institutions on Women’s Rights and Gender Equality*, 4 December 2012, pages 9 and 78, available at <http://www.osce.org/odihr/97756>.

accountability, as well as the appointment mechanism for, and terms of office of, its members. While not every aspect needs to be provided in the Draft Act, it should at least specify the overarching principles and may then refer further elaboration of these aspects to another law, or secondary legislation. Currently, the Draft Act does not make any reference to any subsequent regulations (though it is possible that this may be reviewed once the Draft Act is in place, see par 24 *infra*).

### **2.1. Institutional Framework on the Protection and Promotion of Human Rights in Iceland**

18. The Draft Act provides for the establishment of an NHRI for Iceland, whose main role is to “promote and protect human rights in Iceland” (Article 1). It is understood that such a new institution would take over the tasks currently exercised by the Icelandic Human Rights Centre, which so far appears to have assumed the functions of a *de facto* NHRI.<sup>17</sup>
19. In this context, it is noted that there are a number of other entities in Iceland that have also been entrusted with some functions in the area of human rights, such as the Althing Ombudsman (or Parliamentary Ombudsman) primarily in charge of maladministration cases, the Centre for Gender Equality, the Gender Equality Council, the Gender Equality Complaints Committee, and the Ombudsman for Children.<sup>18</sup> At the same time, Iceland has not yet ratified the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), which requires the designation or establishment of national preventive mechanisms (NPM), despite numerous recommendations at the international level to do so.<sup>19</sup> Currently, the Althing Ombudsman is in charge of monitoring and inspecting places of detention, prisons and psychiatric facilities.<sup>20</sup> The drafters and relevant stakeholders may, however, consider transferring these tasks to the mandate of the NHRI, as the future main human rights protection mechanism. In that respect, General Observation 1.2 specifically states that an NHRI’s mandate should allow for unannounced and free access to inspect and examine any public premises, documents, equipment and assets without prior written

<sup>17</sup> See e.g., *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, Juan Pablo Bohoslavsky, A/HRC/28/59/Add.1, 6 March 2015, par 19, available at <http://www.iceland.is/iceland-abroad/efta/files/hrc28-independand-expert.pdf>; and the *Report of the Working Group on the issue of discrimination against women in law and in practice on its Mission to Iceland*, A/HRC/26/39/Add.1, 16 September 2014, par 60, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/162/77/PDF/G1416277.pdf?OpenElement>.

<sup>18</sup> See the UN Committee on the Rights of the Child, *Concluding Observations on Iceland*, CRC/C/ISL/CO/3-4, 23 January 2012, par 16, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/ISL/CO/3-4&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/ISL/CO/3-4&Lang=En). The Ombudsman for Children is not mandated to receive individual complaints.

<sup>19</sup> See in particular Recommendations 115.26 to 115.39 of the Second Cycle Report of the Working Group on the Universal Periodic Review (UPR) for Iceland, A/HRC/WG.6/26/L.4, 15 November 2016, unedited version available at [https://www.upr-info.org/sites/default/files/document/iceland/session\\_26\\_-\\_november\\_2016/a\\_hrc\\_wg.6\\_26\\_l.4\\_iceland\\_0.pdf](https://www.upr-info.org/sites/default/files/document/iceland/session_26_-_november_2016/a_hrc_wg.6_26_l.4_iceland_0.pdf); UN Committee on the Elimination of Discrimination against Women, *Concluding Observations on Iceland*, CEDAW/C/ISL/CO/7-8, 10 March 2016, pars 13-14, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/ISL/CO/7-8&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/ISL/CO/7-8&Lang=En); UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations on Iceland*, E/C.12/ISL/CO/4, 11 December 2012, par 7, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/ISL/CO/4&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/ISL/CO/4&Lang=En); UN Human Rights Committee, *Concluding Observations on Iceland*, CCPR/C/ISL/CO/5, 31 August 2012, par 5, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/ISL/CO/5&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/ISL/CO/5&Lang=En); UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on Iceland*, CERD/C/ISL/CO/19-20, 25 March 2010, par 13, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/ISL/CO/19-20&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/ISL/CO/19-20&Lang=En). See also the preliminary conclusions of the Council of Europe’s Commissioner for Human Rights following a visit to Iceland from 8 to 10 June 2016, available at <http://www.coe.int/en/web/commissioner/-/iceland-ratify-the-disabilities-convention-and-strengthen-the-human-rights-protection-system?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2Fpersons-with-disabilities>.

<sup>20</sup> See the UN Committee against Torture, *Concluding Observations on Iceland*, CAT/C/ISL/CO/3, 8 July 2008, par 6, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fISL%2fCO%2f3&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fISL%2fCO%2f3&Lang=en).



- notice, including those belonging to military, police and security services (see also par 39 *infra*).
20. If relevant stakeholders decide to make the NHRI the future NPM, then the underlying legislation should specify this. Moreover, relevant provisions should allow the NHRI free access at any time to all places where individuals are or may be deprived of their liberty, without the need for consent from any agency and without prior notification (General Observation 2.9). This is an important safeguard that allows an NHRI to effectively protect the rights of detainees or prisoners (see also par 77 *infra* on the allocation of additional resources and capacities). Additionally, Guidelines on National Preventive Mechanisms (2010)<sup>21</sup> of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provide useful guidance on how to comply with international standards pertaining to NPMs.
  21. Further, it is understood from the Explanatory Report to the Draft Act that the new NHRI of Iceland will serve as the National Implementation and Monitoring Mechanism (NIMM) for the UN Convention on the Rights of Persons with Disabilities (UN CRPD), which has just been ratified by Iceland, as per Article 33 of the UN CRPD.<sup>22</sup> At the same time, the Draft Act does not specifically provide for **a formal legal mandate** as NIMM, as recommended by General Observation 2.9. **The Draft Act should be supplemented accordingly, while specifying that such a mandate encompasses the promotion and protection of the rights of persons with disabilities and the monitoring of the implementation of the CRPD** (Article 33 par 2 of the CRPD). Moreover, additional resources and capacities should be allocated to the NHRI, to ensure that its staff possesses the appropriate skills and expertise to fulfil this part of its mandate (see par 77 *infra*).
  22. As it stands, the Draft Act does not specify the relationship between the NHRI and the other existing human rights bodies in Iceland. In this context, General Observation 1.5 specifies that “NHRIs should develop, formalize and maintain working relationships, as appropriate, with other domestic institutions established for the promotion and protection of human rights, including [...] thematic institutions, as well as civil society and non-governmental organizations”. This means that NHRIs should co-operate with and support the functions of other institutions that work on human rights issues, directly or indirectly.<sup>23</sup> **The Draft Act should thus specify the relationships between the NHRIs and the other domestic institutions in charge of the promotion and protection of human rights, the division of competences between them and modalities of their co-operation.**
  23. It should be highlighted that generally, the Sub-Committee on Accreditation of NHRIs encourages a strong national human rights protection system in a State by having one consolidated and comprehensive NHRI.<sup>24</sup> At the same time, the Paris Principles do not prescribe any specific type of NHRI, but rather the basic necessary elements to ensure functioning NHRIs and guarantee their independence. There are thus a variety of different NHRI models all over the world.
  24. The Icelandic authorities may plan to first set up the new institution and then revisit the issue by carrying out a more in-depth review of the overall institutional framework for

<sup>21</sup> Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en).

<sup>22</sup> The UN Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006 during the sixty-first session of the UN General Assembly by resolution A/RES/61/106, was ratified by Iceland on 23 September 2016.

<sup>23</sup> See *op. cit.* footnote 14, page 144 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

<sup>24</sup> General Observation 6.6.

the protection and promotion of human rights in Iceland at a later stage. However, any new legislation in this area should seek to ensure the coherence and effectiveness of this institutional framework – in particular vis-à-vis the public (see also comments on complaints-handling in Sub-Section 3.2 *infra*). Before creating the NHRI, it would be advisable for the legal drafters to carry out a comprehensive review of the existing framework pertaining to the protection and promotion of human rights in Iceland, including with respect to anti-discrimination and gender equality, children’s rights, maladministration, and human rights protection in general; should there be any plans to ratify the OPCAT, then the designation of an NPM should also be part of this discussion. Moreover, before adopting any new legislation, it is crucial that policy-makers and other stakeholders carry out a full impact assessment of the draft legislation, which should involve a consideration of all financial and human costs for the new entity to fulfil its mandate (see also Sub-Section 6.2 *infra*).

## **2.2. The Independence of the NHRI from Other State Institutions/Bodies**

25. Article 2 of the Draft Act emphasises that the NHRI shall operate independently from the instructions of other parties, including the Althingi (the Parliament). **The Draft Act could be supplemented by adding that the NHRI will base its strategic priorities and activities solely on its determination of the human rights priorities in the country, in co-operation with diverse societal groups as appropriate** (see General Observation 1.7).
26. At the same time, Article 2 further provides that “the Presidium of the Althing [may] require reports on any specific matters falling under the remit of the Institution”. This provision could raise concerns if this right of the Presidium would prevent the NHRI from carrying out its mandate according to its own choices and set priorities without interference.
27. Paris Principle C (a) states that an NHRI must be able to “freely consider any question falling within its competence [...] on the proposal of its members or of any petitioner”. By clearly promoting independence in the NHRI’s method of operation, this provision seeks to avoid any possible interference in the institution’s assessment of the human rights situation in a given state and the subsequent determination of its strategic priorities.<sup>25</sup> This means that members of parliament, and *a fortiori* the Parliament’s Presidium, should not be in a position to influence the work and operation of the NHRI.<sup>26</sup> This is important to ensure that this body is fully independent in its decision-making and its operation, and to avoid potential conflicts of interest. At the same time, such independence is without prejudice to the importance of effective co-operation between NHRIs and Parliament.<sup>27</sup> **The legal drafters should reconsider the provision regarding potential requests by the Presidium of the Althingi.**

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<sup>25</sup> See Justification to General Observation 1.9.

<sup>26</sup> See General Observation 1.9.

<sup>27</sup> See the *2012 Belgrade Principles on the Relationship between National Human Rights Institutions (NHRIs) and Parliaments*, developed during a Seminar co-organized by the Office of the United Nations High Commissioner for Human Rights, the International Coordinating Committee of National Institutions for the promotion and protection of human rights, the National Assembly and the Protector of Citizens of the Republic of Serbia, with the support of the United Nations Country Team in the Republic of Serbia, available at <http://nhri.ohchr.org/EN/Themes/Portuguese/DocumentsPage/Belgrade%20Principles%20Final.pdf>.

### 3. The Mandate of the NHRI of Iceland

#### 3.1. The Scope of the Mandate

28. As mentioned above, Article 1 of the Draft Act refers to the mandate to “promote and protect human rights” – this is overall in line with the Paris Principles, which require NHRIs to be vested with competences to both protect and promote human rights (Paris Principles Section A.1). While a simple statement to this effect is appropriate in the early sections of enabling legislation, it may be preferable to include in the Draft Act a broader statement specifying that the NHRI is entitled to look into, investigate or comment on any human rights situation, without any form of prior approval or impediment, to ensure independence and autonomy.<sup>28</sup>
29. Article 3 then lists a number of tasks that the institution will carry out to fulfil its mandate, including the provision of advice to government authorities, the review of and comments on legislation, draft legislation and administrative practices, monitoring the status of human rights in Iceland, raising awareness about potential violations, partnering with various human rights organizations, either domestic or at the international level, as well as promoting human rights research and education.
30. It is reiterated that according to sections A.1 and A.2 of the Paris Principles, an NHRI should possess “as broad a mandate as possible”. This should include, among others, an explicit mandate **to encourage the ratification or accession to international instruments**. Indeed, on several occasions, the Sub-Committee on Accreditation, when assessing relevant NHRI legislation, has recommended that the law shall expressly include provisions to that effect.<sup>29</sup> Moreover, General Observation 1.2 requires that an NHRI mandate shall extend to **acts and omissions of both the public and private sectors**. It is thus recommended **to supplement Article 3 of the Draft Act accordingly**.
31. Article 3 (d) of the Draft Act provides that the NHRI will “[p]artner with domestic, overseas and international human rights organisations and provid[e] these with information as requested”. This seems to fall short of what is stated in section A.3 (d) and (e) of the Paris Principles, which specifies that NHRIs should contribute and possibly also, pursuant to their independent mandate, comment on the reports which States are required to submit to UN bodies and committees, and regional institutions. They should also “co-operate with the UN and any other organization in the UN system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights” (see also General Observation 1.4). More generally, an NHRI should likewise ensure close co-operation with civil society and non-governmental organizations (NGOs), and conduct training on human rights issues,<sup>30</sup> public outreach and advocacy on human rights and fundamental freedoms (see General Observation 1.2), which go beyond the discussions

<sup>28</sup> See *op. cit.* footnote 14, page 144 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

<sup>29</sup> See e.g., Sub-Committee on Accreditation, *Report and Recommendations of the Session* (May 2016), pages 19 and 26 (on the accreditation of NHRIs of Montenegro and Canada), available at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20MAY%202016-English.pdf>; and Sub-Committee on Accreditation, *Report and Recommendations of the Session* (November 2015), pages 10 and 21 (on the accreditation of NHRIs of Ireland and of the Great Britain), available at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf>.

<sup>30</sup> Including e.g., capacity-building with regard to other thematic institutions in promoting a human rights-based approach to their work.

in the media currently mentioned in Article 3 (e) of the Draft Act. **Unless Article 3 is given a broad interpretation, these aspects do not seem to be adequately covered and the drafters should consider supplementing the Draft Act accordingly.**

32. Some human rights monitoring bodies have recommended that the future Icelandic NHRI should have “a specific mandate to promote and protect women’s rights”.<sup>31</sup> The legal drafters should discuss whether to expressly include this, also in light of the mandates of other entities pertaining to gender equality and anti-discrimination (see also pars 19 *supra* and 35 *infra*).<sup>32</sup> In any case, the future NHRI should mainstream gender and diversity<sup>33</sup> into its broader work of protecting and promoting human rights.<sup>34</sup> **This could be expressly included in the Draft Act as a general aim of the NHRI.**
33. It would also be useful if **the NHRI would also be mandated to apply to the Icelandic constitutional court for an abstract judgment on questions concerning the constitutionality of laws or other regulatory acts which raise issues affecting human rights and freedoms.**<sup>35</sup> **The right of the NHRI to appear as a third party in domestic and international judicial proceedings could also be included,** especially in cases raising important issues concerning human rights matters of a systemic or structural character.<sup>36</sup> Some other functions could also include assistance to victims taking cases to courts or strategic litigation. **These aspects could be added to Article 3 of the Draft Act.** This may also require amendments to other relevant legislation, that would allow the NHRI to have proper access to files and other documents related to the case prior to submitting *amicus curiae* briefs. Courts should be obliged to deal with and respond to the NHRI’s arguments in the written reasoning of their decisions.

### **3.2. The Lack of a Complaints-Handling Mandate**

34. Article 3 par 2 of the Draft Act explicitly excludes from the mandate of the NHRI the handling of individual complaints alleging human rights violations. This is not contrary to international standards, since the Paris Principles do not require that NHRIs shall be able to receive complaints or petitions from individuals or groups regarding alleged violations of their human rights.<sup>37</sup>
35. It is understood from the Explanatory Report to the Draft Act that this provision aims to avoid overlap with the mandates of various other entities. Indeed, it is noted that several other bodies are competent to receive individual complaints, including the Althing

<sup>31</sup> See the *Report of the Working Group on the issue of discrimination against women in law and in practice on its Mission to Iceland*, A/HRC/26/39/Add.1, 16 September 2014, par 100 (a) (ii), available at [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-39-Add1\\_en.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-39-Add1_en.doc).

<sup>32</sup> For instance, the “Icelandic Centre for Gender Equality requires all official institutions and private companies with 25 employees or more to have a Gender Equality Action Plan. The Centre monitors the performance of employers over time to assess their progress. In cases on non-compliance, it can impose fines on companies that do not send their action plan within a prescribed period of time”; see *op. cit.* footnote 16, page 31 (2012 OSCE/ODIHR Handbook for NHRIs on Women’s Rights and Gender Equality). The Draft Act should clarify how the future NHRI will complement this work of the Centre for Gender Equality.

<sup>33</sup> i.e., assessing the implication of any planned action, including legislation, policies and programmes, for women and men, and other persons or groups in a specific situation or facing specific challenges, such as persons with disabilities, older persons, children, members of national or ethnic minorities, stateless persons, foreigners, asylum-seekers, refugees and other persons potentially discriminated on other grounds such as sexual orientation or gender identity.

<sup>34</sup> For instance, NHRIs can implement gender mainstreaming by developing gender/diversity-assessment strategies or impact analyses for draft legislation and existing laws, policies, programmes and activities; see *op. cit.* footnote 16, pages 50-51 (2012 OSCE/ODIHR Handbook for NHRIs on Women’s Rights and Gender Equality).

<sup>35</sup> See Venice Commission, *Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina*, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), CDL-AD(2015)034, par 36, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)034-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)034-e).

<sup>36</sup> See *op. cit.* footnote 14, pages 4 and 185 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

<sup>37</sup> See the Justification to General Observation 2.10.

Ombudsman (or Parliamentary Ombudsman) who is tasked to counter and remedy instances of maladministration by the executive or private persons vested with public authority;<sup>38</sup> and the Gender Equality Complaints Committee, which handles complaints pertaining to alleged discrimination based on gender.<sup>39</sup>

36. Overall, and as noted by certain international human rights monitoring bodies, there seems to be a relatively complicated system of complaints-handling mechanisms established under various government agencies in Iceland.<sup>40</sup> Any such mechanism, whether falling within the competency of an NHRI or another thematic human rights institution, should ensure that complaints are handled fairly, quickly and effectively through processes which are clear and readily accessible to the public.<sup>41</sup> While this may go beyond the scope of this opinion, it is nevertheless recommended that the legal drafters and stakeholders re-discuss the existing complaints-handling systems in Iceland, to ensure that they are coherent, not overly complex and easily accessible. In particular, **the legislator should assess whether existing mechanisms are adequate to deal effectively with individual complaints of human rights violations and ensure effective protection. If not, the legislator may consider including the possibility for the NHRI to review individual complaints of human rights violations in the Draft Act.** In this respect, it is worth mentioning General Observation 2.10, which provides useful guidance as to the powers and functions of an NHRI that has a mandate to receive, consider and/or resolve complaints alleging violations of human rights. In any case, there should be adequate co-ordination between all complaints-handling systems in Iceland and information and statistics on all human rights-related complaints should be transmitted to the NHRI as the main human rights protection mechanism in Iceland, to allow it to gain a comprehensive overview of the human rights situation in the country.
37. Article 3 par 2 also specifies that the NHRI “may provide individuals seeking its assistance with guidance on how to enforce human rights, including on avenues of complaint to Icelandic government authorities and international organisations”. This provision fails to provide for **a clear and adequate referral mechanism whereby the NHRI should refer these complaints to other thematic human rights institutions or competent governmental or judicial bodies. It may be advisable to supplement Article 3 par 2 in that respect.**

### **3.3. The NHRI's Powers to Seek Information**

38. Article 7 of the Draft Act provides that government bodies shall provide the NHRI with any information deemed necessary to perform its role. The personal scope of this provision appears unduly limited as it only concerns “government bodies”. It is of utmost importance **that all legal entities in Iceland are legally obliged to provide the NHRI with such assistance.**<sup>42</sup> Moreover, General Observation 1.2 requires that the

<sup>38</sup> See Articles 2 and 3 of the Act No. 85/1997 on the Althing Ombudsman (1997), available at [http://www.legislationline.org/download/action/download/id/3908/file/Iceland\\_%20Althing\\_Ombudsman\\_Act\\_1997\\_en.pdf](http://www.legislationline.org/download/action/download/id/3908/file/Iceland_%20Althing_Ombudsman_Act_1997_en.pdf).

<sup>39</sup> See the Report of the Working Group on the issue of discrimination against women in law and in practice on its Mission to Iceland, A/HRC/26/39/Add.1, 16 September 2014, pars 56-57, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/162/77/PDF/G1416277.pdf?OpenElement>.

<sup>40</sup> See the UN Committee on the Rights of the Child, *Concluding Observations on Iceland*, CRC/C/ISL/CO/3-4, 23 January 2012, par 16, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/ISL/CO/3-4&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/ISL/CO/3-4&Lang=En).

<sup>41</sup> See General Observation 2.10 regarding specifically the handling of complaints by NHRIs, which should *a fortiori* be applicable to other complaints-handling mechanisms.

<sup>42</sup> See e.g., Section 6 of the Parliamentary Ombudsman Act of Finland (197/2002), available at <http://www.legislationline.org/topics/country/32/topic/82>, which states that “[t]he Ombudsman has the right to executive assistance free

NHRI should be **granted unannounced and free access to inspect and examine any public premises, documents, equipment and assets without prior written notice. These aspects should be directly and properly reflected in the text of the Draft Act.**

39. At the same time, Article 7 further states that “the Institution cannot require information relating to the State’s internal or external security or foreign affairs that should be kept secret, except with the permission of the cabinet minister in question”. Generally, the Sub-Committee on Accreditation considers that an NHRI’s mandate should allow it to conduct a full investigation of all alleged human rights violations, including those involving the military, police and security officers. While limitations relating to national security concerns are not inherently contrary to the Paris Principles, they should not be unreasonably or arbitrarily applied and it should be possible to challenge a refusal to communicate so-called “secret” information.<sup>43</sup> Hence, in case the cabinet minister refuses access to such information, **there should be a possibility for the NHRI to appeal such a decision before a competent independent body.**
40. Moreover, the Draft Act does not foresee specific sanctions for hindering the NHRI in its work. In this context, it may be beneficial to discuss further ways of strengthening the NHRI’s mandate to compel authorities to provide requested information.<sup>44</sup> To ensure this, the power to request information, which is central to the proper execution of the NHRI’s mandate, **should be supported by specific sanctions, which should be specified in the Draft Act.**<sup>45</sup> Such sanctions should be adequate, meaning that they should not be excessive and at the same time serious enough to dissuade public officials (and possibly representatives of other entities) from ignoring the NHRI’s requests. Alternatively, at a minimum, other applicable legislation should be cross-referenced in the Draft Act.

#### **4. The Board of Directors of the NHRI**

##### ***4.1. Appointment of the Board of Directors***

41. Article 4 of the Draft Act provides that the “Althingi elects five members of the Board of Directors of the Institution and an equal number of alternates for a term of five years” and that the Board members “shall have expertise in different fields, including human rights law”.
42. General Observation 1.8 requires that the NHRI legislation or other binding instruments provide for the formalisation of a clear, transparent and participatory selection and appointment process of the NHRI’s decision-making body, which promotes merit-based selection and pluralism. This aims to ensure the independence of, and public confidence in the senior leadership of the institution. Moreover, the process for the selection and appointment of an NHRI’s decision-making body should be made on the basis of pre-determined, objective and publicly-available criteria which should be clearly stated in relevant legislation or other binding legal instruments.

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of charge from the authorities as he or she deems necessary, as well as the right to obtain the required copies or printouts of the documents and files of the authorities and other subjects”.

<sup>43</sup> See e.g., *op. cit.* footnote 28, page 49 (SCA Report and Recommendations of May 2016).

<sup>44</sup> See *op. cit.* footnote 14, page 149 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

<sup>45</sup> See e.g., par Venice Commission, *Opinion on the draft Constitutional Law on the Human Rights Defender of Armenia*, adopted by the Venice Commission at its 109th Session (Venice, 9-10 December 2016), CDL-AD(2016)033, par 29, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)033-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)033-e).

43. In this regard, it is noted that, apart from the general requirement of expertise in human rights law, there is no further indication in the Draft Act as the selection criteria or possible incompatibilities.<sup>46</sup> First, **the Draft Act should include clear and pre-determined criteria for appointment** (e.g., no conviction for a serious criminal offence, recognized competencies, personal history of integrity and independence, etc.).<sup>47</sup> That being said, the eligibility criteria should not be too restrictive in order not to unduly exclude persons from diverse societal groups.<sup>48</sup>
44. Moreover, an NHRI's independence is jeopardized if members of parliament, especially those who are members of the ruling political party or coalition, and representatives of government agencies, are represented in an NHRI, or if they participate in decision-making, since such persons hold positions that may conflict with the independence of the institution (see the Justification to General Observation 1.9). If these persons are appointed as members of the Board of Directors, they would then need to give up their previous posts. More generally, **NHRI functions are not compatible with the performance of another function or profession, public or private, or with membership in political parties or unions – although certain educational, scientific or artistic activities may be undertaken, provided that they are not incompatible with the proper performance of the NHRI duties, its impartiality and public confidence therein.**<sup>49</sup> It is recommended to supplement the Draft Act accordingly (see also comments regarding the issue of part-time or full-time engagement of members of the Board of Directors in par 51 *infra*).
45. Additionally, nothing is said in the Draft Act with respect to certain conditions and modalities to ensure pluralism in the composition of the Board of Directors in terms of gender, ethnicity or minority status<sup>50</sup> (see also additional comments regarding the composition of the Advisory Committee provided in Article 6 of the Draft Act, in par 79 *infra*). The Sub-Committee on Accreditation has also welcomed legal provisions requiring a balanced representation of both women and men in the composition of NHRI decision-making bodies.<sup>51</sup> **The legal drafters could therefore specify that out of the five members, no more than three Directors should be of the same sex. The same requirements should apply to alternates and in case of replacement, a person of the same sex should succeed to the position.**
46. The Paris Principles further specify that an NHRI's composition and the appointment of its members shall likewise afford all necessary guarantees to ensure “the pluralistic representation of social forces (of the civilian society) involved in the promotion and protection of human rights”. Hence, in addition to gender balance, the members of the

<sup>46</sup> For examples of such provisions in NHRI legislation, see e.g., Section 3 of the Law on the Public Defender of Rights (1999, as amended 2009) of the Czech Republic and Articles 3 and 4 of the Ombudsman Act (1995) of Malta, available at <http://www.legislationline.org/topics/topic/82>.

<sup>47</sup> See *op. cit.* footnote 14, pages 123 and 152 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions). See also *op. cit.* footnote 15, Section 2.1 on General Criteria for Office (2016 Venice Commission's Compilation of Opinions concerning the Ombudsman Institution).

<sup>48</sup> General Observations 1.7 and 1.8.

<sup>49</sup> Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe, *Joint Opinion on the Draft Law on the Ombudsman of Serbia*, adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), CDL-AD(2004)041, par 13, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2004\)041-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)041-e).

<sup>50</sup> See Paris Principle B (1) and General Observation 1.7.

<sup>51</sup> See e.g., Article 5 par 2 of the Irish Human Rights Commission Act, requiring that out of a total number of nine members, no less than four members of the Commission shall be men, and that no less than four shall be women; and Section 5 of the Act relating to the Norwegian National Human Rights Institution (2015). See also e.g., Sub-Committee on Accreditation, *Report and Recommendations of the Session* (October 2014), page 17, available at <http://nhri.ohchr.org/EN/AboutUs/ICC/Accreditation/Documents/SCA%20OCTOBER%202014%20FINAL%20REPORT%20-%20ENGLISH.pdf>.

Board should also be representative of the Icelandic society's social, ethnic, religious and geographic diversity, and should reflect diverse segments of Icelandic society, professions, and backgrounds. This helps promote public confidence in the institution and ensures that the NHRI has relevant experience and insights as to the needs of those sectors of society.<sup>52</sup> **Guarantees for ensuring such pluralism should be also included in the Draft Act.**<sup>53</sup>

47. First, advertising vacancies broadly maximizes the potential number of candidates, thereby promoting pluralism.<sup>54</sup> It is therefore recommended **to specify in the Draft Act that the vacancies for members of the Board of Directors shall be publicized broadly.** Other tools to ensure such pluralism in the composition of NHRIs could be to provide for the establishment of an independent selection committee whose composition should reflect diverse societal groups.<sup>55</sup> Such groups (e.g., non-governmental organizations, universities, trade unions, concerned social and professional organizations) could also be invited to suggest or recommend candidates.<sup>56</sup> In any case, the rules and procedures should promote broad consultation and/or participation of these diverse societal groups throughout the application, screening, selection and appointment process.<sup>57</sup> **The legal drafters may consider introducing such modalities to promote pluralism in the NHRI decision-making body. To ensure an inclusive process, the legal drafters should also consult with various stakeholders, including civil society, when determining the most appropriate criteria and procedures for that purpose.**<sup>58</sup>
48. Generally, the selection by the Parliament of the members of the Board of Directors of the Institution for five years i.e., which exceeds the parliamentary term of four years (Article 31 of the Constitution), is a good solution. At the same time, the Draft Act is not clear as to whether such a term is renewable or not. Usually, the Sub-Committee on Accreditation advocates for a term of three to seven years, which may be renewed once.<sup>59</sup> At the same time, if there is no possibility of renewal, this could also enhance the institutional independence, as members would not be affected by potential future re-appointment.<sup>60</sup> In any case, for the sake of clarity of the legislation, **the legislator should specify whether the term of office of the members of the Board of Directors should be renewable or not.**
49. Further, the Draft Act does not specify the parliamentary majority required for such appointments. Due to the independent nature of an NHRI, also representatives of the opposition should have a real say in the appointment of members of the Board of Directors, so as to ensure that there is the broadest possible consensus on the persons

<sup>52</sup> See Justification to General Observation 1.7. See also e.g., OSCE/ODIHR, *Opinion on the Draft Amendments to the Law on Civil Service of Ukraine*, 10 May 2016, par 42, available at [http://www.legislationline.org/download/action/download/id/6196/file/289\\_NHRI\\_UKR\\_10May2016\\_en.pdf](http://www.legislationline.org/download/action/download/id/6196/file/289_NHRI_UKR_10May2016_en.pdf). See also Amnesty International, *National Human Rights Institutions: Amnesty International's Recommendations for Effective Protection and Promotion of Human Rights* (2001), page 10, Recommendation 2.4, available at <https://www.amnesty.org/en/documents/ior40/007/2001/en/>.

<sup>53</sup> See OSCE/ODIHR and Venice Commission, *Joint Opinion on the Law No. 2008-37 of 16 June 2008 relating to the Higher Committee for Human Rights and Fundamental Freedoms of the Republic of Tunisia*, 17 June 2013, par 44, available at <http://www.legislationline.org/documents/id/17976>.

<sup>54</sup> See Justification to General Observation 1.8.

<sup>55</sup> See *op. cit.* footnote 14, page 248 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

<sup>56</sup> See General Observation 1.7. See also *ibid.* page 248 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

<sup>57</sup> See General Observation 1.8.

<sup>58</sup> See Justification to General Observation 1.7.

<sup>59</sup> See General Observation 2.2.

<sup>60</sup> See *op. cit.* footnote 53, par 43 (2013 OSCE/ODIHR-Venice Commission Joint Opinion on the Law relating to the Higher Committee for Human Rights and Fundamental Freedoms of Tunisia).



selected.<sup>61</sup> Recommendation 1615(2003) of the Parliamentary Assembly of the Council of Europe likewise specifically requires a “qualified majority of votes sufficiently large as to imply support from parties outside government”. In order to further strengthen the NHRI’s impartiality, independence and legitimacy,<sup>62</sup> it is recommended to **supplement the Draft Act accordingly**.

50. Article 4 of the Draft Act provides that the Chairperson of the Board of Directors is elected by the Althingi separately. Once again, the selection criteria and duration of the term, as well as the question of whether it is renewable, are not specified. It is also unclear why the Chairperson of the Board of Directors would be elected separately, as this would seem to be an excessive and burdensome procedure, and may also lead to an unnecessary politicization of this position. To avoid this, **the legal drafters may consider revising this provision, so that the members of the Board of Directors elect the Chairperson from among its members by majority decision**. Alternatively, should the Chairperson fulfill a special role that would justify a separate selection procedure, then this should be outlined in the text of the Draft Act.
51. It is unclear from the Draft Act whether the members of the Board of Directors serve in a part-time or full-time capacity. Pursuant to General Observation 2.2., the underlying NHRI legislation should provide that members of its decision-making body include full-time remunerated members. This helps ensure the independence of the NHRI, a stable tenure for the members, regular and appropriate direction for staff, and the on-going and effective fulfilment of the NHRI’s functions.<sup>63</sup> The legal drafters should **supplement the Draft Act by providing that members of the Board of Directors include some, if not all, full-time remunerated members**. In cases where some members of the Board only serve in a part-time capacity, any other professional activity that they engage in needs to be such as to allow the proper performance of the NHRI’s duties, its impartiality and public confidence therein (see par 44 *supra*).
52. Finally, the **Draft Act should also expressly state that members of the Board of Directors serve in their own individual capacity rather than on behalf of the organization that they represent** (see General Observation 1.8).

#### ***4.2. The Expiration of the Term, Resignation, Death, and Dismissal of the Members of the Board of Directors***

53. The Draft Act does not outline the criteria and procedures for terminating the mandates of the members of the Board of Directors and of its Chairperson, as well as the consequences arising from such termination. To ensure continuity of the institution, the current members and the Chairperson should remain in office after the end of their terms until a successor is appointed.<sup>64</sup> This is crucial in the case of the Chairperson due to the importance of having a proper transfer of duties between the old and the new office-holder. **The Draft Act should be supplemented accordingly**.

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<sup>61</sup> Venice Commission, *Memorandum on the Organic Law on the Institution of the Ombudsman of the Federation of Bosnia and Herzegovina*, approved by the Venice Commission at its 46th Plenary Meeting (Venice, 9-10 March 2001), CDL-INF(2001)007 (English only), par 2, available at [http://www.venice.coe.int/webforms/documents/CDL-INF\(2001\)007-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-INF(2001)007-e.aspx).

<sup>62</sup> Venice Commission, *Consolidated Opinion On the Law on Ombudsman in the Republic of Azerbaijan* (Strasbourg, 7 September 2001), CDL(2001)083-e, pars 6-8, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2001\)083-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2001)083-e).

<sup>63</sup> General Observation 2.2 and Justification.

<sup>64</sup> See e.g., Venice Commission, *Opinion on the Draft Amendments to the Law on the Protector of Human Rights and Freedoms of Montenegro*, adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009), par 16, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2009\)043-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)043-e).

54. Further, the Draft Act does not elaborate on the circumstances in which the mandate of the members of the Board may be terminated prior to the expiry of their term. Clear regulations are also needed for cases where the Chairperson is not able to perform his/her duties due to certain circumstances such as resignation, death, illness, conviction for a serious criminal offence, etc. **It would be advisable to specify such cases in the Draft Act.** There is also no provision in the Draft Act governing the interim period pending the election of a Chairperson's successor when the Chairperson is not able to carry out his/her functions. This is of particular importance as the Draft Act does not provide for a Vice-Chairperson of the Board.
55. Additionally, according to General Observation 2.1, in order to address the Paris Principles' requirements for a stable mandate, without which there can be no independence, NHRI legislation must contain an objective dismissal process following pre-defined criteria, similar to that accorded to members of other independent State agencies. The grounds for dismissal must be clearly defined and appropriately confined to those actions and situations which impact adversely on the capacity of the members to fulfill their mandates.<sup>65</sup> Where appropriate, the legislation should specify that the application of a particular ground for dismissal must be supported by the decision of a court or other independent body with appropriate jurisdiction.<sup>66</sup> **The legal drafters should supplement the Draft Act accordingly.**
56. As regards **the procedure for dismissal, a vote by a qualified majority of the Parliament – preferably higher than the majority required for election<sup>67</sup> – would be desirable** to avoid a situation where it is possible to remove members from office simply because the majority in Parliament does not agree with their actions.<sup>68</sup> Moreover, **the Draft Act should provide for a public procedure whereby the members of the Board should be heard prior to the vote on dismissal; there should also be a procedure in place allowing them to challenge the dismissal decisions in court.**<sup>69</sup>

### ***4.3. Other Comments***

57. According to applicable international good practice, to protect the NHRI's real and perceived independence, members of its decision-making body should not take part in decisions in cases where they may have an actual or perceived conflict of interest. On several occasions, the Sub-Committee on Accreditation has encouraged NHRIs to advocate for the inclusion of express legal provisions protecting against such conflicts of interest.<sup>70</sup> **Members should be required to disclose conflicts of interest and to withdraw from discussions and decisions where these arise. The Draft Act should be supplemented accordingly.**
58. While Article 4 par 1 leaves the question of remuneration of Board members to the discretion of the Presidium of the Althingi, it would be preferable, and more in keeping with the independence of the NHRI, if the terms of remuneration would be stated

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<sup>65</sup> General Observation 2.1.

<sup>66</sup> *ibid.*

<sup>67</sup> Venice Commission, *Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova*, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015), CDL-AD(2015)017, par 60, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)017-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)017-e).

<sup>68</sup> Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe, *Joint Opinion on the Draft Law on the Ombudsman of Serbia*, adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), CDL-AD(2004)041, par 19, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2004\)041-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)041-e).

<sup>69</sup> See e.g., *op. cit.* footnote 67, par 61 (2015 Venice Commission's Opinion on the Law on the People's Advocate of Moldova).

<sup>70</sup> See e.g., *op. cit.* footnote 29, pages 16 and 31 (SCA Report and Recommendations of May 2016).

clearly in the Draft Act. Practice varies greatly across the OSCE region with Ombudspersons or Human Rights Commissioners being recognized as having equal status to judges of the Constitutional or Supreme Courts, the Public Prosecutor or the Governor of the National Bank, but generally, the status and remuneration of Board members should correspond to other positions with a high rank within the state apparatus.<sup>71</sup> **It is recommended to amend Article 4 par 1 of the Draft Act accordingly.**

59. Article 5 of the Draft Act provides that the Board of Directors shall appoint the Director of the NHRI, who is in charge of the institution's day-to-day activities and operation, as well as of engaging its employees and other experts. Hence, the Director's real and perceived independence should be ensured in order not to have a negative impact on the independence and autonomy of the NHRI itself. Nothing is said as to the eligibility requirements and incompatibilities for the Director's position, or as to the rank of this post. As mentioned in par 44 *supra*, NHRI functions are not compatible with the performance of another function or profession, public or private, or with membership in political parties or unions.<sup>72</sup> **The Draft Act should therefore specify the eligibility criteria for the Director's position and incompatibilities to ensure that the perceived independence of the NHRI is preserved.**
60. In addition, the Draft Act should contain general regulations concerning the remuneration of the Director that correspond to the upper end of the public sector's salary scale,<sup>73</sup> and should not leave this issue to the free interpretation and decision of the Official Remuneration Council (Article 5 par 2 of the Draft Act). **Article 5 par 2 of the Draft Act should be amended in that respect** (see also par 70 *infra* regarding the remuneration of the staff).
61. Finally, the Draft Act fails to specify the nature of the working relationships between the Board of Directors and its Chairperson (and reporting lines) as well as that of the Director vis-à-vis the Board, and does not clearly delineate their respective roles and responsibilities. Lack of clarity in this regard may lead to considerable problems related to the division of authority within the NHRI and effective management of the institution overall. **These aspects should be clarified.**

## **5. The NHRI's Functional immunity**

62. The functional immunity<sup>74</sup> of the members of an NHRIs' decision-making bodies exists as an essential corollary of their institutional independence<sup>75</sup> and protects their ability to

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<sup>71</sup> See e.g., Article 10 (5) of the Ombudsman Act (1995) of Malta referring to remuneration equivalent to the judge of superior courts; Section 8 of the Law on the Public Defender of Rights (1999, as amended 2009) of the Czech Republic which refers to the salary, severance pay, reimbursement of expenses and benefits in kind equal to that of the President of the Supreme Audit Office; Article 12 of the Law on Establishment of a Mediator of Luxembourg (2003) referring to the specific upper salary scale applicable in the public service; all are available at <http://www.legislationline.org/topics/topic/82>. See also *op. cit.* footnote 15, Section 4.1.1 on Rank and Salary (2016 Venice Commission's Compilation of Opinions concerning the Ombudsman Institution).

<sup>72</sup> Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe, *Joint Opinion on the Draft Law on the Ombudsman of Serbia*, adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), CDL-AD(2004)041, par 13, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2004\)041-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)041-e).

<sup>73</sup> See *op. cit.* footnote 14, pages 123 and 152 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

<sup>74</sup> i.e., the protection from liability for the words spoken and written and the actions and decisions undertaken in good faith in one's official capacity ("functional immunity" or "non-liability").

<sup>75</sup> See General Observation 1.1 and justification to General Observation 2.3 which considers functional immunity as being an "essential hallmark of institutional independence".

- engage in critical analysis and commentary on human rights issues.<sup>76</sup> This is essential to ensure that an NHRIs' independence is not compromised through fear of criminal proceedings or civil action by an allegedly aggrieved individual or entity, including public authorities.<sup>77</sup> On several occasions, the Sub-Committee on Accreditation has recommended that the relevant legislation be supplemented to include express provisions that clearly establish the functional immunity of an NHRI's decision-making body.<sup>78</sup> Although not expressly required by the Paris Principles, it is generally considered positive to extend the functional immunity to NHRI staff.<sup>79</sup>
63. As it stands, the Draft Act does not contain any provisions aiming to protect the functional immunity of the members of the Board of Directors or of the NHRI's staff.
64. In the underlying legislation, **the scope of functional immunity should generally be drafted in a broad manner to protect the NHRI's decision-making body and staff from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacity.**<sup>80</sup> It is recommended to introduce such wording in the Draft Act. The provision should specify that such functional immunity should apply even after the end of the Board members' mandate or after the staff cease their employment with the NHRI.<sup>81</sup>
65. An additional safeguard to protect functional immunity is also to **guarantee the inviolability of the NHRI's premises, property, means of communication and all documents, including internal notes and correspondence,**<sup>82</sup> as well as of baggage, correspondence and means of communication belonging to the Board members and professional staff.<sup>83</sup> It is recommended to supplement the Draft Act accordingly.
66. Overall, there needs to be a proper balance between immunity as a means to protect an NHRI against pressure and abuse from state powers or individuals (including, in particular abusive prosecution, false, frivolous, vexatious or manifestly ill-founded complaints, or harassment) and the general concept that nobody, including an NHRI decision-making body, should be above the law.<sup>84</sup> This concept derives from the principle of equality before

<sup>76</sup> See justification to General Observation 2.3.

<sup>77</sup> See e.g., regarding the similar case of the immunity of judges, the case of *Ernst v. Belgium*, ECtHR Judgment of 15 October 2003 (Application No. 33400/96, only in French), par 85, available at [http://hudoc.echr.coe.int/eng#{"fulltext":\["33400/96"\],"languageisocode":\["FRE"\],"documentcollectionid":\["GRANDCHAMBER"\],"CHAMBER":\["itemid":\["001-65779"\]\]}](http://hudoc.echr.coe.int/eng#{), holding that immunity ('privilege de juridiction') pursues the legitimate aim of ensuring that judges are protected against undue lawsuits and enabling them to exercise their judicial function peacefully and independently.

<sup>78</sup> See e.g., *op. cit.* footnote 29, page 37 (SCA Report and Recommendations of May 2016).

<sup>79</sup> See e.g., OSCE/ODIHR, *Final Opinion on the Draft Act Amending the Act on the Commissioner for Human Rights of Poland*, 16 February 2016, Sub-Section 3.2 on the Personal and Temporal Scope of the Functional Immunity, available at <http://www.legislationline.org/documents/id/19896>; and Venice Commission, *Opinion on draft amendments to Article 23(5) of the law on the Human Rights Defender of Armenia*, adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008), CDL-AD(2008)028, pars 7-8, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2008\)028-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)028-e).

<sup>80</sup> General Observation 2.3 refers to the protection from legal liability for "actions and decisions that are undertaken in good faith in their official capacity". See also Venice Commission, *Opinion on Amendments to the Law on the Human Rights Defender of Armenia*, CDL-AD(2006)038, adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), pars 74 and 76, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2006\)038-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)038-e); and *op. cit.* footnote 8, par 7.5 (PACE Recommendation 1615(2003)).

<sup>81</sup> See *op. cit.* footnote 35, par 69 (2015 Venice Commission Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina); and OSCE/ODIHR-Venice Commission, *Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro*, adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011), par 23, available at <http://www.legislationline.org/documents/id/16665>.

<sup>82</sup> See *op. cit.* footnote 53, par 52 (2013 OSCE/ODIHR-Venice Commission Joint Opinion on the Law relating to the Higher Committee for Human Rights and Fundamental Freedoms of Tunisia).

<sup>83</sup> See e.g., *op. cit.* footnote 81, par 23 (2011 OSCE/ODIHR-Venice Commission Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro).

<sup>84</sup> General Observation 2.3 which states that "[i]t is acknowledged that no office holder should be beyond the reach of the law and thus, in certain exceptional circumstances it may be necessary to lift immunity".

the law, which is also an element of the rule of law.<sup>85</sup> Indeed, the Sub-Committee on Accreditation has recognized this, and thus stated that **the law should clearly establish the grounds, and a clear and transparent process, by which the functional immunity of the members of the decision-making body may be lifted.**<sup>86</sup> It is recommended to supplement the Draft Act accordingly. At the same time, a proper mechanism is needed to prevent or stop such investigations or proceedings where there is no proper evidence to suggest criminal liability on the part of the NHRI members,<sup>87</sup> or where functional immunity considerations apply. In particular, the request to lift immunity should be submitted by a body independent from the executive, and clear, transparent and impartial criteria and procedures shall determine whether immunity should be lifted or not in a given case.<sup>88</sup>

67. It is noted that different rules and procedures may apply for lifting staff immunities; for example, the Draft Act could set out that for staff members, the Board of Directors may decide whether or not to waive immunity.<sup>89</sup>

## **6. The NHRI's Autonomy in Human Resources Management and Financial Independence**

### **6.1. The NHRIs' Autonomy in Human Resources Management**

68. It appears that there are plans to transfer the staff of the Icelandic Human Rights Centre, which is currently funded by the Ministry of Interior, in its entirety to the new Institution. Generally, an NHRI not only needs to be independent, but must also be "seen" to be independent.<sup>90</sup> NHRI members and staff should therefore not be too closely connected to the public service or considered or perceived as government employees.<sup>91</sup> Hence, such a transfer of staff to the future NHRI may raise some concerns in terms of perceived and actual independence from the executive. Moreover, as noted in General Observation 2.5, an NHRI "must have the authority to determine its staffing profile and to recruit its own staff". The fact that the entire staff body of a government agency would be transferred to the new entity would *de facto* limit the NHRI's autonomy in that respect.
69. The employment status of the NHRI's staff is also not clear. In that respect, it is noted that most countries have human resources policies pertaining to their public services that apply to all public agencies and entities, including NHRIs.<sup>92</sup> These types of

<sup>85</sup> See Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, pages 18-19, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e).

<sup>86</sup> See e.g., *op. cit.* footnote 29, page 37 (SCA Report and Recommendations of May 2016).

<sup>87</sup> See e.g., regarding the immunity of judges, par 54 of Opinion No. 3 of the Consultative Council of European Judges to the attention of the CoE Committee of Ministers on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (2002), available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2002\)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2002)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3).

<sup>88</sup> See e.g., *op. cit.* footnote 79, Sub-Section 4 on the Procedure for Lifting the Commissioner's Immunity from Criminal Proceedings (2016 OSCE/ODIHR Final Opinion on the Draft Act Amending the Act on the Commissioner for Human Rights of Poland).

<sup>89</sup> *ibid.* par 42 (2016 OSCE/ODIHR Final Opinion on the Draft Act Amending the Act on the Commissioner for Human Rights of Poland).

<sup>90</sup> *ibid.* page 39 (2010 OHCHR Handbook on National Human Rights Institutions). See also e.g., *op. cit.* footnote 81, pars 12, 27-29 (2011 OSCE/ODIHR-Venice Commission Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro).

<sup>91</sup> International Council on Human Rights Policy and OHCHR, *Report on Assessing the Effectiveness of National Human Rights Institutions* (2005), page 8, available at [http://www.ichrp.org/files/reports/18/125\\_report.pdf](http://www.ichrp.org/files/reports/18/125_report.pdf).

<sup>92</sup> See *op. cit.* footnote 52, pars 19-22 (2016 OSCE/ODIHR Opinion on the Draft Amendments to the Law on Civil Service of Ukraine). See also OHCHR, *Handbook on National Human Rights Institutions - History, Principles, Roles and Responsibilities* (2010), page 156, available at [http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI\\_en.pdf](http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf).

institutions should nevertheless benefit from certain flexibility with respect to public service rules on recruitment and career advancement.<sup>93</sup> In any case, **the Draft Act should clarify the employment status of the NHRI's staff.**

70. Regarding staff salaries and benefits, General Observation 1.10 provides that they should be “comparable” to those of civil servants performing similar tasks in other state independent institutions. In many countries though, public sector salaries may not always be adequate or appropriate and it is recognized that so-called “comparable” salaries should only be a minimum criterion.<sup>94</sup> A good practice in that respect is to provide salaries that are more at the upper end of the public sector’s salary scale, particularly for professional expert staff, while taking into account similar levels of responsibilities and experience. This is useful not only to attract and retain competent staff,<sup>95</sup> but also to ensure their independence<sup>96</sup> from the executive when carrying out their work. **The Draft Act should be supplemented accordingly, while ensuring that the NHRI has some flexibility to set the levels of wages and benefit packages for its staff, especially professional expert staff, which may differ from those of the public service in general;<sup>96</sup> similar comments apply regarding rules on career advancement and human resources management.<sup>97</sup>**
71. As stated in General Observation 1.7, a “diverse [...] staff body facilitates the NHRI’s appreciation of, and capacity to engage on, all human rights issues affecting the society in which it operates, and promotes the accessibility of the NHRIs for all citizens”. As in the case of the Board of Directors (see pars 45-47 *supra*), the staff of an NHRI should reflect pluralism in terms of gender, ethnicity or minority status<sup>98</sup> so as to represent all segments of society within NHRI staff at all levels of responsibility, including senior level positions.<sup>99</sup> This can help strengthen the visibility of an NHRI’s commitment to inclusiveness and diversity, could positively influence the institution’s overall credibility and effectiveness, and may serve as model for other public bodies.<sup>100</sup> Thus, it is recommended to supplement the Draft Act **by adding provisions clearly stating that qualification requirements and selection criteria and modalities, and employment conditions, for NHRI staff, should ensure gender balance and diversity at all staff levels.**<sup>101</sup>

<sup>93</sup> *ibid.* page 156 (2010 OHCHR Handbook on NHRIs). See also *op. cit.* footnote 14, pages 173-174 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

<sup>94</sup> *Op. cit.* footnote 92, page 156 (2010 OHCHR Handbook on NHRIs); and *op. cit.* footnote 14, page 174 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

<sup>95</sup> *ibid.* pages 123 and 152 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

<sup>96</sup> *ibid.* page 152 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

<sup>97</sup> *ibid.* page 174 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

<sup>98</sup> *ibid.* page 20, General Observation 1.7 (General Observations). See also e.g., *op. cit.* footnote 29, page 9 on the Staffing of the Commissioner for Administration and Human Rights (CAHR) of Cyprus (SCA Report and Recommendations of November 2015).

<sup>99</sup> *Op. cit.* footnote 16, pages 9 and 78 (2012 OSCE/ODIHR Handbook for NHRIs on Women’s Rights and Gender Equality). See also *op. cit.* footnote 92, page 157 (2010 OHCHR Handbook on NHRIs).

<sup>100</sup> *ibid.* pages 39 and 173 (2010 OHCHR Handbook on NHRIs). See also e.g., Amnesty International, National Human Rights Institutions: Amnesty International’s Recommendations for Effective Protection and Promotion of Human Rights (2001), page 10, Recommendation 2.4, available at <https://www.amnesty.org/en/documents/ior40/007/2001/en/>.

<sup>101</sup> See e.g., *op. cit.* footnote 16, pages 9, 78 and 80 (2012 OSCE/ODIHR Handbook for NHRIs on Women’s Rights and Gender Equality); and Sub-Committee on Accreditation, *Report and Recommendations of the Session* (March 2015), page 23 on the Staffing of the Protector of Citizens (PCRS) of Serbia, available at <http://nhri.ohchr.org/EN/AboutUs/ICC/Accreditation/Documents/SCA%20MARCH%202015%20FINAL%20REPORT%20-%20ENGLISH.pdf>; and Sub-Committee on Accreditation, *Report and Recommendations of the Session* (March 2012), pages 8 and 10 on the Staffing of the Commissioner for Human Rights of Kazakhstan and of the Ombudsperson (Akyikatchy) of the Kyrgyz Republic (OKR), available at <http://nhri.ohchr.org/EN/AboutUs/ICC/Accreditation/Documents/SCA%20MARCH%202012%20FINAL%20REPORT%20ENG%20WI TH%20ANNEXURES.pdf>.

72. The Sub-Committee on Accreditation has also noted positively cases where NHRIs have adopted policies to promote greater gender balance, diversity and opportunities for advancement within their institutions.<sup>102</sup> These include, for instance, measures to ensure equal opportunities for promotion, supporting professional development of under-represented persons<sup>103</sup> and human resource policies that take into consideration the needs of pregnant women and persons with parental and/or caretaking responsibilities, as well as promote work-life balance for all employees, more broadly.<sup>104</sup> Additionally, NHRIs should pay particular attention to the special requirements for employees with disabilities, in line with Article 27 of the UN CRPD,<sup>105</sup> and should ensure that its human resources policies<sup>106</sup> accommodate such persons as far as reasonably possible. **It is recommended to supplement the Draft Act accordingly.**

### **6.2. The NHRI's Budget**

73. The Draft Act does not provide information on the institution's budget and more generally on modalities to ensure its financial and operational autonomy. The Paris Principles provide that an NHRI should be provided with "adequate funding" to ensure the smooth conduct of its activities and enable the institution to have its own staff and premises. General Observation 1.10 specifies that an appropriate level of funding also helps guarantee an NHRI's independence and allows it to freely determine its priorities and activities, and to allocate funding according to its priorities. Thus, it is recommended **to include in the Draft Act specific provisions regarding the NHRI's budget and financial autonomy.** Such provisions **should prescribe that the budgetary allocation of funds for the operations of the institution shall be adequate to the need to ensure full, independent and effective discharge of the responsibilities and functions of the institution.**<sup>107</sup> The Draft Act should also **provide for the autonomous management, by the NHRI, of the budgetary allocation at its disposal.**<sup>108</sup>
74. National law should also indicate the relevant budget source.<sup>109</sup> When deciding on the accreditation of NHRIs, the Sub-Committee on Accreditation reviews whether the underlying legislation provides that an **NHRI's funding is allocated to a separate budget line applicable only to the NHRI.**<sup>110</sup> **It is recommended to supplement the Draft Act accordingly.**
75. The Sub-Committee on Accreditation has stated that situations where the NHRI's budget is subject to Government approval or where the executive has substantial control

<sup>102</sup> Sub-Committee on Accreditation (SCA), *Report and Recommendations of the Session* (October 2014), page 17, available at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20OCTOBER%202014%20FINAL%20REPORT%20-%20ENGLISH.pdf>.

<sup>103</sup> See e.g., the good practice of special programmes for professional development addressed to women, which use different selection criteria for recruitment and then provide training and development prior to accessing permanent employment, see *op. cit.* footnote 14, page 174 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

<sup>104</sup> *Op. cit.* footnote 16, pages 9, 78 and 80 (2012 OSCE/ODIHR Handbook for NHRIs on Women's Rights and Gender Equality). See also *ibid.* pages 174-175 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

<sup>105</sup> UN Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006 during the sixty-first session of the UN General Assembly by resolution A/RES/61/106; the Convention was ratified by Iceland on 23 September 2016.

<sup>106</sup> *Op. cit.* footnote 14, page 175 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

<sup>107</sup> See e.g., Venice Commission, *Opinion on the possible reform of the Ombudsman Institution in Kazakhstan*, adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007), CDL-AD(2007)020, pars 8 and 30.VI, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2007\)020-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)020-e).

<sup>108</sup> See e.g., *op. cit.* footnote 67, pars 74-75 (2015 Venice Commission's Opinion on the Law on the People's Advocate of Moldova).

<sup>109</sup> See Justification to General Observation 1.10.

<sup>110</sup> See e.g., *op. cit.* footnote 29, pages 19 and 26 on the accreditation of NHRIs of Montenegro and Canada (SCA Report and Recommendations of May 2016).

over budgetary decisions raises concerns with respect to the NHRI's financial independence.<sup>111</sup> To sustain this independence, these considerations should be reflected in the Draft Act.

76. Additionally, to increase the NHRI's financial independence, **some additional safeguards may also be contemplated. For instance, the Draft Act may specify that the budgetary process should not be used to allocate/reduce funds from the budget in a manner that interferes with the NHRI's independence.**<sup>112</sup> **The relevant legislation could also prescribe that the institution itself should submit its budget proposal to the parliament and that this proposal should be included in the national budget without changes.**<sup>113</sup> **In addition, legal provisions against unwarranted budgetary cutbacks could be introduced, including but not limited to the principle that compared to the previous year, any reductions in the NHRI's budget should not exceed the percentage of reduction of the budgets of the Parliament or the Government.**<sup>114</sup> The NHRI should also **be allowed to receive additional funding from external sources.**<sup>115</sup> In any case, the NHRI has the obligation to ensure the coordinated, transparent and accountable management of its funding through regular public financial reporting and a regular annual independent audit,<sup>116</sup> and needs to follow the existing domestic regulations on proper and efficient budgetary planning.
77. Further, as mentioned in par 21 *supra*, the new NHRI of Iceland will serve as the NIMM for the UN CRPD, although the Explanatory Note to the Draft Act concludes that “[n]o additional administrative costs are expected”. However, it is essential for the independence of the institution that sufficient funding is provided to allow this body to have the adequate human, financial, material and technical capacity to guarantee the proper implementation of its mandate both as NHRI and as NIMM. The question of adequate resources should thus be reviewed carefully. Also, if in the future Iceland ratifies the Optional Protocol to the UNCAT and decides to appoint the NHRI as the NPM, additional funding and human resources would need to be allocated for that purpose.
78. Under General Observation 1.10, several elements need to be taken into account to define what constitutes “adequate funding” and when drawing the annual budget for the NHRI. In addition to an appropriate level of salaries and benefits (see pars 58, 60 and 70 *supra*), these should include the allocation of funds for the NHRI's own premises (separate from the Government's premises) that are accessible to the wider community, including persons with disabilities, and the establishment of well-functioning communications systems including telephone and internet. **The Draft Act could specifically list them.**

<sup>111</sup> See e.g., *op. cit.* footnote 29, page 12 (SCA Report and Recommendations of November 2015).

<sup>112</sup> See e.g., *op. cit.* footnote 68, pars 74-75 (2015 Venice Commission's Opinion on the Law on the People's Advocate of Moldova).

<sup>113</sup> See e.g., Venice Commission, Opinion on the possible reform of the Ombudsman Institution in Kazakhstan, adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007), CDL-AD(2007)020, pars 8 and 30.VI, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2007\)020-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)020-e).

<sup>114</sup> See e.g., *op. cit.* footnote 45, par 69 (2016 Venice Commission Opinion on the draft Constitutional Law on the Human Rights Defender of Armenia).

<sup>115</sup> See General Observation 1.10 and its justification.

<sup>116</sup> See General Observation 1.10 and its justification.



## 7. Other Comments

79. Article 6 of the Draft Act provides for the appointment of an Advisory Committee of Stakeholders composed of 10 members with a two-year term. It is unclear why this advisory body is appointed for such a brief duration, as two years may be too short for it to carry out its functions in a meaningful manner. Also, nothing is said as to whether the mandate of the Committee members is renewable or not. The drafters should consider extending the term for members of this body so that it is similar to that of members of the Board of Directors. The Draft Act is also silent as to the selection criteria and means to ensure pluralism in the composition of the Committee (see also pars 45-46 and 71-72 *supra* on NHRI pluralism). **The Draft Act could be supplemented in that respect.**
80. Article 8 of the Draft Act states that the NHRI shall submit to the Althingi an annual report on its activities and the implementation of human rights and make this report public by 1 September. General Observation 1.11 recommends that the enabling NHRI law shall ensure that NHRI's reports are widely circulated, discussed and considered by the legislature, and the NHRI should be able to table reports directly in the legislature. **A respective provision should be introduced to the Draft Act along with an obligation on the side of the Althingi to hold a parliamentary debate on the NHRI report, for instance at the session which immediately follows the report's submission to the Parliament.** At the same time, the parliament should not be required to formally adopt such an annual report since such a vote would indirectly call into question the independence of the institution.<sup>117</sup> Indeed, the main purpose of the parliamentary debate should be informational in nature, so as to bring to the parliament's attention the issues raised by the report and for the parliament to take action to address them, as appropriate. This debate by itself would, however, not replace the need for regular and effective cooperation between the NHRI and the Althingi on an everyday basis (see par 27 *supra*).
81. Finally, it is understood that the Ministry of Interior has carried out public consultations when drafting the Draft Act, which is welcome. It is worth recalling that OSCE commitments require legislation to be adopted "as the result of an open process reflecting the will of the people, either directly or through their elected representatives" (Moscow Document of 1991, par 18.1).<sup>118</sup> Particularly legislation that may have an impact on human rights and fundamental freedoms, as is the case here, **should undergo extensive consultation processes throughout the drafting and adoption process, to ensure that human rights organizations and the general public, including marginalized groups, are fully informed and able to submit their views prior to the adoption of the Act.** Public discussions and an open and inclusive debate will increase all stakeholders' understanding of the various factors involved and enhance confidence and trust in the adopted legislation, and in the institutions in general. The Icelandic legislator is encouraged to ensure that the Draft Act is consulted extensively up until its adoption.

[END OF TEXT]

<sup>117</sup> See *op. cit.* footnote 35, par 82 (2015 Venice Commission Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina).

<sup>118</sup> Available at <http://www.osce.org/fr/odihr/elections/14310>.

## **Draft Act on the Independent National Human Rights Institution of Iceland**

### Article 1

The National Human Rights Institution operates under the auspices of Iceland's parliament, the Althingi. The Institution's main role is to promote and protect human rights in Iceland as they are defined in the Constitution of the Republic of Iceland, legislation, international agreements and other international commitments.

### Article 2

The Institution is independent in its activities from the instructions of other parties, including the Althingi. However, the Presidium of the Althing may, either on its own initiative or at the request of Members of Parliament, require reports on any specific matters falling under the remit of the Institution.

### Article 3

The Institution performs its role primarily by:

- a. Advising government authorities on all areas relating to the promotion and protection of human rights. The Institution may provide this advice in the form of reports, opinions and proposals on any matters relating to human rights. The Institution may decide to publish such documents.
- b. Providing comments on any legislation, legislative bills and administrative practices relating to the protection of human rights; thereby promoting the compliance of legislation and public administration with international human rights agreements to which the Icelandic government is a party and respect for the rights provided for thereunder.
- c. Reviewing the status of human rights in Iceland, raising government awareness of potential violations of human rights and proposing improvements.
- d. Partnering with domestic, overseas and international human rights organisations and providing these with information as requested.
- e. Promoting human rights research and education and generating discussion about human rights in the media.

The Institution is not a ruling body on human rights issues, for which reason complaints concerning the decisions of government or private parties cannot be referred to the Institution. However, the Institution may provide individuals seeking its assistance with guidance on how to enforce human rights, including on avenues of complaint to Icelandic government authorities and international organisations.

### Article 4

The Althingi elects five members to the Board of Directors of the Institution, and an equal number of alternates, for a term of five years. The members of the Board shall have expertise in different fields, including human rights law. The Althingi elects the Chairperson of the

Board of Directors separately. In other respects, the Board shall allocate responsibilities among its members. The Presidium of the Althingi decides the remuneration of Board members.

The role of the Board is to define the areas of emphasis in the work of the Institution and oversee its activities and operations. Among other things, the Board may establish procedures for the Institution for this purpose. Major decisions shall be referred to the Board for approval or rejection.

#### Article 5

The Board of Directors of the Institution shall appoint the Director of the Institution for a term of five years. The Director of the Institution shall have charge of its day-to-day activities and operation and engage its employees. The Director of the Institution may also engage experts to work on individual projects.

The Official Remuneration Council (*Kjararáð*) decides the remuneration and employment terms of the Director of the Institution. The Director of the Institution is not permitted to engage in other paid employment or any activities that are incompatible with his/her work.

#### Article 6

The Board of Directors of the Institution appoints a ten-member Advisory Committee of Stakeholders for a term of two years. The Advisory Committee supports the Institution in its work by providing advice, information and opinions as needed.

#### Article 7

Notwithstanding confidentiality, government bodies shall provide the Institution with any information deemed necessary by the Institution to perform its role. The provision of information shall comply with the provisions of Act No. 2000/77 on the Protection of Privacy and the Processing of Personal Data. The Institution cannot require information relating to the State's internal or external security or foreign affairs that should be kept secret, except with the permission of the cabinet minister in question.

#### Article 8

The Institution shall submit to the Althingi an annual report on the Institution's activities and the implementation of human rights during the preceding calendar year. The report shall be made public before 1 September each year.

#### Article 9

The members of the Board of Directors and employees of the Institution, as well as others that the Institution engages for work, shall be bound by a duty of confidentiality as regards information of which they may become aware in the course of their duties and must be kept secret under law, under instructions from their superiors or by the nature of the case. The duty of confidentiality shall remain in force after termination of employment.

#### Article 10

This Act shall take effect ....