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OPINION ON THE DRAFT LAW ON THE NATIONAL COMMISSION FOR THE PROMOTION AND THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS AND THE FIGHT AGAINST DISCRIMINATION

ITALY

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Based on an unofficial English translation of the Draft Law commissioned by the OSCE Office for Democratic Institutions and Human Rights.



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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

At the outset, it should be noted that ODIHR welcomes the legislative initiative, as it seeks to create the basis for the establishment of a National Commission for the Promotion and the Protection of Fundamental Human Rights and the Fight against Discrimination (the Commission) in Italy, in compliance with the United Nations Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (hereinafter “the Paris Principles”).¹ This is a significant first step in addressing the recommendations made to Italy previously by various human rights monitoring bodies. At the same time, however, it is recommended to expand and amend the Draft Law so as to ensure important aspects pertaining to the National Institution for the Promotion and Protection of Human Rights (hereinafter “NHRI”) and its functioning, especially those at the core of the institution’s basic guarantees of independence, and to ensure full compliance with the Paris Principles.

In particular, the functions and powers of the Commission should be enhanced to ensure effective implementation of its full mandate and not only parts thereof. Additional safeguards need to be introduced strengthening independence and autonomy of the Commission, including its financial independence and autonomy in human resources management, also ensuring that the process of appointment and dismissal of its members is in compliance with the international standards. Furthermore, the Commission members should enjoy functional immunity and be protected from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in its official capacities. The Draft Law should further be revised to ensure the Commission’s pluralist composition.

More specifically, and in addition to what is stated above, ODIHR makes the following recommendations to further improve the Draft Law:

- A. with respect to the mandate of the Commission:
1. To revise Article 3, clarifying the scope of the powers and functions of the Commission, extending them to all aspect of the Commission’s mandate; [par 30]
 2. To amend Article 3 par 1 (b) adding other prohibited grounds of discriminatory treatment covering marginalized and vulnerable groups, and to avoid in law and practice possible contradictions with international norms; [par 36]
 3. To clarify in Article 3 par 1 (f) of the Draft Law that the Commission submits its annual report directly to the Parliament for its consideration and discussion; [par 38]
 4. To amend Article 3 par 1 (c) to include the Commission’s authority to receive reports covering all aspects of its mandate (and not only related to equality and non-discrimination) and its power to provide assistance in judicial and administrative proceedings; [par 40]

¹ 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, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>>.

5. To revise Article 3 par 1 (j) of the Draft Law by making explicit reference to the power to submit the Commission's own reports to the UN Treaty Bodies and similar regional and international institutions in a fully independent manner; [par 47]
- B. To clearly define the authority and the mandate of the Commission in the Draft Law in order to avoid potential conflicts and overlaps in functions with the other domestic institutions promoting and protecting human rights; [par 55]
- C. To include in the Draft Law a provision requiring that public body have to respond in a timely manner to the Commission's recommendations arising from any area of its mandate; [par 59]
- D. To remove Article 4 par 3, as it undermines the independence and autonomy of the Commission. The Draft Law should instead refer to uniform rules that are applied to State agencies for regulating their own internal organizational or operational issues, to the extent these are applicable to the Commission, provided that such rules shall not impair on the Commission's independence and autonomy. In the absence thereof, the Draft Law should provide the legal basis for the Commission to determine its internal organizational and operational issues; [par 65]
- E. To introduce and define in the Draft Law (and/or in other relevant legislative acts) the scope of functional immunity, in particular protecting the Commission members and relevant staff from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacity; [par 72]
- F. To expand Article 2 pars 5 and 9 by including transitional provisions ensuring the Commission's functioning without interruption, including by extending term of office of the Commission member, when a substitute is not elected; [par 86]
- G. To include in Article 2 par 4 of the Draft Law necessary safeguards for the selection and appointment process with particular emphasis on transparency, broad consultation and participation of diverse societal forces. The Draft Law should also define criteria, which members of the selection panel need to satisfy, bearing in mind the requirements for reflecting diversity in society and civil society/NGO participation. It should also specify the role of the selection panel, and to whom their recommendations for the selection of Commission's members are to be made.; [pars 90-93]
- H. With respect to the terms of the Commission members:
 1. To consider revising the Draft Law, introducing a 5 years term that is renewable only once, or a single longer term; [par 95]
 2. To revise Article 2 par 5, providing for a more extensive timeframe for selection and appointment of the Commission members, possibly indicating in the Draft Law the start date for the process to commence, as well as an overall timeframe allocated for the process; [par 97]
- I. To ensure that terms and the process of dismissal in Article 2 pars 5, 6 and 9 are clearly defined and precise, as well as to ensure that it is not based solely on the discretion of the appointing body. The Draft Law should provide for clear regulations and objective criteria for cases of dismissal, including for specific

cases and circumstances where the President and the Commission members are not able to perform duties [pars 98-102]

J. To evaluate whether the funding, as suggested in the Draft Law, is adequate in light of the powers and functions to be assigned to the Commission, and the size of the country. The legislation should also aim to guarantee a long-term and stable funding of the Commission, also ensuring its autonomy in management and control of the budget; [pars 114-115]

K. To continue efforts to ensure that the Draft Law is fully compliant with the Paris Principles, other international norms and OSCE commitments and prior to its adoption is subjected to inclusive, extensive and effective consultations, which should continue at further stages of the law-making process. [par 121]

These and additional Recommendations, are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 5 August 2021, the Chair of the Constitutional Committee of the Parliament of Italy sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) a request for a legal review of the Draft Law on the National Commission for the Promotion and the Protection of Fundamental Human Rights and the Fight against Discrimination (hereinafter “the Draft Law”).
2. On 6 August 2021, ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of this Draft Law with international human rights standards and OSCE human dimension commitments.
3. This Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments.

II. SCOPE OF THE OPINION

4. The scope of this Opinion covers only the Draft Law submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating human rights protection mechanisms in Italy.
5. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on those provisions that require amendments or improvements than on the positive aspects of the Draft Law. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations, as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation, ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.
6. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women² (hereinafter “CEDAW”) and the 2004 OSCE Action Plan for the Promotion of Gender Equality³ and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective.
7. This Opinion is based on an unofficial English translation of the Draft Law commissioned by ODIHR which is attached to this document as an Annex. Errors from translation may

² UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Ukraine deposited its instrument of ratification of this Convention on 12 March 1981.

³ See OSCE Action Plan for the Promotion of Gender Equality, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), par 32.

internationally recognized rules on the mandates and competencies of NHRIs.⁷ The Paris Principles also set out minimum standards on the establishment and functioning of NHRIs, and promote key principles of pluralism, transparency, guarantees of functional and institutional independence and effectiveness of NHRIs. The implementation of the Paris Principles and evaluation of NHRIs against these principles is undertaken by the Global Alliance of National Human Rights Institutions (hereinafter “GANHRI”) Sub-Committee on Accreditation (hereinafter “SCA”).⁸ The SCA publishes reports on the accreditation applications of states, reviews their status and provides them with status accreditation every five years.⁹ The SCA additionally develops “General Observations”, which clarify and further explain the Paris Principles.

12. The Paris Principles state that NHRIs need to have an infrastructure at their disposal that is suited to the smooth conduct of their activities, which particularly includes adequate funding and staffing. The purpose of such funding is, among others, to ensure that NHRIs have their own staff and premises, so that they may be independent from Government and will not be subject to financial control that may affect their independence.¹⁰ With respect to staffing in particular, the SCA has confirmed, in its 2018 General Observations, that salaries and benefits awarded to an NHRI’s staff need to be comparable to those of civil servants performing similar tasks in other independent institutions of the State.¹¹
13. The SCA has further noted that NHRIs should be legislatively empowered to determine their staffing structure and the skills required to fulfil their mandates, to set other appropriate criteria (e.g. to increase diversity), and to select their staff in accordance with national law. Staff should be recruited according to an open, transparent and merit-based selection process that ensures pluralism (including in the context of gender, ethnicity and persons with minority status) and a staff composition that possesses the necessary skills required to fulfil the NHRI’s mandate, and that also ensures the equitable participation of women in the NHRI.¹² This process should lie within the sole discretion of the NHRI. While stressing that the Paris Principles do not rule out that an NHRI may hire a public servant with the requisite skills and experience through a prescribed procedure, the SCA has nevertheless reiterated the importance of an NHRI being, and being perceived as being, able to operate in a manner that is independent of government interference. The recruitment process should always be open to all, clear, transparent, merit-based and at the sole discretion of the NHRI.¹³

7 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.

8 The Global Alliance of National Human Rights Institutions (GANHRI), formerly known as the International Coordinating Committee for National Human Rights Institutions (hereinafter “ICC”), was established in 1993 and is the international association of national human rights institutions 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.

9 See Article 15 of the GANHRI Statute (version adopted on 22 February 2018). Accreditation is the official recognition that an NHRI meets the requirements of or continues to comply with the Paris Principles. The SCA awards A, B or C status to NHRIs. Status A means that an NHRI is fully in compliance with the Paris Principles and a voting member as regards the work and meetings on NHRIs internationally; Status B means that the NHRI does not yet fully comply with the Paris Principles or has not yet submitted sufficient documentation in this respect, while status C institutions are not seen as being compliant with the Paris Principles.

10 See Paris Principles, B.2 (Composition and guarantees of independence and pluralism).

11 See the latest revised General Observations of the Sub-Committee on Accreditation, as adopted by the GANHRI Bureau (hereinafter “SCA General Observations”) at its meeting held in Geneva on 21 February 2018, General Observation 1.10, p. 27.

12 See SCA General Observation 1.7 of 21 February 2018, p. 20.

13 SCA General Observation 2.4 of 21 February 2018, p. 39.

14. The UN General Assembly and the UN Human Rights Council have also issued various general resolutions on NHRIs.¹⁴ Additionally, the United Nations Development Programme (hereinafter “UNDP”) and the Office of the United Nations High Commissioner for Human Rights (hereinafter “OHCHR”) have published a Toolkit for Collaboration with National Human Rights Institutions. The toolkit explains the various models of NHRIs and provides guidance on how to support NHRIs in the different phases of their existence, from their establishment to supporting their development into more mature NHRIs.¹⁵
15. Furthermore, the UN Resolution A/ RES / 75/186 (hereinafter “UN Resolution”) on the role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law,¹⁶ in its paragraph 2, strongly encourages Members States to create and strengthen Ombudsman institutions “consistent with the principles on the protection and promotion of the Ombudsman institution (the Venice Principles)”; in paragraph 8 it “[e]ncourages Ombudsman and mediator institutions, where they exist, (a) To operate, as appropriate, in accordance with all relevant international instruments, including the Paris Principles and the Venice Principles”.
16. At the Council of Europe (hereinafter “CoE”) level, Parliamentary Assembly Recommendation 1615 (2003) lists certain characteristics that are essential for the effective functioning of ombudsperson institutions specifically.¹⁷ In addition, the CoE Commission of Ministers 2021 Recommendation aims to ensure that NHRIs are established and governed in accordance with the minimum standards set out in the Paris Principles, in particular as regards their terms of reference and competence to promote and protect all human rights and their autonomy from government.¹⁸ The European Commission for Democracy through Law (hereinafter “Venice Commission”), in addition to numerous opinions on NHRI legislation, published Principles on the Protection and Promotion of the Ombudsman Institution (“the Venice Principles”) in 2019.¹⁹
17. 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”.²⁰ Other OSCE commitments have further emphasized the important role that NHRIs play in the protection and promotion of human rights, in particular, the Bucharest Plan of Action for Combatting Terrorism, which tasks the

¹⁴ 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; 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. See also 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.

¹⁵ UNDP-OHCHR, Toolkit for Collaboration with National Human Rights Institutions (hereinafter “UNDP-OHCHR Toolkit”), December 2010), page 241.

¹⁶ Adopted by the UN General Assembly on 16 December 2020 (75th session).

¹⁷ Parliamentary Assembly of the Council of Europe (PACE), Recommendation 1615 (2003) on the Institution of Ombudsman, 8 September 2003; see also other CoE documents of relevance, e.g., CoE Committee of Ministers, Recommendation Rec(97)14E on the Establishment of Independent National Institutions for the Promotion and Protection of Human Rights, 30 September 1997; PACE, Recommendation 1959 (2013) on the Strengthening of the Institution of Ombudsman in Europe, adopted on 4 October 2013.

¹⁸ CoE Committee of Ministers, Recommendation CM/Rec(2021)1, on the Development and strengthening of effective, pluralist and independent national human rights institutions, 31 March 2021.

¹⁹ European Commission for Democracy through Law (Venice Commission), Principles on the Protection and Promotion of the Ombudsman Institution (“the Venice Principles”), 3 May 2019.

²⁰ See OSCE Copenhagen Document (1990), par 27.

OSCE/ODIHR with continuing and increasing “efforts to promote and assist in building democratic institutions at the request of States, inter alia by helping to strengthen [...] ombudsman institutions”.²¹

18. 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:
- i. the *Compilation of Venice Commission Opinions concerning the Ombudsman Institution* (2016);²² and
 - ii. 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.²³

2. BACKGROUND

19. Article 3 of the Constitution of Italy provides that ‘all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. Article 10 provides that the ‘Italian legal system conforms to the generally recognized principles of international law...’
20. Italy has seen various efforts to establish a NHRI in line with the UN Resolution 48/134. For example, in 2011 the Commission for Constitutional Affairs of the Italian Senate unanimously approved a draft law establishing a National Commission on the promotion and protection of human rights.²⁴ More recently, during the 2019 Universal Periodic Review, the Government of Italy reaffirmed its will to establish an independent national human rights institution in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights.²⁵
21. It is therefore a welcome step that the present Draft Law aims to establish a National Commission for the Promotion and the Protection of Fundamental Human Rights and the Fight against Discrimination (hereinafter: “Commission”) in line with the Paris Principles. The Draft Law provides the legal basis for the establishment of a NHRI for Italy, whose main role is to promote and protect human rights in Italy (Article 2 par 1). It is all the more important to create a legal framework for the establishment of a NHRI in Italy since it currently does not have a national independent mechanism specifically for promoting and protecting human rights.
22. The Draft Law is concise, with eight provisions covering the mandate, the appointment procedure, and the Commission’s staff and premises as well its funding. Positively, the Draft Law contains explicit references to the Paris Principles, independence and autonomy

21 See Bucharest Plan of Action for Combating Terrorism (2001), Annex to OSCE Ministerial Council Decision on Combating Terrorism, MC(9).DEC/1, 4 December 2001, par 10.

22 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)>.

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

24 See for example: <https://unipd-centrodirittumani.it/en/news/Italian-Senate-the-Commission-for-Constitutional-Affairs-approves-the-bill-establishing-a-National-Commission-for-Human-Rights/2097>.

25 UN Human Rights Council, Report of the Working Group on the Universal Periodic Review – Italy, A/HRC/43/4, 27 December 2019, par. 6. See also UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined nineteenth and twentieth periodic reports of Italy, 17 February 2017, pars 10-11.

of the Commission, and the provision of promotion and protection functions. It is recalled here that SCA General Observation 1.1 states that relevant NHRI legislation should specify in detail the Institution's role, functions, powers, funding and lines of accountability, as well as the appointment mechanism for, and terms of office of, its members. While not every practical aspect needs to be provided in NHRI legislation, it should at least lay out the basic guarantees of the NHRI's independence and specify other overarching principles, in particular as regards the NHRI's mandate and the composition of its decision-making body (including appointment mechanisms, terms and conditions of office, mandate, powers, funding and lines of accountability). The said legislation may then refer to another law or secondary legislation for further elaboration of these aspects.²⁶

23. The Draft Law, being concise, at times lacks sufficient details. For example, it is unclear how the Commission's mandate is reconciled with other existing national human rights bodies. In addition, the appointment and selection procedure would benefit from clear and precise wording to ensure its compliance with the Paris Principles. Also, to ensure independence of the institution, its continuous and efficient functioning of the Commission, the Draft Law should be revised, and transitional provisions should be introduced.
24. When reviewed against international standards for the establishment and functioning of NHRIs, the Draft Law raises a number of concerns with respect to the selection and appointment procedure, the broad and unclear grounds for dismissal and the process related to that, the administrative regulations pertaining to a wide range of issues including staffing; budgeting and recruitment procedures; funding; financial autonomy and functional immunity.

3. MANDATE

3.1 Purpose of the Commission

25. The Draft Law provides for the mandate of the Commission in Article 2 par 1, which states that it is established with 'the aim of promoting and protecting fundamental human rights, in particular those laid down in the Constitution and those identified and recognised by the international conventions to which Italy is a party, and to monitor and guarantee equal treatment and the effectiveness of the instruments of protection against all forms of discrimination'.
26. It is welcome that when defining the aims of the Commission, the Draft Law explicitly refers to human rights promotion and protection functions of the Commission, as required by the Paris Principles (Article 1 par 1), and the SCA (General Observation 1.2 (2018)). The explicit statement of independence of the Commission in the Draft Law, covering all aspects of its operation (Article 2 par 2) is a further positive inclusion, though some ensuing provisions raise questions and may limit the mandate and the Commission's independent status.

3.2 Scope, Functions and Powers of the Commission

27. At the outset, it is noted that in the title of the Draft Law as well as throughout the Draft Law reference is made to 'fundamental human rights'. As this terminology implies a differentiation between human rights and their hierarchy and importance, it is suggested to

²⁶ SCA General Observation 1.1 and Justification and its Justification, 21 February 2018, p. 5.

harmonize the terminology in the Draft Law and commonly refer to ‘human rights and fundamental freedoms’.

28. Further, certain provisions of the Draft Law contain terminology that is either unclear or leaves space for broad interpretation. For example, Article 3 par 1 (a) provides ‘to supervise the respect of human rights and any abuses perpetrated *against peoples in Italy* with reference to domestic law and to international rules and treaties’. The reference to ‘peoples in Italy’ seems to imply that protection is accorded to groups, whereas the persons protected are individuals. It is suggested to consider rephrasing this to ‘everyone within the jurisdiction of the Republic of Italy’. Further Article 1 par 1 refers to ‘European legislation’, which would benefit from clarification. **It is therefore recommended to review the Draft Law to ensure that consistent and clear terminology is used.**
29. In principle, the institution’s tasks should, at the very minimum, encompass the scope defined in the Paris Principles. According to the SCA’s General Observation 1.2, the promotion functions of NHRIs include education, training, advising, outreach and advocacy. General Observation 1.2 provides that the protection mandate of NHRIs should include functions such as “those that address and seek to prevent actual human rights violations, including monitoring, inquiring, investigating and reporting on human rights violations” and may also include individual complaints handling.²⁷ It is also worth reiterating that according to Paris Principles A.1 and A.2, an NHRI should possess “as broad a mandate as possible”.
30. The tasks and functions of the Commission are set out in Article 3 of the Draft Law, with additional complaints handling functions set out in Article 5. The Commission is thus given functions across the aforementioned areas identified by the SCA. **Nevertheless, all the powers and functions of the Commission in Article 3 would benefit from clarification, to specify that they are all applicable to the full mandate of the Commission.**
31. Article 3 par 1 (b) of the Draft Law defines prohibited grounds of discrimination based on nationality, sex, race, language, religion, political opinions and personal and social conditions. These are also reflected in Article 3 of the Constitution. The UN Human Rights Committee’s General Comment No. 18 defines discrimination as “any distinction, exclusion, restriction or preference” based on the list of protected grounds cited in Article 26, which has the purpose or effect of nullifying, or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.²⁸ International treaties, such as CERD, CEDAW and CRPD, contain similar definitions. The EU Equality Directives, on the other hand, refer to situations “where one person is treated less favourably than another is, has been or would be in a comparable situation”.²⁹
32. Further, the discrimination grounds as reflected in Article 3 par 1 (b) include a reference to personal and social conditions, which, echoing the principle behind Protocol 12 to the ECHR, greatly expands the scope of the prohibition of discrimination. This is all in line with the international evolution of antidiscrimination legislation, which has recognized these particular forms of discrimination, and constitute positive elements of the Draft Law. While States do not need to adopt exactly the same definition as the one provided by international treaties, it should be broad enough to encompass all the components as envisaged by various instruments.

27 SCA General Observation 1.2 and its Justification, 21 February 2018.

28 UN HRC, General Comment No. 18 on Non-Discrimination, par 7.

29 Article 2 in both EU Equality Directives.

33. It should also be acknowledged that neither this Draft Law, nor the provisions of international treaties and conventions provide for an exhaustive list of protected grounds based on which discrimination is prohibited. However, certain grounds, which have been recognized internationally as particularly likely to give rise to discrimination, are absent from this list. The CERD noted in its concluding observations to Italy that it remained ‘concerned at the lack of clarity regarding the specific legislation and the provisions which prohibit racial discrimination, in accordance with article 1 of the Convention, in particular with regard to the prohibition of discrimination on the basis of colour and national or ethnic origin, and regardless of whether discrimination was a consequence of “purpose or effect” (Article 1)’.³⁰ The UN Human Rights Committee expressed concern that Article 3 of the Constitution “does not contain a comprehensive list of prohibited grounds of discrimination...” and recommended that Italy “take all measures necessary, including the adoption of comprehensive anti-discrimination legislation, to ensure that its legal framework... provides full and effective protection against discrimination in all spheres, including in the private sphere, and prohibits direct and indirect discrimination...comprehensively addresses all grounds of discrimination, including colour, national origin, citizenship, birth, disability, age, sexual orientation and gender identity and any other status...”.³¹
34. The ECtHR has acknowledged in its case law that the protection against discrimination afforded by Article 14 ECHR extends to the grounds of sexual orientation and gender identity, although they are not expressly mentioned in this provision.³² The grounds of sexual orientation have been recognized by the ECtHR, moreover, as calling for a high level of protection.³³ Finally, the UN High Commissioner for Human Rights,³⁴ the Parliamentary Assembly of the Council of Europe,³⁵ and the Council of Europe Commissioner for Human Rights³⁶ have all called upon states to ensure that anti-discrimination legislation includes gender identity among the prohibited grounds.³⁷
35. Despite the non-exhaustive nature of the grounds set out in the Draft Law, explicitly mentioning the above features sends the message that discrimination on the basis of such characteristics is unacceptable and that these types of discrimination will be punished. For example, when it comes to discrimination on the basis of sexual orientation, drawing from the experience of EU member states, it is generally acknowledged that explicitly sanctioning this form of discrimination has had positive effects.³⁸

³⁰ UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined nineteenth and twentieth periodic reports of Italy, 17 February 2017, par. 6.

³¹ UN Human Rights Committee, Concluding observations on the sixth periodic report of Italy, 1 May 2017, pars 8-9.

³² On nationality, see ECtHR, *Gay gusuz v. Austria* (Application no. 17371/90, judgment of 16 September 1996), par 41 ; on sexual orientation, ECtHR, *Gay gusuz v. Austria* [GC] (Application no. 43546/02, judgment of 22 January 2008), par 91; on gender identity, see ECtHR, *Identoba and others v. Georgia* (Application no. 73235/12, judgment of 12 May 2015), par 96.

³³ On nationality, see *ibid.* par 41 (ECtHR, *Gay gusuz v. Austria*, 16 September 1996); on sexual orientation, see *ibid.* par 91 (ECtHR GC, *Gay gusuz v. Austria*, 22 January 2008).

³⁴ United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity* (4 May 2015) UN Doc No. A/HRC/29/23, par 79(c).

³⁵ Parliamentary Assembly of the Council of Europe, ‘Promoting the human rights of and eliminating discrimination against intersex people’, Resolution 2191 (2017).

³⁶ Commissioner for Human Rights of the Council of Europe, *Human Rights and Gender Identity* (29 July 2009) CommDH/Issue Paper (2009), p. 18.

³⁷ On this issue, see more generally, M. Van den Brink and P. Dunne, *Trans and intersex equality rights in Europe. A Comparative Analysis*, European network of legal experts in gender equality and non-discrimination, European Commission, DG Justice and Consumers, Nov. 2018.

³⁸ See the Report on Harassment related to Sex and Sexual Harassment Law, in 33 European Countries prepared by the Members of the European Network of Legal Experts in the Field of Gender Equality (2012).

36. Taking into account international standards, best practices, and relevant case law,³⁹ it is recommended to list in the Draft Law other grounds for prohibited treatment covering marginalized and vulnerable groups, by specifically referring to sexual orientation,⁴⁰ gender identity,⁴¹ as well as mentioning explicitly national origin, health status, disability⁴², ethnic origin, and age in the list of prohibited grounds. Article 3 par 1 (b) should thus be revised, clarifying the above definitions to avoid in law and practice possible contradictions with international norms.
37. SCA's General Observation 1.11 notes that annual, special and thematic reports serve to highlight key developments in the human rights situation in a country and provide a public account, and therefore public scrutiny, of the effectiveness of an NHRI. The reports also provide a means by which an NHRI can make recommendations to government and monitor respect for human rights by government. SCA General Observation 1.11 recommends that the enabling law "establish a process whereby its reports are required to be widely circulated, discussed and considered by the legislature". In particular, "it is preferable for the NHRI to have an explicit power to table reports directly in the legislature rather than through the executive and, in so doing, to promote action on them."⁴³ The SCA also has emphasized the importance of parliamentary consideration in its examination of NHRI practice⁴⁴. It further stresses the importance for an NHRI to prepare, publicize and widely distribute an annual report on its national situation with regard to human rights in general, and on more specific matters.
38. With respect to the Commission's reporting function, as reflected in Article 3 par 1 (f), it is noted that it would benefit from additional clarity to bring it into line with the requirements of the Paris Principles. In particular, the term 'to draw up an annual report for

39 See the cases of the ECtHR, *Schalk and Kopf v. Austria*, *Vallianatos v. Greece* [GC]; *Taddeucci v. Italy*, *Pajic v. Croatia*, *Orlandi v. Italy* and many others.

40 UN Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, par 2), UN Doc E/C.12/GC/20, 2009, par 32. The same goes for Article 26 of the ICCPR, see UN HRC, *Young v Australia* (Communication No. 941/2000), UN Doc CCPR/C/78/D/941/2000 (2003). - The ECtHR has decided likewise, see for eg. *Smith and Grady v. the United Kingdom* (Application nos. 33985/96 and 33986/96, judgment of 27 September 1999); *Karner v. Austria* (Application no. 40016/98, judgment of 24 July 2003); *Bączkowski and Others v. Poland* (Application no. 1543/06, judgment of 3 May 2007); and *E.B. v. France* [GC] (Application no. 43546/02, judgment of 22 January 2008). See furthermore the Explanatory Report of the Council of Europe to the Protocol No. 12 to the ECHR, Rome, No. 20, explicitly referring to equality and sexual orientation and to the ECtHR's case *Salgueiro da Silva Mouta v. Portugal* (Application no. 33290/96, judgment of 21 December 1999).

41 Although Article 14 of the ECHR does not explicitly list 'sexual orientation' as a protected ground, the ECtHR has expressly stated that it is included among the 'other' grounds protected by Article 14 in a series of cases – see Footnote No. 2, p. 77. Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, par 2), UN Doc E/C.12/GC/20, 2009, par. 32; see furthermore ECtHR, *Goodwin v. the United Kingdom* [GC] (Application no. 28957/95, judgment of 11 July 2002); European Court of Justice, *P. v S. and Cornwall County Council*, Case C-13/94, (1996). See also the ECtHR case of *Vallianatos v. Greece* [GC] (Application nos. 29381/09 and 32684/09, judgment of 7 November 2013), par 77. Sexual orientation is a concept covered by Article 14. The Court has repeatedly held that, just like differences based on sex, differences based on sexual orientation require "particularly convincing and weighty reasons" by way of justification (see, for example, *Karner v. Austria*, pars 37 and 42; *X and Others v. Austria* [GC], pars 99, etc.). Where a difference in treatment is based on sex or sexual orientation, the State's margin of appreciation is narrow (see *Karner v. Austria*, par 41, and *Kozak v. Poland* (Application no. 13102/02, judgment of 2 March 2010, par 92). Differences based solely on considerations of sexual orientation are unacceptable under the Convention (see *Salgueiro da Silva Mouta v. Portugal*, par 36; *E.B. v. France* [GC], pars 93 and 96; and *X and Others v. Austria* [GC], par 99).

42 According to Article 2 CRPD, "[d]iscrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation." Italy ratified the Convention on the Rights of Persons with Disabilities on 15 May 2009.

43 SCA General Observation 1.11 and its Justification, 21 February 2018.

44 For example, in its assessment of the NHRI of Finland in October 2014, the SCA recommended a change in procedure in the enabling law to ensure that the parliament had the opportunity to discuss the NHRI's report, and further, called on the NHRI to provide a consolidated annual report text to the whole parliament and not just a parliamentary committee. The SCA found that "In accordance with Section 12 of the Parliamentary Ombudsman Act, the annual report of the Ombudsman is tabled in Parliament and is discussed in the presence of the Ombudsman. The report of the HRC is presented to the Constitutional Law Committee, to other Committees depending upon the content of the report, and to members of Parliament. However, it is neither tabled nor discussed in Parliament. The SCA is of the view that, as a result of this difference in procedure, Parliament is not provided with a complete account of the work of the FNHRI." SCA Report, Finland, October 2014, p. 9.

the Government' must be interpreted in line with the independence and autonomy of the Commission. Furthermore, it is advisable for the Commission to have the power to lay the annual report directly before parliament for its consideration, without the involvement of the executive in this process. The enabling law shall also ensure that such reports are widely circulated. **It is therefore recommended to revise Article 3 par 1 (f) of the Draft Law accordingly, specifying that the Commission submits its annual report to the parliament for its consideration and discussion.**

39. 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.⁴⁵ Indeed, the main purpose of the debate should be informational in nature, so as to bring attention to the issues raised by the report; it is then up to the parliament to take action to address them, as appropriate.
40. It is observed that despite the scope of the mandate provided for in Article 1 par 1 of the Draft Law, certain powers and functions under Article 3, to receive reports of specific violations or limitations of rights (Article 3 par 1 (c)), is restricted to '*rights recognised in the relevant international acts*' only. **It is recommended to expand the power of the Commission covering all aspects of human rights and freedoms, in line with Article 1 par 1 and to refer latter provision in Article 3 (b). In particular, the Commission should have the authority to receive reports covering all aspects of its mandate. Thus, it is recommended to amend Article 3 par 1 (c) to include the entire substantive mandate of the Commission. This would be in line with the Paris Principles 3 (a) (ii) whereby the NHRI shall have the power to examine "any situation of violation of human rights which it decides to take up".**
41. Furthermore, Article 3 par 1 (c) also seems to limit the assistance in judicial and administrative proceedings to victims of *discriminatory behaviour*.⁴⁶ This is of concern, as this power to provide assistance in judicial and administrative proceedings does not cover the Commission's broader human rights mandate as reflected in Articles 1 and 2 par 2 of the Draft Law. As the power to provide assistance in judicial and administrative proceedings seems not to cover the Commission's broader human rights mandate as reflected in Articles 1 and 2 par 2, it is recommended to revise the Draft Law accordingly. This provision would also benefit from clarification as to the exact role the Commission has in these proceedings. Further, it is important to reconcile this specific power with the mandate of Office for the promotion of equal treatment and the removal of discrimination based on race or ethnic origin (Ufficio Nazionale Antidiscriminazioni Razziali – "UNAR" (see paragraph 55).
42. As to the Commission's awareness-raising power in Article 3 par 1 (g) and the promotion of 'studies, research, training courses and exchanges of experience' in Article 3 par 1 (h), these functions are linked to the topics of equal treatment and the fight against discrimination, respectively. Although promoting equality and non-discrimination is an important function, the Commission's activities should be focusing on various human rights aspects. It is recommended to expand these two functions to the entire mandate of the Commission, and not just these limited aspects.

45 See op. cit. footnote 67, par 82 (2015 Venice Commission's Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina).

46 Article 3 par 1 (c) provides the tasks of the Commission are '...to receive reports of specific violations or limitations of rights recognised in the relevant international acts and to provide assistance, in judicial and administrative proceedings, to persons who consider themselves victims of discriminatory behaviour, including the procedures laid down in article 425 of the Code of Civil Procedure;...'.

43. It is worth emphasizing that in its observations on Italy's Report on the Status of Implementation of the UN CRPD from October 2016,⁴⁷ the Committee expressed concern regarding the lack of an independent and inclusive monitoring mechanism in line with Article 33 par 2 of the CPRD. The Committee recommended Italy to 'immediately establish and implement an independent monitoring mechanism that adheres to the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles)' and to 'provide adequate funding for its functioning and the full involvement of organizations of persons with disabilities in its work'.⁴⁸
44. The Draft Law is silent on this matter and it is not clear whether the new NHRI of Italy will play a role in that respect. At the same time, SCA General Observation 2.9 recommends that the enabling law provides the NHRI with a formal legal mandate as a National Monitoring Mechanism (hereinafter "NMM"). **If the Commission is to serve as NMM, the Draft Law 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, sufficient funding should be provided to allow this new body to have the adequate human, financial, material and technical capacity to guarantee the proper implementation of its mandate both as NHRI and as NMM. In this case, additional resources and capacities should also be allocated to the NHRI, to ensure that its staff possesses the appropriate skills and expertise to fulfil this part of its mandate as well.
45. Finally, it is unclear from the Draft Law how overlap with other existing national monitoring mechanisms and their respective mandates are to be dealt with. For example, one of the national monitoring mechanisms of Italy, UNAR, also covers non-discrimination and equal treatment. This potential overlap in powers and functions should be dealt with caution. Any delineation between the powers of these two bodies should be clarified in the law or worked out in practice, without restricting the Commission's mandate (see paragraph 55 and further).
46. The Paris Principles Sections A.3 (d) and A.3 (e) give NHRIs the responsibility to interact with the international human rights system. The Paris Principles recognise that monitoring and engaging with the international human rights system, in particular the Human Rights Council and its mechanisms (Special Procedures and Universal Periodic Review) and the United Nations Human Rights Treaty Bodies, can be an effective tool for NHRIs in the promotion and protection of human rights domestically. Depending on existing domestic priorities and resources, effective engagement with the international human rights system may include submitting parallel or shadow reports to the Universal Periodic Review, Special Procedure mechanisms and Treaty Bodies Committees, making statements during debates before review bodies and the Human Rights Council, assisting, facilitating and participating in country visits by United Nations experts, and monitoring and promoting the implementation of relevant recommendations originating from the human rights system.⁴⁹
47. While it is appropriate for governments to consult with NHRIs in the preparation of a state's reports to human rights mechanisms, NHRIs should neither prepare the country report nor should they report on behalf of the government. NHRIs must maintain their independence and, where they have the capacity to provide information to human rights mechanisms, do so in their own right. Although the Paris Principle A.3(d) refers to 'contribute to the reports which States are required to submit to United Nations...', the SCA has clarified in General

47 Committee on the Rights of Persons with Disabilities, CRPD/C/ITA/CO/1, Concluding observations on the initial report of Italy, 6 October 2016, para 81-82.

48 Committee on the Rights of Persons with Disabilities, CRPD/C/ITA/CO/1, Concluding observations on the initial report of Italy, 6 October 2016, para 81-82.

49 SCA General Observation 1.4, 21 February 2018.

Observation 1.4 that a ‘NHRI’s contribution to the reporting process through the submission of stakeholder or shadow reports under relevant international instruments should be done independently of the state, and may draw attention to problems, issues and challenges that may have been omitted or dealt with inadequately in the state report’. Article 3 par 1 (j) of the Draft Law would benefit from clarification in this respect by making explicit reference to the power to submit the Commission’s own reports to the UN Treaty Bodies and similar regional and international conventions in a fully independent manner.

48. Section C(c) of the Paris Principles requires a NHRI to, “... publicize its opinions and recommendations”, “...directly or through any press organ...”. At present, certain explicit references are made to inform the general public about the work of the Commission, such as in Article 5 par 7 of the Draft Law that provides that the Commission ‘publishes its measures in a transparent manner and may take any step it deems appropriate to disseminate knowledge of the measures adopted and of the work carried out to the general public’. **However, express provision could be made for the public nature of the broader work of the Commission as it sees fit, and the interaction of the Commission with the international human rights system in line with the requirements of the Paris Principles.**⁵⁰
49. Additional functions are set out in Article 5 of the Draft Law, whereby the Commission “shall carry out investigations on its own initiative, based on individual or collective complaints”. However, the title of the Article “Obligation to report, professional secrecy and sanctions” may lead to a lack of clarity as to the nature of this function. For NHRIs with complaints handling functions, the SCA has a specific General Observation, 2.9, according to which the NHRI should have the ability to receive complaints against both public and private bodies in its jurisdiction from alleged victims or persons acting on their behalf. It should also have the ability to commence a complaint on its own initiative, investigate complaints, including the power to compel the production of evidence and witnesses, and to visit places of deprivation of liberty. In fulfilling its complaint-handling mandate, the NHRI should ensure that complaints are dealt with fairly, transparently, efficiently, expeditiously, and with consistency. In fulfilling its complaint-handling mandate, the NHRI should ensure that complaints are dealt with fairly, transparently, efficiently, expeditiously, and with consistency and that its facilities, staff, and its practices and procedures, facilitate access by those who allege their rights have been violated and their representatives.⁵¹
50. In light of the above, it is therefore recommended to revise the title of the Article 5, clarify the functions laid out in Article 5 as to the nature and scope of the powers set out in it, including investigative powers of the Commission. Furthermore, the Commission must also be given enough human and financial resources to be able to operationalise this part of their function. It is therefore recommended to.

RECOMMENDATION A.1.

To revise Article 3, clarifying the scope of the powers and functions of the Commission, extending them to all aspect of the Commission’s mandate

RECOMMENDATION A.2.

To amend Article 3 par 1 (b) adding other prohibited grounds of discriminatory treatment covering marginalized and vulnerable groups, and to avoid in law and practice possible contradictions with international norms

⁵⁰ See for example SCA General Observation 1.6, 21 February 2018.

⁵¹ SCA General Observation 2.9, 21 February 2018.

RECOMMENDATION A.3.

To clarify in Article 3 par 1 (f) of the Draft Law that the Commission submits its annual report directly to the parliament for its consideration and discussion.

RECOMMENDATION A.4.

To amend Article 3 par 1 (c) to include the Commission's authority to receive reports covering all aspects of its mandate (and not only related to equality and non-discrimination) and its power to provide assistance in judicial and administrative proceedings.

RECOMMENDATION A.5.

To revise Article 3 par 1 (j) of the Draft Law by making explicit reference to the power to submit the Commission's own reports to the UN Treaty Bodies and similar regional and international institutions in a fully independent manner.

3.3 Compatibility with other existing national human rights mechanisms

51. At present, Italy has different thematic human rights monitoring bodies at the national level that have also been entrusted with some functions in the area of human rights, such as the National Authority for the rights of persons deprived of liberty (Garante nazionale dei diritti delle persone private della libertà persona – the National Authority) which serves as the national preventive mechanism (NPM) under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), the Italian Ombudsperson for Children and Adolescents (Autorità Garante per l'infanzia e l'adolescenza – “AGIA”) and the Office for the promotion of equal treatment and the removal of discrimination based on race or ethnic origin (Ufficio Nazionale Antidiscriminazioni Razziali - “UNAR”).
52. The National Authority was established by Legislative Decree no. 146 of 23 December 2013 and is tasked to ensure that deprivation of liberty is implemented in accordance with national standards and international conventions on human rights ratified by Italy. The AGIA was established by Law no. 112 of 12 July 2011, with a view to promote and protect the rights of minors, proclaimed by the Convention on the Rights of the Child. The body has various competences (Article 3 of Law 112/2011) including promotion and awareness raising and adopting opinions and recommendations. The UNAR was created by Legislative Decree no. 225 of 9 July 2003, as a response to Council of the European Union Directive 2000/43/CE. It was established to guarantee the right to equal treatment of all people, regardless of ethnic or racial origin, their age, their religious beliefs, their sexual orientation, their gender identity or whether they are persons with disabilities. Since 2011, UNAR is also the National Contact Point for social inclusion of Roma people. UNAR receives complaints and assists victims of discrimination, carries out inquiries, provides recommendations and non-binding opinions, carries out trainings and research, has an awareness-raising function, and provides two annual reports on the progress and obstacles to promote anti-discrimination in Italy to the parliament and government.
53. The Paris Principles do not prescribe any specific type of NHRI, but rather set out 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. Regardless of which model Italy follows, the NHRI should be strong and independent, and the law-makers should ensure that its mandate is clearly defined, especially *vis-à-vis* the mandates of the other national human rights mechanisms described above.

54. Article 3 par 1 (j) of the Draft Law provides that the Commission cooperates with “...public authorities, institutions, and bodies, such as ombudsmen, guarantors of rights of detainees, however named, and the Office for the promotion of equal treatment and the removal of discrimination based on race or ethnic origin (UNAR)...”. As it stands, however, the Draft Law does not elaborate on the specific modalities of the relationships between the Commission and the above-mentioned existing human rights bodies in Italy.
55. 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 as appropriate have working relationships with other institutions that work on human rights issues, directly or indirectly.⁵² Therefore, in order to avoid potential conflicts and overlaps in functions and to ensure clear and workable relationships, the **Draft Law should clearly define the authority and the mandate of the Commission.** Furthermore, practice has shown that in States that have both an NHRI in compliance with the Paris Principles and other human rights institutions dealing with specialized thematic areas, formal work arrangements such as MoUs are put in place to ensure modalities for effective coordination and collaboration and to delineate competences between them.

RECOMMENDATION B.

To clearly define the authority and the mandate of the Commission in the Draft Law in order to avoid potential conflicts and overlaps in functions with the other domestic institutions promoting and protecting human rights.

3.4 The Commission’s Powers to Perform its Mandate

56. General Observation 1.2 requires that an NHRI’s mandate should provide it with the authority to obtain the statements or documents that it needs in order to assess situations raising human rights issues. Moreover, General Observation 1.2 provides that the NHRI should be granted unannounced and free access to inspect and examine any public premises, documents, equipment and assets without prior written notice, and be authorized to conduct a full investigation into all alleged human rights violations, including those committed by the military, police and security services. Specifically, the NHRI, through its representatives, should be guaranteed free access at any time to all places where individuals deprived of their liberty are or may be detained, without the need for consent from any agency and without prior notification. This is one of the most important safeguards for the effective operation of the NHRI in the areas related to the rights of detainees or prisoners and should be clearly stipulated in underlying legislation. A person deprived of liberty should also have the opportunity to freely communicate either in person or through any other means of communication, without any supervision, with NHRI representatives. At

⁵² See *op. cit.* footnote 15, page 144 (2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions).

the same time, the work under this aspect of the NHRI's mandate should be closely coordinated with the National Authority (see paragraph 84 *supra*).

57. The Venice Principles provide that “the Ombudsman shall be entitled to request the cooperation of any individuals or organisations who may be able to assist in his or her investigations. The Ombudsman shall have a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential. This includes the right to unhindered access to buildings, institutions and persons, including those deprived of their liberty.”⁵³
58. Pursuant to the pars 3 and 5 of Article 3 of the Draft Law, the Commission has a power to “ask public bodies and administrations for access to databases and archives”, while state bodies “shall cooperate with the Commission” with a view to provide accesses and verifications. This enables the Commission to exercise its mandate to promote and protect human rights effectively and independently. While acknowledging that the National Authority (Garante nazionale dei diritti delle persone private della libertà persona), may have a power (and indeed needs to be guaranteed with such) of an unannounced visits to the places of deprivation of liberty, the Draft Law should provide the Commission with similarly effective powers. **It is recommended to revise the Draft Law granting the Commission with the right to access to any premises, documents or other information, and a requirement for bodies and individuals to fully co-operate in any investigations. This should apply to both public and private sectors.**

3.5 Follow-up to the Commission's Recommendations

59. The Draft Law currently does not regulate whether, and how, state authorities are expected to respond to the Commission's recommendations. The SCA encourages governments to respond to advice and requests from NHRIs, and to indicate, within a reasonable time, how they have complied with their recommendations. It also recommends that NHRIs publish information on how authorities respond to their recommendations, and has raised concerns where the state does not respond to the NHRI's recommendations.⁸³
60. In the Council of Europe Committee of Ministers' 2021 Recommendation on NHRIs, it notes that ‘Member States should implement the recommendations of NHRIs’ and that they ‘are encouraged to make it a legal obligation for all addressees of NHRI recommendations to provide a reasoned reply within an appropriate time frame, to develop processes to facilitate effective follow-up of NHRI recommendations, in a timely fashion and include information thereon in their relevant documents and reports’.⁸⁴ With a view to enhance effectiveness of the Commission's work, it is therefore recommended to include in the Draft Law a requirement for the relevant public body to respond to the Commission's recommendations arising from any area of its mandate in a timely manner.

RECOMMENDATION C.

To include in the Draft Law a provision requiring that public body have to respond in a timely manner to the Commission's recommendations arising from any area of its mandate.

4. INDEPENDENCE AND APPOINTMENT PROCEDURE

4.1 Independence of the Commission

61. The Paris Principles require that an NHRI is, and is perceived to be, able to operate independent of government interference. This requirement seems to be met by the Draft Law, which provides in Article 2 par 2 for the full independence of the Commission, in terms of its organization, functioning, and financing. In addition, Article 2 par 3 of the Draft Law states as one of the appointment criteria for Commission members that the person shall have ‘acknowledged independence’. Nevertheless, the ensuing provisions cause the principle of independence to be caveated to an extent that concern arises as to their compatibility with the Paris Principles.
62. Article 4 par 3 of the Draft Law⁵⁴ regarding administrative regulations on the functioning of the Commission may be problematic and undermine its independence and functioning as an NHRI. The functioning, staffing, internal organisation, budget, accounts, management of expenses, functions of the director and recruitment procedures are placed in the hands of a Government Ministry. The Commission’s role in these critical aspects of its operation is relegated to one of ‘consultation’.
63. According to the SCA General Observation 1.9, from Paris Principles B1, B2 and B3 it can be derived ‘that members of parliament, or representatives of government agencies, should not in general be represented on, nor should they participate in decision making, since they hold positions that may at times conflict with an independent NHRI’.⁵⁵ Where such representatives are present, it notes that enabling laws should indicate that such representatives can act only in advisory capacity and that measures should be established, for example in the NHRI’s rules of procedure, to ensure that these persons are unable to inappropriately influence decision-making.
64. The SCA has explicitly referred to the problematic nature of internal organizational/operational issues being regulated by government decree.⁵⁶ It notes in General Observation 2.7 that where certain aspects of the administration of an NHRI are regulated by the Government, such regulation must not compromise the NHRI’s ability to perform its role independently and effectively. While it may be appropriate that the State imposes general regulatory requirements to promote ‘fair, transparent and merit-based selection processes, financial propriety in the use of public funds, or operational accountability’⁵⁷, such regulation should not result in the Commission being required to seek government approval prior to carrying out its legislatively mandated activities. This could compromise the Commission’s independence and autonomy. For this reason, it is important that the relationship between the Government and the NHRI be clearly defined so as to avoid any undue Government interference. Once the Commission is established it should be able to make determinations for the operations of the institution.
65. It is thus recommended that Article 4 par 3 be removed or substantially revised, as it undermines the independence and autonomy of the Commission. The Draft Law should

⁵⁴ Article 4 par 3 of the Draft Law provides “Within thirty days of the date of entry into force of this law, by decree of the President of the Council of Ministers, on the proposal of the Minister for Foreign Affairs and International Cooperation, in agreement with the Ministers for the Economy and Finance and for Public Administration, after hearing the opinion of the competent parliamentary committees and after consulting the Commission, regulations concerning the functioning, the staffing, the internal organisation, the budgets, the accounts and the management of expenses, the functions of the Director of the Secretariat and the procedures and methods for recruiting the Office’s staff shall be adopted...”

⁵⁵ SCA General Observation 1.9 and its Justification, 21 February 2018, p. 24.

⁵⁶ SCA, ‘Accreditation Report - Indonesia (Komnas HAM)’ (March 2017) 27; SCA, ‘Accreditation Report - Greece (GNCHR)’ (March 2015) 29.

⁵⁷ SCA General Observation 2.7 and its Justification, 21 February 2018, p. 44.

either refer to relevant uniform rules that are applied to public institutions (for instance, such as judicial bodies), provided that such rules do not impair on the Commission's independent and autonomous functioning. In the absence of such rules, the Draft Law should provide the legal basis for the Commission to determine its internal organizational and operational issues.

66. Finally, 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.⁵⁸ This means that external entities should not be in a position to influence the work and operation of the NHRI.⁵⁹ This is important to ensure that the NHRI is fully independent in its decision-making and its operation, and to avoid potential conflicts of interest.
67. The Draft Law could also be supplemented by adding that the Commission will base its strategic priorities and activities on its determination of the human rights priorities in the country, in consultation with diverse societal groups as appropriate (see SCA General Observation 1.7). Permanent or *ad hoc* advisory boards with a pluralist composition could for instance assist the Commission in determining its programming, annual work plans and priorities. At the same time, the independence of the NHRI is without prejudice to the importance of effective co-operation between NHRIs and other institutions, including Parliament, non-governmental organizations and supra-national human rights bodies.⁶⁰

RECOMMENDATION D.

To remove Article 4 par 3, as it undermines the independence and autonomy of the Commission. The Draft Law should instead refer to uniform rules that are applied to State agencies for regulating their own internal organizational or operational issues, to the extent these are applicable to the Commission, provided that such rules shall not impair on the Commission's independence and autonomy. In the absence thereof, the Draft Law should provide the legal basis for the Commission to determine its internal organizational and operational issues.

4.2 Functional immunity

68. The functional immunity (or “non-liability”) of members of NHRIs' governing bodies exists as an essential corollary of their institutional independence and protects their ability to engage in critical analysis and commentary on human rights issues. Because their tasks require special examinations/investigations of frequently politically sensitive issues and reporting on actions or failures to act of the Government, often resulting in strong criticism of authorities, such institutions may be a likely target of actions motivated by political or

58 SCA General Observation 1.9 and its Justification, 21 February 2018.

59 *ibid.* General Observation 1.9.

60 See *op. cit.* footnote **Error! Bookmark not defined.**, General Observation 1.5 and its justification. See also 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, <<http://nhri.ohchr.org/EN/Themes/Portuguese/DocumentsPage/Belgrade%20Principles%20Final.pdf>>.

other interests. Functional immunity is therefore essential to ensure that a NHRI's independence is not compromised due to fear of criminal proceedings or civil action by an allegedly aggrieved individual or entity, including public authorities.

69. Acts performed in an official capacity are those related to the mandate and functions of the NHRI, that are sanctioned or authorised by the NHRI and/or which the NHRI (including its staff) has been empowered to perform.⁶¹ Functional immunity should cover words spoken or written, recommendations, decisions and other acts undertaken in good faith while performing these functions.⁶² Indeed, the NHRI (including its staff) should be protected from civil, administrative or criminal claims when making a recommendation, adopting decisions, or voicing an opinion or views on a human rights matter.
70. SCA General Observation 2.3 requires that such protection be given to members and staff of the NHRI as “external parties may seek to influence the independent operation of an NHRI by initiating, or by threatening to initiate, legal proceedings against a member of the decision-making body or a staff member of the NHRI”. For this reason, members and staff of an NHRI should be protected from both criminal and civil liability for acts undertaken in good faith in their official capacity. Such protections serve to enhance the NHRI's ability to engage in critical analysis and commentary on human rights issues, safeguard the independence of senior leadership of the NHRI, and promote public confidence in the NHRI.⁷⁸
71. The SCA notes that ‘it is now widely accepted that the entrenchment of these protections in law is necessary for the reason that this protection, being one that is similar to that which is granted to judges under most legal systems, is an essential hallmark of institutional independence.’ In exceptional circumstances where functional immunity is not part of the legal tradition, the NHRI must provide the SCA with an explanation as to why this is the case. The Venice Commission has similarly underscored the need for functional immunity for independent human rights bodies.⁶³
72. On several occasions, the SCA 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.⁶⁴ Although not expressly required by the Paris Principles, it is generally considered positive to extend the functional immunity to NHRI staff.⁶⁵ The Draft Law in its current form does not contain any provisions aiming to protect the functional immunity of members of the NHRI's leadership body or of the NHRI's staff. In the underlying legislation, the scope of functional immunity should thus generally be

⁶¹ *Op. cit.* footnote 37, page 250 (UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions (2010)).

⁶² *Op. cit.* footnote 6, General Observation 2.3 (ICC General Observations). 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), paragraphs 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 15, par 7.5 (PACE Recommendation 1615 (2003)).

⁶³ CDL-AD(2009)043 – 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), §§12, 27 and 29. 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, OSCE/ODIHR Opinion on the Draft Amendments to the Act on Establishment of the Slovak National Centre for Human Rights, 21 January 2019, par 81 and further. See also OSCE/ODIHR Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland, 31 October 2017, par 42 and further.

⁶⁴ See e.g., Sub-Committee on Accreditation, Report and Recommendations of the Session (May 2016), page 37, <<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20MAY%202016-English.pdf>>.

⁶⁵ 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, <<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, <[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)>.

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.⁶⁶ Such protections serve to enhance the NHRI's ability to engage in critical analysis and commentary on human rights issues, safeguard its independence, and promote public confidence in the NHRI. It is therefore recommended to revise the Draft Law (and/or other relevant legislative acts) accordingly. The relevant provision should specify that functional immunity should apply even after the end of the leadership body's mandate or after a staff member ceases his/her employment with the NHRI.⁶⁷

73. An additional safeguard to protect functional immunity is to guarantee in legislation the inviolability of the NHRI's premises, property, means of communication and all documents, including internal notes and correspondence,⁶⁸ as well as of baggage, correspondence and means of communication belonging to the members of the NHRI's leadership body and professional staff.⁶⁹ **It is recommended to supplement the Draft Law (or separate act) accordingly.**
74. It is noted that different rules and procedures may be considered for lifting staff immunities.⁷⁰ This should be based on clear criteria, similar to the ones taken into consideration when debating whether or not to lift the Commission members' immunity and subject to judicial review.
75. 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 members of an NHRI governing body, should be above the law.⁷¹ Functional immunity should not extend to opinions or conduct that are not part of the exercise of the NHRI's mandate or functions.⁷² **In principle, the NHRI's members and staff should only benefit from functional immunity in the exercise of lawful functions. There should be no immunity from**

66 Op. cit. footnote **Error! Bookmark not defined.**, General Observation 2.3, which 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, <[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 11, par 7.5 (PACE Recommendation 1615(2003)). 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, par. 39. See also OSCE/ODIHR Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland, 31 October 2017, par 43.

67 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 69, <[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)>; 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, <<http://www.legislationline.org/documents/id/16665>>.

68 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 52, <<http://www.legislationline.org/documents/id/17976>>.

69 See e.g., op. cit. footnote 67 (?), par 23 (2011 OSCE/ODIHR-Venice Commission Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro).

70 OSCE/ODIHR Final Opinion on the Draft Act Amending the Act on the Commissioner for Human Rights of Poland, 2016, par. 42.

71 SCA General Observation 2.3 and its Justification, 21 February 2018 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".

72 See as a matter of comparison, when dealing with the non-liability of parliamentarians, op. cit. footnote 22, par 182 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)). See also the case of Cordova v. Italy, ECHR judgment of 30 January 2003 (Application nos. 40877/98 and 45649/99), par 63, where the ECHR held that the behaviour of the parliamentarian in question was "not connected with the exercise of parliamentary functions in the strict sense" and that it was therefore a violation of Article 6 of the ECHR to deny access to court.

criminal liability for acts that, even if undertaken during the performance of duties, inherently fall outside the scope of the official mandate,⁷³ for instance accepting bribes, corruption, influence peddling or other similar criminal offenses.⁷⁴

76. This concept derives from the principle of equality before the law, which is also an element of the rule of law.⁷⁵ Indeed, the SCA has recognized this, and has stated that **the law should clearly establish the grounds, and a clear and transparent process, by which the functional immunity of members of the decision-making body may be lifted.**⁷⁶ **This aspect should also be addressed in the Draft Law (or separate act).** 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,⁷⁷ 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.⁷⁸ It is recommended to supplement the Draft Law in that respect.
77. The legislation could for instance specify that the following criteria should be taken into consideration in favour of maintaining immunity and refusing to approve the initiation of criminal proceedings, e.g., (i) when the allegations involve words spoken or written, or any acts falling within the scope of the functional immunity(ies); (ii) when they are clearly and obviously unfounded; (iii) when they are clearly brought for partisan-political motives (*fumus persecutionis*) in order to harass or intimidate the Commissioner or to interfere with his or her mandate; or (iv) when legal proceedings would seriously endanger the institutional functions of the Commissioner.⁷⁹
78. On the other hand, the following could be cited as considerations in favour of lifting immunity, e.g., (i) when the respective request is based on sincere, serious and fair grounds; (ii) when the person concerned is caught in flagrante delicto; (iii) when the alleged offence is of a particularly serious nature (the SCA often cites corruption practices as an example);⁸⁰ (iv) when the request concerns criminal conduct which is not strictly related to the performance of Commission's functions but concerns acts committed in relation to other personal activities; (v) when proceedings should be allowed in order not to obstruct justice or in order to safeguard the authority and legitimacy of the Commission; (vi) when the Commission member requests that immunity be lifted.⁸¹

⁷³ *Op. cit.* footnote 37, page 250 (UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions (2010)).

⁷⁴ See e.g., *op. cit.* footnote 45, page 20 (ICC Sub-Committee on Accreditation Report (March 2015)), expressly referring to corruption.

⁷⁵ See Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, 18 March 2016, pages 18-19, <[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)>.

⁷⁶ See e.g., SCA Report and Recommendations of May 2016, p. 37.

⁷⁷ 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),

<[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)>.

⁷⁸ See e.g., 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).

⁷⁹ *ibid.* pars 188-189 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

⁸⁰ See e.g., page 27 of the ICC Sub-Committee on Accreditation Report (November 2013), page 27, available at <http://nhri.ohchr.org/EN/AboutUs/ICC/Accreditation/Documents/SCA%20NOVEMBER%202013%20FINAL%20REPORT%20ENGLISH.pdf>; and *op. cit.* footnote 45, page 20 (ICC Sub-Committee on Accreditation Report (March 2015)).

⁸¹ *Op. cit.* footnote 22, par 189 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

79. Finally, regarding the lifting of immunity, SCA General Observation 2.3 recommends that “a special majority of parliament” be required. However, the decision to lift immunity should not be exercised by an individual, but rather by an appropriately-constituted body such as the superior court or by a special majority of parliament. **It is recommended that national law provide for well-defined circumstances in which these protections may be lifted in accordance with fair and transparent procedures.**

RECOMMENDATION E.

To introduce and define in the Draft Law (and/or in other relevant legislative acts) the scope of functional immunity, in particular protecting the Commission members and relevant staff from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacity.

4.3 Transition Period to Ensure Stability and Continuity of the Commission

80. Principle 3 of Council of Europe’s Committee of Ministers *Recommendation (2019)6* stipulates that the process of the selection and appointment of the head of an ombuds institution should promote its independence. In this context, Principle 3 explicitly states that “*arrangements should be in place so that the post of the head of any Ombudsman institution does not stay vacant for any significant period of time*”. In this, *Recommendation (2019)6* and its annexed principles go even further than the Paris Principles, by not only noting the importance of ensuring the smooth conduct of NHRI activities, but also stressing the need to avoid vacancies in the institution’s leadership for a lengthy amount of time. Moreover, as expressly recommended in Principle 13 of the *Belgrade Principles*, vacancy in the composition of the membership of a NHRI “*must be filled within a reasonable time*” and “[a]fter expiration of the tenure of office of a member of a NHRI, such member should continue in office until the successor takes office”. The SCA has in the past noted with great concern that the continued failure to appoint a head of an NHRI had an actual or perceived impact on its permanency and institutional independence, and restricted the ability of this institution to effectively carry out the full extent of its mandate.⁸²
81. Indeed, it is precisely for this reason that ODIHR has repeatedly urged OSCE participating States to include transitional provisions in their NHRI legislation that will allow the parting head of the institution to remain in office until his/her successor takes up office.⁸³ ODIHR has specifically recommended with respect to incumbent Ombudsperson, as a matter of good practice, to ensure that he or she remain in remain in office after the end of his/her terms until a successor is appointed, in order to ensure the continuity of the institution and ensure proper transfer of duties between the old and new office-holder. It is important, nonetheless, that such a succession is carried out expeditiously.

⁸² See e.g., SCA, Report and Recommendations of the Session, held on 15-19 October 2018 in Geneva, Decision 3.1 on the Defensor del Pueblo de la Nación Argentina.

⁸³ See, e.g. ODIHR, Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland, 6 February 2017, par 53; and 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 Tunisia, 17 June 2013, par 43. See also ODIHR, Opinion on the Law of the Republic of Lithuania on the Seimas Ombudsmen, 21 September 2011, par 44, where such a transitional provision was considered reasonable in cases where an Ombudsperson’s mandate expires.

82. The Venice Commission has made similar recommendations in its opinions on NHRI legislation.⁸⁴ In particular, it has recommended that after the expiration of the term of an Ombudsperson, and prior to the selection of a new one, the current office holder should continue in office until the successor takes office. The Venice Commission emphasized that “[t]his would help to avoid a situation where no Protector holds an office - as happens sometimes for up to several months - with only a deputy as an acting ombudsman filling in temporarily”, noting “the need for the proper transfer of Protector’s duties between the old and the new office holder”.⁸⁵ Moreover, the Venice Principles clearly state that “States shall refrain from taking any action aiming at or resulting in the suppression of the Ombudsman institution or in any hurdles to its effective functioning, and shall effectively protect it from any such threats”. Failing to ensure continuity of leadership would clearly represent a significant hurdle to the effective functioning of the NHRI.
83. Therefore, it is of great importance that legislation establishes procedures to ensure NHRIs’ continuous functioning without interruption, either through provisions allowing Commission members to continue their mandate until their successor(s) is (are) appointed or through the introduction of clearly defined rules, which would allow NHRIs to continue to effectively perform their functions.
84. Bearing in mind the need to ensure the continuous functioning and independence of their NHRIs, and to ensure smooth transitions of leadership, numerous OSCE participating States have included transitional provisions that allow an office-holder to remain in office until a successor is appointed. By definition, provisions such as these do not unduly extend the leader’s term of office as they are transitional or temporary in nature. The NHRIs in the majority of countries with similar transitional modalities have received “A-status” accreditation.⁸⁶
85. For example, a number of states, e.g. Albania,⁸⁷ Belgium,⁸⁸ Bosnia and Herzegovina,⁸⁹ Bulgaria,⁹⁰ Czech Republic,⁹¹ Denmark,⁹² Lithuania,⁹³ Moldova,⁹⁴ Portugal⁹⁵ and Romania,⁹⁶ have stipulated that the heads of their NHRIs shall remain in office until their successor has been elected or appointed, or has taken the oath of office. Such provisions are included in primary legislation even if the respective maximum length of the mandate is mentioned in the Constitution. Such a transitional modality is also provided in the case

84 See e.g., Venice Commission, Opinion on the Draft Amendments to the Law on the Protector of Human Rights and Freedoms of Montenegro, 13 October 2009, par 16.

85 *ibid.* par 16.

86 Notably, Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Finland, Georgia, Latvia, Lithuania, Moldova, Portugal, Serbia and Spain.

87 See Article 9 of the Law on the People’s Advocate of Albania, passed on 4 February 1999, last amended in 2014.

88 Regarding the Federal Ombudsman, see Article 3, par 1, last sentence of the Federal Ombudsmen Act (1995, as amended).

89 See Article 12 of the Law on the Human Rights Ombudsman of Bosnia and Herzegovina of 12 December 2000, last amended in 2006.

90 See Article 13 of the Ombudsman Act of Bulgaria, in force since 1 January 2004, last amended in 2013.

91 See Section 4, par 1 of the Act on the Public Defender of Rights of the Czech Republic (8 December 1999, last amended in 2017).

92 See Section 1 (3) of the Ombudsman Act of Denmark (1996, as amended).

93 See Article 9 par 4 of the Law of the Seimas Ombudsmen of Lithuania of 3 December 1998, last amended in 2017.

94 See Article 5 of the Law on the People’s Advocate of 9 May 2014 of Moldova, last amended in 2019.

95 See Article 6 of the Statute of the Ombudsman of Portugal of 9 April 1991, last amended in 2013.

96 See Article 8 of the Law on the Organization and Functioning of the Ombudsman of Romania of 13 March 1997, last amended in 2018

of the EU Ombudsman.⁹⁷ Other countries, notably Croatia,⁹⁸ Finland,⁹⁹ Georgia,¹⁰⁰ Latvia,¹⁰¹ Montenegro,¹⁰² Serbia,¹⁰³ and Spain,¹⁰⁴ have stated that, until a new head of the institution has taken office, one or more deputy heads shall act as the head of the NHRI. In these countries, generally the deputy heads either enjoy the same privileges and immunities as the head of the NHRI, or the legislation specifies that when performing the duties of the head during the transition period until appointment of the new office-holder, the deputy head shall enjoy the rights, legal guarantees and immunity granted to the head of the NHRI.¹⁰⁵ In France, the legislation provides that the replacement of NHRI collegium members should be decided at least eight days before the end of their term of office and if successors are not appointed by that time, the collegium of the NHRI should propose a candidate to the appointing authority.¹⁰⁶ Such provisions stress the importance of the principle of continuity of the operations of the NHRI for the sake of victims of human rights violations and the need to avoid any vacuum in that regard.

86. It is recommended to expand Article 2 pars 5 and 9 by including transitional provisions to ensure continuity of the Commission when a leadership position becomes unexpectedly vacant. It is of great importance that the legislation establishes procedures to ensure the Commission's continuous functioning without interruption, either through provisions allowing Commission members to continue their mandate until their successor is appointed or through the introduction of other clearly defined rules, which would allow NHRIs to effectively perform their functions. This should include clarity on timelines and procedures for replacement, including whether the 'replacement' commission members serve a new full term or the remaining term of the original commissioner.

RECOMMENDATION F.

To expand Article 2 pars 5 and 9 by including transitional provisions ensuring the Commission's functioning without interruption, including by extending term of office of the Commission member, when a substitute is not elected.

⁹⁷ See Article 7(2) of the Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom); and Rule 231 of Title X of the European Parliament Rules of Procedure.

⁹⁸ See Articles 12 and 14 of the Ombudsman Act of Croatia of 29 June 2012.

⁹⁹ See Section 16 of the Parliamentary Ombudsman Act of Finland of 1 April 2002, last amended in 2015.

¹⁰⁰ See Article 9 of the Organic Law on the Public Defender of Georgia of 16 May 1996, last amended in 2018.

¹⁰¹ See Section 16 of the Ombudsman Law of Latvia of 5 April 2006, last amended in 2011.

¹⁰² See Article 14 of the Law on the Protector of Human Rights and Freedoms of Montenegro of 10 July 2003, last amended in 2018.

¹⁰³ See Article 16 of the Law on the Protector of Citizens of Serbia of 2005, last amended in 2007.

¹⁰⁴ See Article 5 of the Organic Law on the Public Defender of Spain of 7 May 1981, last amended in 2009.

¹⁰⁵ See e.g., Article 8 of the Ombudsman Act of Croatia of 29 June 2012, which states that "[t]he Ombudsman and his/her deputies shall enjoy immunity as do members of the Croatian Parliament"; Article 9 of the Organic Law on the Public Defender of Georgia of 16 May 1996, last amended in 2018, which states that when performing the duties of the current Public Defender of Georgia until a new Public Defender is elected, the Deputy Public Defender "shall enjoy the rights, legal guarantees and immunity granted to the Public Defender of Georgia"; Section 16 of the Ombudsman Law of Latvia of 5 April 2006, last amended in 2011, provides that "[d]uring the absence of the Ombudsman his or her functions and tasks shall be performed by the Deputy Ombudsman, who during this period of time shall have the same powers as the Ombudsman has"; Articles 9-12 of the Law on the Protector of Human Rights and Freedoms of Montenegro, which grants the same privileges and immunities to the Deputy Protector; Article 10 of the Law on the Protector of Citizens of Serbia of 2005, last amended in 2007, providing for the same immunity as the Protector of Citizens; Article 6 par 4 of the Organic Law on the Public Defender of Spain of 7 May 1981, last amended in 2009, which provides that the rules on immunities, prerogatives and incompatibilities "shall be applicable to the Deputy Ombudsmen in the performance of their duties".

¹⁰⁶ See the French Law n°2017-55 of 20 January 2017 on the general statute of independent administrative authorities, which includes the Commission Nationale Consultative des Droits de l'Homme (French NHRI).

5. THE LEADERSHIP, STAFFING, OPERATION AND FUNDING OF THE COMMISSION

5.1 Pluralism and Selection and Appointment Process

87. The Commission will consist of five members (Article 2 par 3 of the Draft Law). Paris Principles B.1, refers to the need to ensure “the pluralistic representation of social forces (of the civilian society) involved in the promotion and protection of human rights”. While there are diverse models for ensuring pluralism in the composition of NHRIs,¹⁰⁷ it is generally acknowledged that when both the leadership and the staff are representative of a society’s social, ethnic, religious and geographic diversity and are gender-balanced, this helps promote public confidence in the institution.¹⁰⁸ Such an approach also ensures that the NHRI has relevant experience and insights as to the needs of diverse sectors of society and enhances the effectiveness of the NHRI, as well as its accessibility and real and perceived independence.¹⁰⁹ As specifically stated in General Observation 1.7, a “diverse decision-making and 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”.¹¹⁰
88. According to Article 2 par 4 of the Draft Law, the composition of the Commission shall ensure adequate gender representation, taking into account ethnic diversity in society, the full range of vulnerable groups and ensuring respect for diversity as well as the pluralist representation of the social forces involved in the promotion and protection of human rights. This is a welcome element in the Draft Law that aims to ensure pluralism in the Commission.
89. The SCA considers that a selection and appointment process requires competent authorities to: a) publicize vacancies broadly; b) maximize the number of potential candidates from a wide range of societal groups; c) promote broad consultation and/or participation in the application, screening, selection and appointment process; d) assess applicants on the basis of pre-determined, objective and publicly available criteria; and e) select members to serve in their own individual capacity rather than on behalf of the organization they represent.¹¹¹ The Venice Commission recommendation for Ombudspersons notes in this respect that ‘the way according to which an Ombudsman is appointed is of the utmost importance as far as the independence of the institution is concerned and the independence of the Ombudsman is a crucial corner stone of this institution’.¹¹² The selection and appointment process for the NHRI should be detailed with particular emphasis on transparency, broad consultation and participation of diverse societal forces.

107 SCA General Observation 1.7 and its Justification, 21 February 2018 which refers to e.g., the requirement that members of the decision-making body shall represent different segments of society, ensure pluralism via the appointment procedures of the governing body or through procedures enabling effective co-operation with diverse societal groups (e.g., advisory committees, networks, consultations or public forums) or reflect pluralism by having staff that are representative of diverse segments of society.

108 *ibid.* See also e.g., ODIHR Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland, 2017, par. 46; and Opinion on the Draft Amendments to the Law on Civil Service of Ukraine, 10 May 2016, par 42.

<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’ Recommendations for Effective Protection and Promotion of Human Rights (2001), page 10, Recommendation 2.4, <<https://www.amnesty.org/en/documents/ior40/007/2001/en/>>.

109 *ibid.*

110 See also SCA General Observation 1.7 and its Justification, 21 February 2018, which states that the SCA considers the “pluralistic composition of the NHRI to be fundamentally linked to the requirement of independence, credibility, effectiveness and accessibility”.

111 SCA General Observation 1.8 and its Justification, 21 February 2018.

112 Venice Commission, ‘Opinion on the draft law on prevention and protection against discrimination’ (19 March 2018) CDL-AD(2018)001, para 69.

90. According to the SCA, integrity and quality of members is a key factor in the effectiveness of the NHRI and therefore selection criteria that ensure the appointment of qualified and independent decision-making members should be established in relevant legislation, regulations or binding administrative guidelines, as appropriate, and made publicly available prior to appointment. The Draft Law at present does not provide for these essential provisions of the SCA requirements. **It is recommended to amend the Draft Law, either Article 2 par 4 or other provisions, to include relevant selection criteria and express provision regulating and safeguarding the selection and appointment process.**
91. In addition to the requirement for broad consultation and/or participation in the application and screening process, the panel to screen and select the members should be diverse.²⁶ It is also observed that the nomination processes should not be overly political. For example, in reviewing the NHRI of Albania, the SCA was concerned that only candidates supported by at least twenty-eight members of parliament were able to be considered.¹¹³ At the same time Article 2 par 4 of the Draft Law provides that the Commission members ‘shall be appointed by a decision requiring the agreement of the Presidents of the Senate and the Chamber of Deputies, by a two-thirds majority of the respective members, according to terms established by parliamentary rules’. This provision reads ambiguously as it is unclear whether, even if a two-thirds majority is obtained, this would be sufficient to appoint a Commission member in the absence of the consent of both the President of the Senate and of the Chamber of Deputies. It should be noted that selection panels comprised entirely of political, governmental or administrative representatives have been found to be problematic by the SCA.¹¹⁴ It is important that politicisation of selection be avoided, and that other societal groups including civil society be included.
92. The Draft Law lacks provision for a consultations process relating to the selection and appointment process. A method of consultation could also be expressly included in the Draft Law to allow civil society actors to be involved in the selection and appointment process. This can be through directly soliciting proposals from civil society or allowing civil society to directly participate in the evaluation of candidates.¹¹⁵ **The Draft Law does not make it clear who will be on the selection panel, or how the process will work in practice. It is recommended that the Draft Law specifies what criteria members of the selection panel need to satisfy, bearing in mind the requirements for reflecting diversity in society and civil society/NGO participation. It should also specify the role of the selection panel, and from and to whom recommendations for the Commission’s members are to be made.**
93. The provisions in the Draft Law contain further a number of unclear criteria for selection and appointment. One may be as a result of translation, though read at present it seems that the final clause of Article 2 par 3 of the Draft Law refers to those “who have held managerial positions in public or private international organizations” as a standalone criterion. **This would need to be revised as it would mean that a member of the Commission could be considered as sufficiently qualified if they met this sole criterion.**

113 SCA, ‘Accreditation Report - Albania (PA)’ (October 2014) 18-19. A similar concern was expressed in relation to the process of the NHRI of Ukraine where the candidates were proposed either by the chair of the parliament or no less than one-fourth of the deputies. SCA, ‘Accreditation Report - Ukraine (UPCHR)’ (October 2014) 35-36.

114 For example, Algeria (selection committee comprising the First President of the Supreme Court, the President of the Council of State, the President of the Court of Auditors, and the President of the National Economic and Social Council) SCA, ‘Accreditation Report - Algeria (CNDH)’ (May 2018) 15; Sri Lanka (President from the Constitutional Council, a ten-member body that included the Prime Minister, Speaker of Parliament, Leader of the Opposition, and at least three other members of parliament) SCA, ‘Accreditation Report - Sri Lanka (SLHRC)’ (May 2018) 36.

115 Langtry & Roberts Lyer (2021), citing SCA, ‘Accreditation Report - Algeria (CNDH)’ (May 2018) 15. Similar recommendations were made to Croatia: SCA, ‘Accreditation Report - Croatia (ORC)’ (March 2019) 18; SCA, ‘Accreditation Report - Ukraine (UPCHR)’ (October 2019) 21-22.

RECOMMENDATION G

To include in Article 2 par 4 of the Draft Law necessary safeguards for the selection and appointment process with particular emphasis on transparency, broad consultation and participation of diverse societal forces. The Draft Law should also define criteria, which members of the selection panel need to satisfy, bearing in mind the requirements for reflecting diversity in society and civil society/NGO participation. It should also specify the role of the selection panel, and to whom their recommendations for the selection of Commission's members are to be made.

5.2 Terms of the Commission Members

94. The Paris Principles require a 'stable mandate' as it is critical to ensuring independence of a NHRI. The SCA has set out the requirements for a stable mandate in General Observation 2.1 of 2018. Of particular importance here are the length of terms of office, the term of office of the president, and the procedures for dismissal. Further, the SCA specifies that NHRI members should be full time.¹¹⁶ This is unclear from the present Draft Law and should be clarified with an explicit provision.
95. The SCA has recommended to include clearly defined fixed terms of office in law. It has suggested terms of office of between 3 and 7 years, renewable once. However, it has a clear preference for slightly longer terms, having found a 3 year term too short in a number of cases.¹¹⁷ **The Draft Law proposes a 5-year, non-renewable term, which may merit reconsideration.** For example, the Venice Principles recommend a term of office of not less than 7 years for ombudspersons (non-renewable).¹¹⁸
96. The implication of this provision would be that the whole membership of the Commission is renewed every five years, unless any of the members will be revoked before the end of the term and will be replaced by a newly elected member. To ensure continuity of the Commission, staggered terms of office should be considered, as otherwise all 5 members will leave office at the same time, which would be undesirable from the point of view of continuity of experience and collective memory. In the initial round of appointments, to ensure that the entire Commission does not leave office at the same time it is recommended that Commissioners be appointed for different terms, some of them for 5-years and other, possibly, for a longer term. It is recommended to consider reflecting in the Draft Law a term of 5 years that is renewable once, or a single longer term.
97. Article 2 par 5 provides further that appointments shall be made within 30 days after the entry into force of the present Draft Law. It is welcome that there is recognition that the appointment of members should be prompt. Yet, it is unclear why a limited time is provided for such a comprehensive process. It would appear that 30 days from initiation to appointment is insufficient to undertake an open, transparent and consultative appointment process in the manner required by the Paris Principles. It is recommended that Article 2 par 5 be revised to provide for a more extensive timeframe for selection and appointment,

116 SCA General Observation 2.2 and its Justification, 21 February 2018.

117 SCA, 'Accreditation Report - El Salvador (PDDH)' (November 2016) 23; SCA, 'Accreditation Report - Tanzania (Commission for Human Rights and Good Governance of (CHRAGG))' (November 2016) 54; SCA, 'Accreditation Report - Zambia (HRCZ)' (October 2018) 22.

118 Venice Commission, Venice Principles, para 10.

possibly indicating the start date for the process to *commence*, which may be in 30 days from the adoption of the draft law.

RECOMMENDATION H.1

To consider revising the Draft Law, introducing a 5 years term that is renewable only once, or a single longer term.

RECOMMENDATION H.2

To revise Article 2 par 5, providing for a more extensive timeframe for selection and appointment of the Commission members, possibly indicating in the Draft Law the start date for the process to commence, as well as an overall timeframe allocated for the process.

5.3 Dismissal

98. According to SCA 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 also contain an independent and 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 fulfil their mandates.¹¹⁹ 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.¹²⁰ Clear regulations and objective criteria are needed for cases of dismissal, but also for situations where the President is not able to perform his/her duties due to certain circumstances such as resignation, death, illness, conviction for a serious criminal offence, etc.
99. In the Draft Law, there are a number of ways in which a member of the Commission can have his/her term of office end. These are provided in Article 2 pars 5, 6 and 9.¹²¹ However, the draft provisions regulating grounds, criteria and procedure for dismissal appear to be problematic. For instance, the grounds for dismissal in par 5, namely 'manifest breach of official duties or of the guarantee of undisputed morality and integrity', are overbroad and lack necessary clarity. In addition to this broad and potentially problematic terminology, a

119 SCA General Observation 2.1 and its Justification, 21 February 2018.

120 *ibid.*

121 Article 2 provides: "5...The members of the Commission hold office for five years and their term of office is not renewable. The first appointment of the members of the Commission shall be made within thirty days after the date of entry into force of this law. The members of the Commission may be revoked at any time in the event of a manifest breach of official duties or of the guarantee of undisputed morality and integrity, following the same procedures adopted for their appointment..."

6. The offices of president and member of the Commission are incompatible, under penalty of nullity, with any elective or governmental office, with any other public or private employment, with any administrative office in public or private companies, with the exercise of entrepreneurial activity and with offices in associations that carry out activities in the field of human rights. The president and the members of the Commission cannot carry out any activity within or on behalf of associations, parties or political movements..."

9. In addition to the natural expiry of the term of office or death or proven or ascertained physical or mental impediment, the office of member of the Commission ceases exclusively in case of resignation or established lack of the requirements and qualities prescribed for the appointment. The substitution of the outgoing members is carried out according to the modalities set forth in paragraph 4..."

Commission member may also lose their office for ‘proven or ascertained’ physical or mental impediment or ‘established lack of the requirements and qualities prescribed for the appointment’ (Article 2 par 9 of the Draft Law). Further, there is no process detailed for these circumstances, which is particularly problematic. Any removal for incapacity as provided in Article 2 par 9 should be determined by an independent medical professional or tribunal.¹²² It may be noted that where terms are clear in the overall context of national law, this will likely be sufficient to meet the requirements, once it is clear and precise.

100. Additionally, Article 2 par 6 also provides that ‘the president and the members of the Commission cannot carry out any activity within or on behalf of associations, parties or political movements.’ These provisions are excessively broad and open to potential misuse. Bearing in mind that Commission members may appropriately collaborate with different societal forces, particularly civil society, in undertaking their work, such broad provision could potentially impact the ability of the Commission to promote awareness of human rights. It is also unclear how ‘nullity’ of the member’s position would be initiated (by whom) and what the process would be for any removal.

101. The Draft Law does not elaborate on the circumstances in which the mandate of the members of the collegial body may be terminated prior to the expiry of their term. Clear regulations and objective criteria are needed for cases of dismissal, but also for situations where the President or other Commission members are not able to perform duties due to circumstances such as resignation, illness, conviction for a serious criminal offence, etc. It would be advisable to specify such cases in the Draft Law (or a separate act).

102. It is extremely important that the Draft Law clearly and precisely defines the grounds, terms and procedures of dismissal of the Commission members. Currently, the procedures for dismissal are not adequately provided for. The Draft Law must be clear who can initiate a process for dismissal.¹²³ The reference back to the appointment process in Article 2 pars 5 and 9 of the Draft Law are insufficient both in terms of their vagueness and because it could lead to the dismissal being placed solely on the discretion of the appointing body. If a process for removal involves parliament, sufficient safeguards need to be in place to avoid the risk of politically motivated removal by the parliamentary majority.¹²⁴ The process should not be based solely on the discretion of the appointing body.

103. The legislation should also provide for a public procedure whereby the members of the Commission heard prior to the decision on dismissal; there should also be a procedure in place allowing them to challenge such decisions in court.¹²⁵ There must also be a right to appeal.¹²⁶ It is also good practice for the NHRI legislation to provide for the adoption of a code of ethics that is binding on the members of the NHRI’s governing body, as well as all its employees and other co-operating persons or entities.

123 SCA, ‘Accreditation Report - Mexico (CNDH)’ (November 2016) 37-38.

124 SCA, ‘Accreditation Report - Latvia (OORL)’ (March 2015) 10, ‘The SCA welcomes the introduction of a requirement that an investigation be undertaken by the Parliamentary Investigation Commission, and be submitted to the Parliament, in advance of a decision being taken. However, the SCA is of the view that the process, even as amended, does not provide sufficient procedural safeguards to ensure that dismissal of the Ombudsman will not be undertaken for political reasons.’

125 See e.g., 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 61, <[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)>.

126 SCA, ‘Accreditation Report - Paraguay (DPP)’ (March 2019) 11; SCA, ‘Accreditation Report - Namibia (Ombudsman)’ (October 2018) 13-14.

RECOMMENDATION I

To ensure that terms and the process of dismissal in Article 2 pars 5, 6 and 9 are clearly defined and precise, as well as to ensure that it is not based solely on the discretion of the appointing body. The Draft Law should provide for clear regulations and objective criteria for cases of dismissal, including for specific cases and circumstances where the President and the Commission members are not able to perform duties.

5.4 Remuneration

104. Pursuant to General Observation 2.2., the underlying NHRI legislation should provide that members of its governing 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.¹²⁷
105. The legal drafters should supplement the Draft Law by providing that some, if not all members of the leadership body, shall work full-time and be adequately remunerated. In cases where some members of the Commission 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 independence and impartiality and public confidence therein.
106. As to the level of their remuneration, it would be advisable, and more in keeping with the independence of the NHRI, if the terms of remuneration would be stated clearly in the Draft Law (or a separate act).¹²⁸ In that respect, 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. Generally, the status and remuneration of Board members should correspond to other high-ranking positions within the state apparatus.¹²⁹

5.5 Funding

107. 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 these priorities. Despite the provision in Article 2 par 4 of the draft Law, Article 4 par 3 indicates that in fact the Commission will not have budgetary autonomy and moreover, that its freedom to use its budget as it sees fit may be directly interfered with by government. Decisions over and control of the budget of the Commission must not be in the hands of the government, but in the control of the

¹²⁷ SCA General Observation 2.2 and its Justification, 21 February 2018.

¹²⁸ See also e.g., ODIHR Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland, 2017, par. 58.

¹²⁹ 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 22, Section 4.1.1 on Rank and Salary (2016 Venice Commission's Compilation of Opinions concerning the Ombudsman Institution).

Commission itself, in line with its independence. The Commission should have the authority to submit its budget to parliament.¹³⁰

108. The SCA has also noted that generally, financial arrangements should be such that an NHRI has complete financial autonomy as a guarantee of its overall freedom to determine its priorities and activities.¹³¹ The 2019 Venice Principles issued by the Venice Commission emphasize, in relation to ombudsperson institutions specifically, that an Ombudsman shall be consulted and shall be asked to present a draft budget for the coming financial year.¹³²
109. With respect to the determination of a budget it is the responsibility of the State to ensure the NHRI's core budget. The SCA provides that the domestic legislation should indicate the source of the budget of the NHRI and ensure the appropriate timing of release of funding. A separate budget line is to be provided over which the NHRI has absolute management and control. 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.¹³³
110. Thus, it is recommended to ensure that the Draft Law guarantees of the Commission's budget and financial autonomy and to consider removing Article 4 par 3. To ensure financial autonomy, provisions should prescribe that the budgetary allocation of funds shall be adequate to ensure the full, independent and effective discharge of the responsibilities and functions of the institution.¹³⁴
111. Under General Observation 1.10, several elements need to be taken into account to define what constitutes "adequate funding" when drawing up the annual budget for the NHRI. In addition to an appropriate level of salaries and benefits for members of the leadership body and staff, these should include the allocation of funds for the NHRI's *own* premises, which should be sufficient to ensure that said premises are accessible to the wider community, including to persons with disabilities, and to allow for the establishment of well-functioning communications systems, including telephone and the internet.¹³⁵
112. As regards the amount of funding, and recalling that funding should cover the "premises, salaries and benefits to staff, well-functioning communications systems and sufficient resources for mandated activities", and that there are to be 30 staff and 5 commissioners, €2.5 million seems a very low figure, which is unlikely to leave sufficient resources to undertake its functions. For comparison, the Irish Human Rights and Equality Commission has an annual budget of €6.93 million for a population of 5 million people.⁶⁷ The UK Equality and Human Rights Commission has a budget of around €20 million for a population of 66 million people. The Dutch Institute for Human Rights, €6.9 million (2019) for a population of 17 million.⁶⁸ The French Defender of Rights has a budget of €22.3 million (2019) for a population of 65 million.⁶⁹ In many of these countries there are also other independent state bodies that additionally comprise the national human rights infrastructure. There is a concern that for a country the size of Italy, and for a body with the range of functions of the Commission, 30 staff in total and 5 Commissioners is likely to be insufficient. Overall, it can be said that in the European context, for a single mandate

130 SCA, 'Accreditation Report - South Africa (SAHRC)' (November 2017) 33.

131 See revised SCA General Observations, as adopted by the GANHRI Bureau at its meeting held in Geneva on 21 February 2018, p. 29. See also UNDP-OHCHR Toolkit, December 2010, page 146.

132 See Venice Commission, Venice Principles, 3 May 2019, par 21.

133 SCA General Observation 1.10 and its Justification, 21 February 2018.

134 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, <[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)>.

135 SCA General Observation 1.10 and its Justification, 21 February 2018..

institution €2.5 million for a country the size of Italy is a very small budget that is unlikely to be considered adequate funding. **In light of the powers and functions to be assigned to the Commission, and the size of the country, reconsideration should be given to whether the amount indicated in the budget constitutes adequate funding for Italy's national institution.**

113. This is all the more so as in light of Article 3 par 4 the Commission may be 'assigned tasks derived from international commitments'. To ensure that the NHRI may remain working effectively and ensure its independence, it is suggested to add here a sentence that whenever the body is tasked to exercise additional mandate as envisaged by this provision, it is also granted adequate (and additional) resources to do so.
114. National law should also indicate the relevant budget source.¹³⁶ When deciding on the accreditation of NHRIs, SCA reviews whether the underlying legislation provides that an **NHRI's funding is allocated to a separate budget line dedicated only to the NHRI.**¹³⁷ **This should be included in the Draft Law.** 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 over budgetary decisions, as is the case here, raise concerns with respect to the NHRI's financial independence.¹³⁸ **To sustain the institution's independence, these considerations should be reflected in the Draft Law.**
115. A separate entry in the national budget ensures the financial security and autonomy of NHRIs.¹³⁹ The Draft Law discusses funding in Article 8, allocating an estimated €2.5 million to the Commission drawn from a special reserve fund: "Fondi di riserva e speciali" of the 'Fondi da ripartire' of the estimate of the Ministry of Economy and Finance for the year 2020, thus partially using the appropriation relating to said Ministry for this purpose." The reference only to funding in this limited timeframe, and from a special reserve fund raises serious concerns as to the stability of the funding of the NHRI in the long term. **The long-term stable funding of the Commission should be provided for in the Draft Law, being "a separate budget line over which the NHRI has absolute management and control".**¹⁴⁰
116. Additionally, to further increase the NHRI's financial independence, some additional safeguards may also be contemplated. For instance, the Draft Law may specify that the funds allocated may not be reduced in a manner that interferes with the NHRI's independence.¹⁴¹ The relevant legislation could also prescribe that the NHRI itself should submit its budget proposal to the relevant authority and that this proposal should in principle likewise not be reduced.¹⁴² 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 fund allocation should not exceed the percentage of reduction of the budgets of the Parliament or the Government.¹⁴³

136 *ibid.* Justification to General Observation 1.10.

137 See e.g., *op. cit.* footnote 64, pages 19 and 26 on the accreditation of NHRIs of Montenegro and Canada (SCA Report and Recommendations of May 2016).

138 See e.g., Sub-Committee on Accreditation, Report and Recommendations of the Session (November 2015), page 12, <<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf>>.

139 SCA, 'Accreditation Report - Qatar (National Human Rights Committee (NHRC))' (March 2009) 4; SCA, 'Accreditation Report - Bosnia and Herzegovina (IHROBH)' (November 2012) 12.

140 SCA General Observations, 21 February 2018, p. 29-30.

141 See e.g., Venice Commission's Opinion on the Law on the People's Advocate of Moldova, 2015, pars 74-75.

142 See e.g., Venice Commission's Opinion on the Possible Reform of the Ombudsman Institution in Kazakhstan, 2007, pars 8 and 30.VI.

143 See e.g., Venice Commission Opinion on the draft Constitutional Law on the Human Rights Defender of Armenia, 2016, par. 69.

117. The NHRI should also **be allowed to receive additional funding from external sources, domestic and foreign**.¹⁴⁴ General Observation 1.10 emphasizes that funding from external sources should not constitute the NHRI's core funding, as it should be the State's responsibility to ensure the NHRI's core budget. It is not clear whether the 2.5 million Euros are sufficient for the NHRI to carry out its mandate in full independence and in compliance with the Paris Principles.
118. Finally, 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,¹⁴⁵ and needs to comply with the financial accountability requirements applicable to other independent agencies.¹⁴⁶

RECOMMENDATION J.

To evaluate whether the funding, as suggested in the Draft Law, is adequate in light of the powers and functions to be assigned to the Commission, and the size of the country. The legislation should also aim to guarantee a long-term and stable funding of the Commission, also ensuring its autonomy in management and control of the budget.

6. LEGISLATIVE PROCESS

119. 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).¹⁴⁷ 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 Draft Law. 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.
120. At the same time, a meaningful consultation presupposes that any comments received are duly taken into consideration during the subsequent revision of the draft legislation. Pursuant to the *Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes* (2015), state authorities are encouraged to develop a mechanism whereby decision-makers shall report back to those involved in consultations by providing, in due time, meaningful and qualitative feedback on the outcome of public consultations, including clear justifications for including or not including certain comments/proposals.¹⁴⁸ Moreover, to guarantee effective participation, consultation mechanisms must allow for input at an early stage *and throughout the process*,¹⁴⁹ meaning

144 SCA General Observation 1.10 and its Justification, 21 February 2018.

145 SCA General Observation 1.10 and its Justification, 21 February 2018.

146 *ibid.*

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

148 Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015, par 16 (e), <<http://www.osce.org/odihr/183991>>.

149 See e.g., OSCE/ODIHR, Guidelines on the Protection of Human Rights Defenders (2014), Section II, Sub-Section G on the Right to Participate in Public Affairs, <<http://www.osce.org/odihr/119633>>.

not only when the draft is being prepared by relevant government entities but also when it is discussed before the Parliament (e.g., through the organization of public hearings).

121. In light of the above, the Italian legislator is encouraged to continue its efforts to ensure that the Draft Law is fully compliant with the Paris Principles and subjected to inclusive, extensive and effective consultations, which should continue at further stages of the law-making process. It is also recommended that a more in-depth financial impact assessment be carried out to ensure that the future NHRI will receive adequate funding to perform its mandate in accordance with the Paris Principle. As an important element of good law-making, a consistent monitoring and evaluation system of the implementation of the Act and its impact should also be put in place to properly evaluate the operation and effectiveness of the Act, once adopted.¹⁵⁰

RECOMMENDATION K.

To continue efforts to ensure that the Draft Law is fully compliant with the Paris Principles, other international norms and OSCE commitments and prior to its adoption is subjected to inclusive, extensive and effective consultations, which should continue at further stages of the law-making process.

¹⁵⁰ See e.g., OECD, *International Practices on Ex Post Evaluation* (2010), <http://www.oecd-ilibrary.org/governance/evaluating-laws-and-regulations/international-practices-on-ex-post-evaluation_9789264176263-3-en>.