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OPINION ON THE ACT ON THE INSTITUTE FOR HUMAN RIGHTS OF SWEDEN

SWEDEN

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Based on an unofficial English translation of the provided by the Institute for Human Rights of Sweden.



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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

ODIHR strongly welcomes the recent establishment of the Swedish Institute for Human Rights (hereinafter referred to as “the Institute”) and the Institute’s stated objective as a National Human Rights Institution (hereinafter “NHRI”) to adhere to the United Nations Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (hereinafter “the Paris Principles”). Given the NHRIs’ crucial position among the range of institutions that form the infrastructure of a democratic system based on the rule of law and human rights, the setting up of such an institution demonstrates Sweden’s affirmed commitment to human rights, democracy and the rule of law.

The Institute, which began operation in January 2022, applied on 14 April 2023 for accreditation with the Global Alliance of National Human Rights Institutions (GANHRI). In this context, it is of particular relevance that the regulatory framework for the Institute is comprehensive and robust to guarantee the independence of the institution and that adequate human, financial and technical resources are allocated to fully perform its mandate. An independent, strong and effective NHRI is a necessary feature of a state that underpins good governance and justice, and constitutes an indispensable actor for the sustainable promotion and protection of human rights at the country level.

The fact that the mandate of the Institute is based on a law adopted by the Parliament is welcome as this should ensure the permanency, stability and independence of Sweden’s NHRI.

There are some positive provisions in the Act on the Institute for Human Rights (2021: 642) (hereinafter referred to as “the Act”), specifically the broad human rights mandate, including the institution’s functions to both promote and protect human rights. It is also welcome that the Institute was designated as the National Monitoring Mechanism (hereinafter “NMM”) under Article 33 (2) of the UN Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”). At the same time, the Act would benefit from amendments and additions to enhance important aspects pertaining to the core of the institution’s basic guarantees of independence, as well as to ensure full compliance with the Paris Principles.

The following observations and recommendations are made to provide guidance for any future legislative reform process with a view to attain full adherence to the standards set in the Paris Principles and strengthen the Institute’s operationalization in furtherance of its mandate.

In particular, the provisions regulating the selection and appointment of the NHRI senior leadership (Director and Board) should be improved to ensure clear, transparent and participatory merit-based procedures, ensuring pluralism and gender balance representation, since these are essential to guarantee the independence of, and public confidence in the institution. Moreover, the grounds and process for dismissal should be more clearly and strictly regulated as this may otherwise undermine the security of tenure of the Director and Board members, which is an essential guarantee of their independence. The Act should also be enhanced by including specific provisions to guarantee the financial independence and autonomy of the Institute. Furthermore, in particular, the Director, Board and the Institute’s staff should be protected from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in their official capacities (“functional immunity”).

More specifically, ODIHR makes the following recommendations to improve the Act's compliance with OSCE commitments and international human rights standards, including the Paris Principles:

- A. To supplement Section 1 to include an explicit reference to the independence of the Institute, to the Paris Principles and to the promotion and protection of human rights; [para. 27]
- B. With respect to functional immunity:
 - 1. To explicitly provide, in the Act, functional immunity for the Director, the Board and all staff of the Institute, specifying that they shall not incur civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in their official capacity; [para. 33]
 - 2. To provide that such immunity also applies after the end of the mandate or after a staff member ceases their employment; [para. 33]
 - 3. To clarify the grounds, and establish a clear, fair and transparent process, by which the immunity may be lifted by an appropriately-constituted body; [para. 36] and
 - 4. To guarantee in legislation the inviolability of the Institute's premises, property, means of communication and all documents, including internal notes and correspondence, as well as of baggage, correspondence and means of communication belonging to the members of the NHRI's body and professional staff; [para. 34];
- C. To supplement the Act in light of the requirements for an NMM, in particular regarding complaints-handling powers, selection and appointment process, immunity, security of tenure, representatives, staffing, and funding; [para. 48]
- D. To include detailed provisions on the application, screening, selection and appointment procedure for the Director and Board members, reflecting an open, public, fair, broad, merit-based, transparent and participatory process throughout, including provisions on the involvement of civil society, and specific provisions setting out clear, public and objective criteria for the identification and evaluation of candidates at all stages of the process and to ensure pluralism and gender balance in the composition of the Board; [para. 56]
- E. With respect to dismissal:
 - 1. To provide for clear and objective grounds for all cases of dismissal, while ensuring that they are limited to only serious grounds of misconduct or incompetence or to those actions which impact adversely on the capacity of the Director or a member's ability to fulfil her/his mandate, while providing clear and detailed provisions to ensure publicity and transparency of the dismissal process of a member that include the right of appeal to an independent tribunal; [para. 65]
 - 2. To provide for an interim mechanism to ensure the Institute's continuous functioning pending the appointment of the new office-holder; [para. 68]
- F. To expressly provide for pluralism in the composition of the Institute at all levels and include reference to various kinds of diversity, including ethnic and linguistic minorities, persons with disabilities, while ensuring gender balanced representation in the NHRI at all levels, including in leadership positions, and the development of gender- and diversity-sensitive human resources policies; [para. 72]
- G. With respect to publicity:

1. To explicitly provide for the publication of reports and recommendations by the Institute and to allow the Institute to issue its recommendations to the parliament, government or other competent authority as it sees fit; [para. 77]
 2. To provide for the submission of the Annual Report to the Parliament, in addition to the Government , while ensuring that it is discussed and considered by the legislature; [para. 78] and
- H. To specify that the state will provide the Institute with adequate funding to cover the costs of human, financial, material and technical capacity to guarantee the proper implementation of its (broad) mandate both as NHRI and as National Monitoring Mechanism, while providing for the NHRI's financial autonomy, full control over its budget and safeguards against unwarranted budgetary cutbacks. [para. 80]

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 their OSCE human dimension commitments, the ODIHR reviews, upon request, draft and existing laws to assess their compliance with international human rights standards and OSCE human dimension commitments and provides concrete recommendations for improvement.

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ANNEX: Act on the Institute for Human Rights of Sweden

I. INTRODUCTION

1. On 12 June 2023, the Swedish Institute for Human Rights sent a request for a legal review of the *Act on the Institute for Human Rights* (2021: 642) (hereinafter referred to as “the Act”), to the OSCE Office for Democratic Institutions and Human Rights (ODIHR).
2. On 19 June 2023, ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Act with international human rights standards and OSCE human dimension commitments, with particular focus on the compliance with the UN Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights, also known as the “Paris Principles”.
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 human dimension commitments.¹

II. SCOPE OF THE OPINION

4. The scope of this Opinion covers only the Act submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the Swedish Institute for Human Rights (hereinafter referred to as “the Institute”) and human rights protection mechanisms in Sweden. Where relevant however, the Opinion will refer to other applicable and relevant laws and regulations pertaining to the Institute.
5. The Opinion raises key issues and provides indications of areas of concern relating to the Institute. In the interest of conciseness, it focuses on those provisions that require amendments or improvements rather than on positive aspects of the Act. The following 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.
6. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*² (CEDAW) and the *2004 OSCE Action Plan for the Promotion of Gender Equality*³ and commitments to mainstream gender into OSCE activities, programmes and projects, this Opinion integrates, as appropriate, a gender and diversity perspective.

1 See especially 1990 OSCE Copenhagen Document, para. 27, which states that participating States will “facilitate the establishment and strengthening of independent national institutions in the area of human rights and the rule of law”; Bucharest Plan of Action for Combating Terrorism (2001), Annex to OSCE Ministerial Council Decision on Combating Terrorism, MC(9).DEC/1, 4 December 2001, para. 10, which tasks 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”; and OSCE Ministerial Council, Madrid 2007, Decision No. 10/07 on Tolerance and Non-Discrimination: Promoting Mutual Respect and Understanding, para. 10, which “[e]ncourages the establishment of national institutions or specialized bodies by the participating States which have not yet done so, to combat intolerance and discrimination (...), drawing on the expertise and assistance of the relevant OSCE institutions, based on existing commitments, and the relevant international agencies, as appropriate”.

2 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by General Assembly resolution 34/180 on 18 December 1979. Sweden acceded to this Convention on 2 July 1980.

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

7. This Opinion is based on an unofficial English translation of the Act provided by the Institute, which is attached to this document as an annex. Errors from translation may result.
8. In view of the above, ODIHR would like to stress that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Sweden in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

9. NHRIs hold a crucial position among the range of institutions that form the infrastructure of a democratic system based on the rule of law and human rights. As independent bodies with a constitutional and/or legislative mandate to protect and promote human rights, they are considered a “*key component of effective national human rights protection systems and indispensable actors for the sustainable promotion and protection of human rights at the country level*”.⁴ Thus, NHRIs link the responsibilities of the State stemming from international human rights obligations to the rights of individuals in the country and constitute “*a bridge between government and civil society, as well as between the national and international systems*”.⁵ Although part of the state apparatus, NHRIs are independent from the executive, legislative and judicial branches to ensure that they are able to fulfil their mandate.
10. However, whether an NHRI can play its role within the state to the full extent depends on many political, social and legal factors. Such an institution must occupy a proper place within the national institutional framework, while having a sufficiently broad scope of competence, as well as a range of powers and financial resources allowing it to effectively carry out its mandate and advance the legal sphere and practice in the human rights field. An important characteristic of an effectively operating institution of this type must be its independence, including financial independence, from other branches of government, especially the executive. Therefore, special statutory safeguards need to protect such independence, including those involving the institution’s budget. The success of an NHRI also very much depends on its integrity, professionalism and authority within the structures of the state and of society in general. Thus, it is of the utmost importance to establish, *inter alia*, appropriate criteria and an adequately transparent procedure for selecting or appointing individuals to serve in the NHRI’s decision-making body and to recruit staff with professional qualifications of the highest possible level, who are also representative of the diverse segments of society.
11. The UN Paris Principles contain internationally recognized rules on the status, mandates and competencies of NHRIs.⁶ They set out minimum standards on the establishment and functioning of NHRIs, and promote key principles of pluralism, transparency, guarantees

4 UN High Commissioner for Human Rights, Report to the UN General Assembly (2007), A/62/36, para. 15.

5 Joint Statement from the Expert Meeting on Strengthening Independence of National Human Rights Institutions in the OSCE Region, 29 November 2016, Warsaw, <<http://www.osce.org/odihr/289941?download=true>>.

6 The UN Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (Paris Principles) were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris (79 October 1991), and adopted by UN General Assembly Resolution 48/134 of 20 December 1993.

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 (GANHRI) Sub-Committee on Accreditation (SCA).⁷ The SCA, which operates under the auspices of the OHCHR as its Secretariat, publishes reports on the application for accreditation of NHRIs, reviews their status and provides them with status accreditation.⁸ The status of NHRIs may also be reviewed when it appears that the circumstance of the institution may have changed in a way that affects its compliance with the Paris Principles, among other circumstances. The SCA additionally develops “General Observations”, which clarify and further explain the Paris Principles.⁹

12. The UN General Assembly and the UN Human Rights Council have also issued various resolutions on NHRIs.¹⁰ Among them, the UN General Assembly Resolution A/RES/75/186 on the role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law¹¹ strongly encourages Member States to create and strengthen Ombudsman institutions “*consistent with the principles on the protection and promotion of the Ombudsman institution (the Venice Principles)*” and for such institutions, where they exist, “[t]o operate, as appropriate, in accordance with all relevant international instruments, including the Paris Principles and the Venice Principles”. The UN General Assembly’s Resolution 74/156 specifically stresses that “*national human rights institutions and their respective members and staff should not face any form of reprisal or intimidation, including political pressure, physical intimidation, harassment or unjustifiable budgetary limitations*”.¹² In addition, indicator 16.a.1. of the Sustainable Development Goal (SDG) 16 specifically requires the existence of independent national human rights institutions in compliance with the Paris Principles.
13. Sweden is a Member State of the Council of Europe (CoE), and a number of CoE documents on NHRIs and ombudspersons¹³ serve as important and useful sources for reference to policy- and law-makers. In particular, the CoE Committee of Ministers Recommendation CM/Rec(2021)1, on the Development and strengthening of effective, pluralist and independent national human rights institutions (CoE Recommendation

7 The GANHRI, formerly known as the International Coordinating Committee for National Human Rights Institutions (ICC), was established in 1993 and is the international association of national human rights institutions 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; see <<https://ganhri.org/>>.

8 Article 11.1 and 15 of the GANHRI Statute (version adopted on 15 March 2023).

9 See GANHRI SCA, General Observations, adopted on 21 February 2018.

10 See e.g., the latest UN General Assembly, Resolution 74/156 on National Human Rights Institutions, A/RES/74/156, adopted on 18 December 2019. See also Resolution 70/163 on National Institutions for the Promotion and Protection of Human Rights, A/RES/70/163, adopted on 17 December 2015; resolutions 75/186, 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/75/186, A/RES/63/169 and A/RES/65/207, adopted on 16 December 2020, 18 December 2008 and on 21 December 2010 respectively; resolution 63/172 and resolution 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 48/134 on National Institutions for the Promotion and Protection of Human Rights, A/RES/48/134, adopted on 4 March 1994. See also UN Human Rights Council, resolutions 39/17 on National Human Rights Institutions and 27/18 on National Institutions for the Promotion and Protection of Human Rights, A/HRC/RES/39/17 and A/HRC/RES/27/18, adopted on 28 September 2018 and 7 October 2014, respectively. See also UN Secretary General, Report on National institutions for the promotion and protection of human rights, A/76/246, 29 July 2021.

11 UN General Assembly Resolution A/RES/75/186, adopted by the UN General Assembly on 16 December 2020 (75th session), paras. 2 and 8.

12 UN General Assembly, Resolution 74/156 on National Human Rights Institutions, A/RES/74/156, adopted on 18 December 2019, para. 10.

13 For the purpose of this Opinion, the term “Ombudsman” is used when this is the qualification used by an institution or public body. While acknowledging that the Scandinavian term “Ombudsman” is considered to be gender-neutral in origin, the term “ombudsperson” is generally preferred in the Opinion, in line with increasing international practice, to ensure the use of gender-sensitive language (see e.g., <https://www.unescwa.org/sites/default/files/services/doc/guidelines_gender-sensitive_language_e-a.pdf>, p. 12).

(2021)1) 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.¹⁴ In addition, the European Commission for Democracy through Law (Venice Commission), beyond the numerous opinions on NHRI legislation, adopted the Principles on the Protection and Promotion of the Ombudsman Institution (“the Venice Principles”) in 2019,¹⁵ which have been endorsed by various CoE bodies and by the UN General Assembly.¹⁶ Although the Institute is not an ombuds-type institution, these principles are nonetheless relevant as they provide concrete guidance on implementing the Paris Principles.

14. In the context of the European Union (EU), the European Commission’s *Strategy to Strengthen the application of the Charter of Fundamental Rights in the EU* invites Member States to establish and strengthen their NHRIs.¹⁷ The March 2023 European Council Conclusions, adopted under the Swedish Presidency, call on Member States to “[s]et up or facilitate the establishment of national human rights institutions in compliance with the United Nations Paris Principles and adopt a legislative framework enabling them to carry out their role independently and provide them with the adequate mandate and appropriate resources to carry out their tasks effectively”.¹⁸ The EU Fundamental Rights Agency (FRA) has also made a series of findings and recommendations in its 2020 Report on NHRIs.¹⁹
15. At the OSCE level, 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*” (1990 Copenhagen Document).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 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
16. Other useful reference documents of a non-binding nature are also relevant in this context, as they contain a higher level of practical details including, among others:

14 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.

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

16 The Venice Principles were endorsed by the Committee of Ministers of the Council of Europe at the 1345th Meeting of the Ministers’ Deputies, on 2 May 2019; by the Parliamentary Assembly of the Council of Europe, in Resolution 2301(2019) adopted on 2 October 2019; by the Congress of Local and Regional Authorities of the Council of Europe; and by the UN General Assembly in Resolution A/RES/75/186, adopted by the UN General Assembly on 16 December 2020.

17 European Commission, Strategy to Strengthen the application of the Charter of Fundamental Rights in the EU, 2020.

18 European Council, Conclusions on the application of the EU Charter of Fundamental Rights; The role of the civic space in protecting and promoting fundamental rights in the EU – Council conclusions (10 March 2023)

19 EU FRA, Strong and Effective National Human Rights Institutions: Challenges, Promising Practices and Opportunities, 2020.

20 See 1990 OSCE Copenhagen Document, para. 27.

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

- the ODIHR *National Human Rights Institutions in a Public Emergency: A Reference Tool* (2020),²² which aims to assist NHRIs in the exercise of their functions during times of public emergency and post-emergency; and
- the ODIHR *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
- the *Compilation of Venice Commission Opinions concerning the Ombudsman Institution* (as last updated in May 2022);²⁴
- the *Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments* (2012);²⁵
- the United Nations Development Program (UNDP) and Office of the United Nations High Commissioner for Human Rights (OHCHR) *Toolkit for Collaboration with National Human Rights Institutions*,²⁶ which explains the various models of NHRIs and provides useful guidance on how to support NHRIs in the different phases of their existence, from their establishment to supporting their development into more mature NHRIs.²⁷

2. BACKGROUND

17. The Institute was established by the *Act on the Institute for Human Rights* in 2021 and came into operation on 1 January 2022. In September 2022, amendments to the Act entered into force to introduce an obligation for state administrative authorities, municipalities and regions to provide information on the measures taken in their own activities to safeguard human rights, upon request of the Institute.²⁸ In April 2023, the Institute applied for accreditation from the SCA. The Swedish Equality Ombudsman currently holds B-status since 2011 and, according to a recent report from the European Network of NHRIs (ENHRI), will relinquish its accreditation once the Institute is accredited.²⁹
18. Several international and regional human rights bodies have welcomed the establishment of the Institute as the NHRI. In its 2022 General Observations to Sweden, the UN Committee Against Torture noted positively the establishment of the Institute as the NHRI, and recommended that Sweden “periodically review the relevant legislation governing the institution with a view to continuously strengthening the institution’s mandate and independence in order to ensure that it can operate effectively.”³⁰ Sweden has also accepted a series of recommendations on the establishment of a Paris Principles-

22 ODIHR, *National Human Rights Institutions in a Public Emergency: A Reference Tool* (6 October 2020).

23 ODIHR, *Handbook for National Human Rights Institutions on Women's Rights and Gender Equality*, 4 December 2012, p. 9.

24 Available at: <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2022\)022-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2022)022-e)>.

25 The *Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments* (2012),

26 UNDP-OHCHR, *Toolkit for Collaboration with National Human Rights Institutions*, December 2010.

27 *Ibid.* p. 241.

28 Report 2021/22:KU38, *An obligation to provide information to the Institute for Human Rights* [En skyldighet att lämna uppgifter till Institutet för mänskliga rättigheter].

29 ENHRI, *Baseline - Introduction* <https://ennhri.org/wp-content/uploads/2023/06/ENHRI-Baseline-Intro_Methodology_Cross-Regional-Overview.pdf>, p. 16.

30 UN Committee against Torture, *Concluding observations on the eighth periodic report of Sweden*, CAT/C/SWE/CO/8, 20 December 2021, para. 7.

compliant NHRI as part of the UN Human Rights Council's Universal Periodic Review (UPR) process.³¹ In order to meet the SDG 16 targets by 2030, the Institute would need to be accredited by the SCA with A-status, meaning that it fully complies with the Paris Principles.

19. In this context, it is of particular importance that the regulatory framework for the Institute is comprehensive and robust in order to guarantee the independence of the institution and that adequate human, financial and technical resources are allocated to it to fully perform its mandate. An independent, strong and effective NHRI is a necessary feature of a state as it underpins good governance and justice, and constitutes an indispensable actor for the sustainable promotion and protection of human rights at the country level.³² NHRIs play a crucial role in promoting and monitoring the effective implementation of international human rights obligations at the national level. They act as a cornerstone of national human rights protection systems and as a bridge between government and civil society, as well as between the national and regional and international human rights systems. NHRIs play a vital role when human rights and fundamental freedoms are under threat, such as in times of crisis or emergency that add to and further exacerbates the layer of challenges to human rights that already exist in a society. In such circumstances NHRIs help to ensure that all voices are heard by decision-makers, while also making sure that state measures which are taken in times of crisis are inflicting the least possible damage to human rights and rule of law.³³
20. In light of the foregoing, it is critical for the Institute to work towards obtaining A-status, meaning being fully compliant with the Paris Principles, and be granted the means and resources to perform its mandate. This is essential since it is the sole body in Sweden that has a comprehensive mandate covering all international human rights obligations. The fact that the mandate of the Institute is based on a law adopted by the Parliament is welcome as this should ensure the permanency, stability and independence of Sweden's NHRI.³⁴
21. The Institute's request to ODIHR is positive, as it shows its efforts to comply with the Paris Principles, by demonstrating the Institute's willingness to engage with international bodies, which is considered by the SCA as being an important dimension of NHRIs' work and an indicator of its strength.³⁵ The following observations and recommendations are made to provide guidance for future legislative reform process with a view to fully adhere to the standards set in the Paris Principles and strengthen the Institute's operationalization in furtherance of its mandate.

31 See <<https://www.ohchr.org/en/hr-bodies/upr/se-index>>.

32 Joint Statement from the Expert Meeting on Strengthening Independence of National Human Rights Institutions in the OSCE Region, 29 November 2016, Warsaw, <<http://www.osce.org/odihr/289941?download=true>>, which states that "a strong and independent NHRI is a necessary feature of any state that underpins good governance and justice, as well as human rights".

33 See e.g., ODIHR, National Human Rights Institutions in a Public Emergency – A Reference Tool (2020), p. 28.

34 See SCA, General Observation 1.1 and its Justification.

35 See SCA, General Observation 1.4 and its Justification.

3. GENERAL REMARKS ON THE APPLICABLE LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN SWEDEN

22. The Act contains 11 provisions, and thus is rather brief. As discussed further below in the following sections, details on many critical aspects of the operation and functioning of the Institute are regulated by other pieces of legislation or regulations.
23. It is welcome that Section 1 of the Act contains a broad mandate indicating the scope of the Institute's human rights work as covering a range of international, regional and national human rights instruments. Section 1 also specifies that the Institute fulfils the functions of the NMM under Article 33(2) of the UN CRPD. Section 4 provides that, within the limits of its mandate, the Institute decides on its organization and details and focus of its work. However, as emphasized in the following sections of this Opinion, to safeguard the Institute's independence and stability and to fully comply with the Paris Principles, the Act should be further enhanced on a number of aspects to clearly and explicitly guarantee the Institute's institutional independence, legitimacy, credibility, effectiveness and pluralism. This could to a great extent be addressed by strengthening the regulatory framework and introducing additional provisions into the Act itself, and where relevant make cross-references to provisions in other primary laws in the Act.
24. It is important to note that there are several other bodies in Sweden that carry out some functions in the field of human rights and in the system of checks and balances, such as the Chancellor of Justice, the Parliamentary Ombudsmen - which since 2011 fulfills the role as National Preventive Mechanism (NPM) under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), the Ombudsman for Children, the Equality Ombudsman of Sweden, the Media Ombudsman etc. However, as was noted by the UN Human Rights Committee in relation to the Parliamentary Ombudsman, the Chancellor of Justice and the Equality Ombudsman "...the scope of their authority remains restricted to specific instruments and does not include international norms, including the [ICCPR]". Regarding the Swedish Equality Ombudsman, which has been accredited B-status since 2011, the SCA noted in particular that this institution does not have a broad mandate to promote and protect human rights, as its mandate is restricted to matters of equality. Thus, even with the presence of other bodies, the Institute would be uniquely placed in the human rights protection system of Sweden due to its robust protection mandate.
25. In this context, Paris Principles C(f) and C(g) require that NHRIs "maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions)". 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 sub-national statutory human rights institutions, thematic institutions, as well as civil society and non-governmental organizations". These relationships, which may include sharing research, best practices, and other data, are necessary for the holistic realization of human rights, as the effectiveness of NHRIs largely depends on their collaboration with other domestic actors. As also recommended by the SCA, there should be co-operation between the NHRI and other independent human rights bodies, such as specialist ombudspersons, "to ensure coherence and effectiveness of the national human rights protection system". Such co-operation may include the transmission of individual petitions between the NHRI and an ombuds-type institution that possesses complaints-handling powers. This means that NHRIs should co-operate with and support the functions of other institutions

that work on human rights issues, directly or indirectly. Hence, it is important to specify the relationships between the Institute and the other domestic institutions in charge of certain functions in the field of human rights, the division of competences between them and modalities of their co-operation. While details of such co-operation should be left to the independent institutions, formalized powers for the establishment of a co-operative framework set out in the Act would support this engagement.

26. While some of the above-mentioned bodies do have a specific human rights complaints-handling mechanism, the explicit exclusion of complaints-handling as a function of the Institute, and absence of any potential referral mechanism to other bodies in the Act raises questions as to whether there may be protection gaps for individuals wishing to make a human rights complaint in the country. It is also unclear how the Institute will co-operate with complaints-handling bodies independent of the Government such as the Equality Ombudsman. It should also be noted that the UN Committee on the Rights of the Child recently strongly criticized the lack of a complaints-handling function of the Ombudsman for Children of Sweden. As part of its function in protecting human rights, and its mandate to undertake investigations, the Institute should have the power to receive information from individuals alleging a violation of their rights. It should be able to submit human rights cases it may become aware of to the relevant ombudsperson or other independent national body mandated to handle such complaints. The process for undertaking this function should be developed by the Institute, in consultation with the relevant independent bodies, taking into account the need to safeguard the independence of the Institute. (See also Sub-Sections 5.2 and 5.3 *infra*).
27. Finally, apart from the brief mention in Section 1, the Act does not further elaborate the Institute's role and resources for fulfilling the functions of NMM under the CRPD. SCA General Observation 1.1 states: "An NHRI must be established in a constitutional or legislative text with sufficient detail to ensure the NHRI has a clear mandate and independence. In particular, it should specify the NHRI's role, functions, powers, funding and lines of accountability, as well as the appointment mechanism for, and terms of office of, its members". When an NHRI is designated as NMM, during the accreditation process, the SCA will in particular review whether a formal legal mandate has been provided; whether the mandate has been appropriately defined to encompass the promotion and protection of all relevant rights contained in the CRPD; whether the staff of the NHRI possess the appropriate skills and expertise; whether the NHRI has been provided with additional and adequate human, financial, material and technical capacity and resources; whether there is evidence that the NHRI is effectively undertaking all relevant roles and functions as may be provided in the relevant international instrument. The Committee on the Rights of Persons with Disabilities (CRPD Committee) encourages States parties "to appoint NHRIs compliant with the Paris Principles as the monitoring framework or as a mechanism that forms part of the monitoring framework and to further equip them with additional and adequate budgetary and skilled human resources to appropriately discharge their [additional] mandate". This requirement, as with all those contained in the Paris Principles and in NHRI-related recommendations of other bodies, applies to all NHRIs, irrespective of the form of NHRI chosen by the state.

4. THE INDEPENDENCE OF THE INSTITUTE

4.1. Safeguards and Guarantees of Independence

28. The Paris Principles require that an NHRI is, and is perceived to be, independent of the government. While Section 4 suggests a certain degree of autonomy in the Institute's

operations and work, **the Act should explicitly state that the Institute is independent and further, the Act would benefit from additional safeguards that could protect and guarantee such independence.** These include and are not limited to provisions providing guarantees ensuring its operational and financial independence and autonomy (see Section 8 *infra*), on the terms and conditions governing the selection, appointment and dismissal of the Institute’s Director, Board members and staff (see Sections 6 and 9 *infra*), as well as their functional immunity³⁶ (see Sub-Section 4.2 *infra*).

29. While it is welcome that a number of key international human rights instruments are explicitly mentioned in the mandate of the Institute in Section 1, **adding a specific reference to the Paris Principles, and to the promotion and protection of human rights,** would help to set more clearly the purpose for the Act and the Institute as a Paris Principles-compliant institution.

RECOMMENDATION A.

To supplement Section 1 by including an explicit reference to the independence of the Institute, to the Paris Principles and to the promotion and protection of human rights.

4.2. Functional Immunity to Protect Institutional Independence

30. The functional immunity of members of NHRIs’ leadership exists as an essential corollary of their institutional independence.³⁷ Because NHRIs’ tasks require special examinations of frequently politically sensitive issues and reporting on actions of the Government often resulting in strong criticism of authorities, such institutions may be a likely target of actions motivated by political or other interests. The functional immunity of NHRI leadership is therefore essential to guarantee institutional independence, which may be impacted by fear of malicious criminal proceedings or civil action by an allegedly aggrieved individual or entity, including public authorities.³⁸ The SCA has recommended that “*members and staff of NHRI should be protected from both criminal and civil liability for acts undertaken in good faith in their official capacity*” by enabling legislation that clearly establish the functional immunity of an NHRI’s leadership and staff.³⁹ The Venice Principles also provide for the immunity for ombudspersons, deputies and decision-making staff.⁴⁰ To be effective, functional immunity should continue to apply even after

36 i.e., the protection from liability for the words spoken and written and the actions and decisions undertaken in good faith in one’s official capacity (“functional immunity” or “non-liability”).

37 See SCA General Observation 1.1 and Justification to General Observation 2.3, which considers functional immunity as being an “essential hallmark of institutional independence”.

38 See e.g., ODIHR, Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland, 31 October 2017, para. 82. As a comparison, regarding the immunity of judges, see the case of *Ernst v. Belgium*, ECtHR Judgment of July 2003 (Application no. 33400/96, only in French), para. 85, holding that immunity (“*privileège de juridiction*”) pursues the legitimate aim of ensuring that judges are protected against undue lawsuits and enabling them to exercise their judicial function peacefully and independently.

39 SCA General Observation 2.3 and its Justification. See also GANHRI, SCA Report and Recommendations of the Session (May 2016), p. 37.

40 Venice Commission, Venice Principle 123. The CoE European Commission against Racism and Intolerance (ECRI) has similarly stated that: “persons holding leadership positions should benefit from functional immunity, be protected against threats and coercion and have appropriate safeguards against arbitrary dismissal or the arbitrary non-renewal of an appointment where renewal would be the norm”; see ECRI, General Policy Recommendation No. 2: Equality Bodies to Combat Racism and Intolerance at National Level, CRI(2018)06, adopted on 7 December 2017.

the end of the leadership body's mandate or after a staff member ceases his/her employment with the NHRI.⁴¹

31. Functional immunity should cover words spoken or written, recommendations, decisions and other acts undertaken in good faith while performing these functions.⁴² 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. This should also extend to so-called strategic lawsuits against public participation. Such lawsuits may be brought against the Ombudsperson or the deputies or staff by powerful entities, including business persons or corporations. The Ombudsperson and his/her staff should be immune from such forms of pressure.
32. 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*”. 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*”.⁴³
33. It is observed that in this respect that the Swedish Constitution contains provisions on functional immunities for a limited range of public officials, namely, members of the Riksdag, including the Speaker, the Head of State and government ministers.⁴⁴ The functional immunity of the Director, Board and staff is not stated in the Act. It is recommended to amend the Act in this respect, by **explicitly providing that the Director, Board, staff of the Institute shall not incur civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in their official capacity.**⁴⁵ The relevant provision should also 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.⁴⁶
34. **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,⁴⁷ as well as of baggage, correspondence and means of communication belonging to the members of the**

41 See e.g., 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; 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), para. 23. See also Venice Commission, Venice Principle 23; and 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, para. 69.

42 General Observation 2.3 (GANHRI 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)).

43 SCA General Observation 2.3 and GANHRI SCA Report and Recommendations of the Session (May 2016), p. 37.

44 See: The-Instrument-of-Government.pdf (riksdagen.se), Chapter 5, Article 8 (Head of State); Chapter 4, Article 12 (members of Riksdag); Chapter 4, Article 13 (Speaker); Chapter 13, Article 3 (ministers).

45 See SCA General Observation 2.3, which refers to the protection from criminal or civil liability for “acts 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, paras. 74 and 76.

46 See Venice Commission, Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, CDL-AD(2015)034, para. 69; and ODIHR-Venice Commission, Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro (2011), para. 23.

47 See 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, para. 52.

NHRI's leadership body and professional staff.⁴⁸ It is recommended to amend the Act accordingly.

35. At the same time, there needs to be a proper balance between immunity as a means to protect an NHRI against pressure and abuse from state powers or individuals (including, in particular abusive prosecution, false, frivolous, vexatious or manifestly ill-founded complaints, or harassment) and the general concept that nobody, including an NHRI leadership, should be above the law.⁴⁹ This concept derives from the principle of equality before the law, which is also an element of the rule of law.⁵⁰ Indeed, the SCA has recognized this and recommends that the law should clearly establish the grounds, and a clear and transparent process, by which the functional immunity of NHRI leadership, members of the decision-making body and staff may be lifted.⁵¹
36. In light of the foregoing, **the Act should specify the grounds, and establish a clear and transparent process, by which the immunity of the Director, the Board and staff may be lifted.** 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, 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.**⁵²

RECOMMENDATION B.1

To explicitly provide, in the Act, functional immunity for the Director, the Board and all staff of the Institute, specifying that they shall not incur civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in their official capacity.

RECOMMENDATION B.2

To provide that such immunity also applies after the end of the mandate or after a staff member ceases their employment.

RECOMMENDATION B.3

To clarify the grounds, and establish a clear, fair and transparent process, by which the immunity may be lifted by an appropriately-constituted body.

48 See e.g., ODIHR, Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland, 31 October, para. 44. See also Venice Commission, Opinion on The Draft Law "On The Commissioner For Human Rights" of Kazakhstan, CDL-AD(2021)049, 13 December 2021, paras. 50-52, which recommended express provision for protection extending "the scope of the protection [...] to all documents of the Institution, including correspondence and internal notes, as well as to the baggage and means of communication belonging to the Commissioner". See also ODIHR-Venice Commission, Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro (2011), para. 23.

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

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

51 See e.g., SCA Report and Recommendations (May 2016), page 38.

52 See e.g., ODIHR, Final Opinion on the Draft Act Amending the Act on the Commissioner for Human Rights of Poland, 16 February 2016, Sub-Section 4 on the Procedure for Lifting the Commissioner's Immunity from Criminal Proceedings.

RECOMMENDATION B.4

To guarantee in legislation the inviolability of the Institute's premises, property, means of communication and all documents, including internal notes and correspondence, as well as of baggage, correspondence and means of communication belonging to the members of the NHRI's body and professional staff.

5. THE INSTITUTE'S MANDATE

5.1. Human Rights Promotion and Protection Mandate

37. Section 1 of the Act provides a welcome broad scope of the human rights covered by the Institute's mandate. This appears to align with the SCA requirements that NHRIs have a broad human rights mandate, applied to all functions that should at a minimum cover – but not be limited to – human rights in conventions ratified by the state.⁵³
38. Section 1 states that the Institute shall “*promote the strengthening*” of human rights, indicating that the Institute has both a promotion and protection mandate. The main tasks and functions of the Institute are set out in Section 2 of the Act. These include the powers to “*follow, investigate and report*” on the respect for and implementation of human rights in Sweden, the power to submit proposals to the government, engage internationally, and promote human rights education and awareness. Section 2 explicitly states that “*the Institute will not handle complaints from individuals concerning human rights violations*”, and there is no mention of the ability of the Institute to engage with judicial proceedings. The SCA requires that NHRIs have both promotion and protection functions. According to the SCA, promotion functions include education, training, advising, public outreach and advocacy while protection functions include monitoring, inquiring, investigating and reporting on human rights violations, and may include individual complaint handling.⁵⁴ The Institute's functions cover most of these areas. Various aspects of the Institute's mandate, however, would benefit from clarification to strengthen its role to effectively promote and protect human rights as further elaborated below.
39. Section 2 of the Act provides that the Institute may make proposals to the Government for the expansion of Sweden's international human rights obligations. It is unclear whether such proposals will be public. In keeping with the requirement for NHRIs to be open and transparent in their operations (see further, Sub-Section 7.2 *infra*), it is important that such proposals are broadly publicized.
40. There is no explicit reference to the mandate of the Institute covering private entities. SCA General Observation 1.2 requires that an NHRI's mandate should extend to **acts and omissions of both the public and private sectors**.⁵⁵ Venice Principle 13.2 similarly provides that “[t]he mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities.” Accordingly, **the Act should explicitly provide that the Institute's mandate also covers the private sector.**

53 See also ODIHR, Opinion on the draft Law on the National Commission for the Promotion and the Protection of Fundamental Human Rights and the Fight against Discrimination in Italy (19 November 2021); and Opinion on the Draft Law Amending and Supplementing the Ombudsman Act of Bulgaria (29 March 2017).

54 SCA General Observation 1.2.

55 See SCA General Observation 1.2. See also for example, GANHRI SCA, Accreditation Report October 2019, p. 29 and p. 11.

41. Even if a separate NPM i.e., the Parliamentary Ombudsman exists, the NHRI should nonetheless use its general human rights mandate to monitor, review and comment on the status of detention facilities.⁵⁶ In that respect, SCA General Observation 1.2 specifically states that an NHRI's mandate should explicitly allow for unannounced and free access to inspect and examine any public premises, documents, equipment and assets without prior written notice, including those belonging to military, police and security services.⁵⁷
42. Generally, while the Institute's mandate is sufficiently broadly set out in the Act as to allow it to determine what work it undertakes, the Act would benefit from additional clarity as to how the Government commits itself to providing opportunities for the Institute to engage on important human rights law and policy in the state. For example, the Act should provide or be interpreted as providing the Institute with the power to present, in public, recommendations to Parliament or the Executive regarding amendment to legislation or to adopt new law as it sees fit.⁵⁸
43. According to the SCA General Observation 1.6, NHRIs, as part of their mandate to promote and protect human rights, should undertake follow up action on recommendations contained in these reports and should publicize detailed information on the measures taken or not taken by public authorities in implementing specific recommendations or decisions. In fulfilling its protection mandate, an NHRI must not only monitor, investigate and report on the human rights situation in the country, it should also undertake rigorous and systematic follow up activities to promote and advocate for the implementation of its recommendations and findings, and the protection of those whose rights were found to have been violated. **It is recommended to include a provision providing the Institute with responsibility for systematic follow up activities to promote and advocate for the implementation of the Institutes recommendations and findings.**
44. While Section 2 (1) refers to the Institute's mandate to investigate, this Section **would also benefit from detail on how these functions should operate in practice, and what powers are available to the Institute to operationalize this function** (see also Sub-Section 7 *infra*). This is in keeping with the requirement for NHRI enabling laws to contain sufficient detail, as noted above.

5.2. The Institute as the National Monitoring Mechanism under the CRPD

45. Pursuant to Section 2 of the Act, the Institute performs the function of a NMM under Article 33(2) of the CRPD. In that regard, it may be recalled that CRPD Committee has stated that the NMM should have protection functions, and "*protection activities includes the consideration of individual or groups complaints alleging breaches of the Convention, the conduction of inquiries, the referral of cases to the courts, the participation of the framework in judicial proceedings and the issuance of reports related to complaints received and processed*".⁵⁹

56 See e.g., UNDP-OHCHR, Toolkit for Collaboration with National Human Rights Institutions, December 2010, p. 57.

57 See also SCA Report and Recommendations (November 2015), pp. 13, 25 and 42; and SCA Report and Recommendations (May 2016), p. 48.

58 See e.g., Venice Commission, Venice Principle 18. See also e.g., Article 29 of the Law on the Constitutional Law on the Human Rights Defender of Armenia, according to which the Defender has the right to submit a written opinion on draft normative legal acts regarding human rights and freedoms prior to their adoption to the relevant body; and Article 32 of the Organic Law of France on the Defender of Rights, see <LOI organique n° 2011-333 du 29 mars 2011 relative au Défenseur des droits (1) - Légifrance (legifrance.gouv.fr)>.

59 UN CRPD Committee, Guidelines on independent monitoring frameworks and their participation in the work of the Committee - Annex to the CRPD Rules of Procedure, CRPD/C/1/Rev.1, paras. 11 and 13.

46. As such, the NHRI underlying legislation should comply with the relevant provisions of the CRPD, particularly Article 33 (2), which states that States Parties shall have “*a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the [Paris Principles].*” The CRPD Committee has emphasized the importance of independence for NMMs, stating that “*The respect of functional independence entails that States parties ensure that the each mechanism composing the monitoring framework is independent from the executive branch of the State party; and that the monitoring framework ; (1)has members which are appointed in a public, democratic, transparent and participatory manner; has sufficient funding and technical and skilled human resources; has autonomy in managing its budget; (2) has autonomy in deciding and considering which issues fall under its consideration; can maintain and develop relations and engage in consultations with other bodies; and (3), may hear and consider complaints put forward by individuals or groups alleging that their rights under the Convention have been violated.*”⁶⁰
47. As noted above, the Institute is expressly prohibited from handling individual complaints. The Swedish Equality Ombudsman has a role in handling complaints in relation to discrimination under the 2008 Equality Act.⁶¹ In its most recent State Report under the CRPD in 2019, the Swedish Government indicated that the Equality Ombudsman has a broader role under the Convention: “*The Equality Ombudsman has been tasked with working to ensure that discrimination relating to grounds such as disability does not occur within any area of society. The Ombudsman shall contribute, by providing advice and via other means towards those who encounter discrimination, to exercise their rights. Within its area of operations, the Ombudsman shall inform, educate, confer and have other contact with government agencies, businesses, individuals and organisations.*”⁶² Given the role of the Equality Ombudsman to date and as underlined in the UN CRPD Committee’s Guidelines on NMM,⁶³ States Parties should ensure appropriate and close co-operation between all entities making up the monitoring framework under the CRPD and it is therefore important that there is clarity on the relationship between the Institute and the Equality Ombudsman (see further Sub-Section 6.3 *infra*).
48. Apart from the brief mention in Section 2, the Act is otherwise silent on the NMM role. The UN CRPD Committee’s Guidelines on NMM provide that “*[i]f the monitoring framework consists of one or more mechanisms, all mechanisms are required to be independent from the executive branch and at least one of them must be compliant with the Paris Principles.*”⁶⁴ In light of this and noting that the Equality Ombudsman is not an A-status NHRI, and further that the SCA only accredits one A-status institution per country, it is all the more essential to ensure the Institute’s accreditation with A-status. ODIHR therefore emphasizes the importance that the Act is revised in line with the recommendations in this Opinion to ensure that it also meets the requirements of the NMM. This Opinion only addresses aspects of the NMM where they may be impacted

60 UN CRPD Committee, Guidelines on independent monitoring frameworks and their participation in the work of the Committee - Annex to the CRPD Rules of Procedure CRPD/C/1/Rev.1

61 Discrimination Act, 2008:567.

62 Committee on the Rights of Persons with Disabilities, Combined second and third reports submitted by Sweden under article 35 of the Convention pursuant to the optional reporting procedure, due in 2019 - Replies to the list of issues prior to reporting (CRPD/C/SWE/QPR/2-3), CRPD/C/SWE/2-3, 27 April 2020, p. 39.

63 UN CRPD Committee, Guidelines on independent monitoring frameworks and their participation in the work of the Committee - Annex to the CRPD Rules of Procedure, CRPD/C/1/Rev.1, para. 12.

64 UN CRPD Committee, Guidelines on independent monitoring frameworks and their participation in the work of the Committee - Annex to the CRPD Rules of Procedure, CRPD/C/1/Rev.1, para. 14.

by the content of the Act. **In particular, the Act's provisions or lack thereof on the complaints-handling powers, selection and appointment process, immunity, security of tenure, representatives, staffing, and funding should be amended in light of the requirements for an NMM.**

RECOMMENDATION C.

To supplement the Act in light of the requirements for an NMM, in particular regarding complaints-handling powers, selection and appointment process, immunity, security of tenure, representatives, staffing, and funding.

6. SELECTION, APPOINTMENT AND TENURE

6.1. General Remarks

49. The criteria and modalities/procedure for the selection and appointment of NHRI leadership are critical for its independence. The SCA emphasizes that a clear, transparent and participatory selection and appointment process that promotes merits-based selection and ensure pluralism and participation of diverse societal forces should be spelled out in enabling laws, regulations or binding administrative guidelines.⁵³ It further notes 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.⁶⁵
50. The SCA's position is supported by a range of regional and international standards. The Venice Commission has noted 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*".⁶⁶ Venice Principle 6 specifies that "[t]he Ombuds[person] shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution".

6.2. Eligibility Criteria for the Director and Board

51. Pursuant to Section 5, the Institute is led by a Board, and headed by a Director who is appointed for a period of 5 years. In order to qualify for the post of Director, Section 6 provides that the individual "*shall have experience of qualified work in the field of human rights*". While there are some positive aspects to the eligibility criteria for the Director listed in this Section, particularly that the person has human rights experience, the absence of reference to the individual being of high moral standing and the absence of any specification of the level of human rights experience are of concern.
52. Section 8 of the Act provides indications of the eligibility requirements for the Board members, requiring that they have "*expertise in the field of human rights and experienced of qualified work*" in civil society, the judicial system or legal practice and academic

⁶⁵ SCA General Observation 1.8.

⁶⁶ Venice Commission, Opinion on the draft law on prevention and protection against discrimination in North Macedonia, CDLhttps://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)001-eAD(2018)001, para. 69.

research and higher education. Further, Section 8 specifies that “for each of the areas of activity”, there must be two members with experience. It is positive that there is explicit reference to civil society and academia in this Section.

53. The SCA considers that eligibility criteria for NHRI positions should not be too narrowly drawn. This is to ensure pluralism and encourage applications from a broad range of individuals. The Venice Principles similarly provide that criteria for ombudspersons “shall be sufficiently broad as to encourage a wide range of suitable candidates”.⁶⁷ Importantly, they note that “the essential criteria are high moral character, integrity and appropriate professional expertise and experience, including in the field of human rights and fundamental freedoms”.⁶⁸ In the present case, there is no reference to the character of the individual to be appointed, or of the appropriateness of their expertise and experience. **Specific reference to the requirement for appointees to be of high moral standing should be included in the Act**, which could be determined on the basis of elements such as the absence of conviction for a serious criminal offence, personal history of integrity and independence, etc.⁶⁹

6.3. The Selection and Appointment Process

54. As noted above, the selection and appointment of NHRI leadership is critical for its independence. The Act is largely silent on the selection and appointment process. In particular, the Act is entirely silent on the application process for filling the positions.⁷⁰ There are no requirements for wide advertisement of vacancies. The SCA emphasizes that the selection process should aim at “[m]aximizing the number of potential candidates from a wide range of societal groups”. The Venice Principles similarly provide that “[t]he procedure for selection of candidates shall include a public call and be public, transparent, merit based, objective, and provided for by the law”.⁷¹ As noted above, appointment via “a public, democratic, transparent and participatory” process is also a requirement for the members of the NMM. In light of the above, **specific provision for the wide publication of vacancies, in a timely and accessible manner aiming at reaching potential candidates with a wide variety of backgrounds and expertise, should be included in the Act.**
55. As regards the nomination and selection procedure, the Act is unclear about how the process will be undertaken. It only states that the post of Director “shall be ...filled following an application procedure” (Section 6) and the Board are “appointed by the Government” (Section 7). There are no further details on how such a candidate is selected and assessed, including the composition of the selection panels, if there are any.⁷² Moreover, there are no provisions in the Act for any broad and inclusive public consultation process as part of the selection and appointment procedure.⁷³ There is also no reference to the role of the legislature in the process. For the members of the Board, the Government must request proposals from the Advisory Council, Swedish Bar Association and Universities and University colleges. At the same time, it is not clear whether the Government is required to select members from the proposals made from

67 Venice Commission, Venice Principle 6.

68 Ibid. (Venice Principle 8).

69 See 2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions, pages 123 and 152. See also Sub-Sections 1 and 3 of the 2022 Venice Commission’s Compilation of Venice Commission Opinions concerning the Ombudsman Institution.

70 See for example, SCA Report on Montenegro (May 2016), p. 17.

71 See Venice Commission, Venice Principle 7.

72 SCA Report March 2015, p. 7.

73 See for example, SCA Report March 2019, pp. 16–17.

these bodies. Moreover, there is no reference to civil society in this process. Thus, the Government may have the sole power to select and appoint the Board, which would not be in line with the Paris Principles. **The reference solely to the Government as the appointing authority in the Act without any requirement for public consultation and/or involvement of civil society in the nomination/selection process raises concern and should be reconsidered as this may severely reduce the perceived and/or actual independence of the Institute.** A secondary piece of legislation, Ordinance 2021:1198 states that the Board appoints the Director, and indeed, the first Director was appointed by the Board.⁷⁴ However, even where appointment is made by the Board, the above-mentioned Paris Principles requirements for the selection and appointment process should be followed. Lastly, it is noted that the Board selects the members of the Advisory Council (see Section *infra*-6.6). This may give rise to conflict-of-interest issues between these two bodies.

56. **In light of the above, it is recommended to include detailed provisions on the application, screening, selection and appointment procedure for the Director and Board members, reflecting a broad, transparent and participatory process throughout, including mechanisms for the involvement of civil society.**⁶⁷ This can be done, for instance, through directly soliciting proposals from civil society and/or allowing civil society to directly participate in the evaluation of candidates as mentioned above. Specific provisions should also set out the criteria for identification, screening and evaluation of candidates and modalities for nominations from external parties, for instance by providing for the establishment of an independent pre-selection commission, whose composition reflects diverse societal groups (e.g., non-governmental organizations, universities, trade unions, concerned social and professional organizations, human rights groups).⁷⁵ Indeed, the SCA has generally found overly political panels or selection panels comprised entirely of political, governmental or administrative representatives to be problematic, and undermining the Paris Principles.⁷⁶ This selection commission would then select a limited pool of candidates who would then be proposed for appointment.⁷⁷ Of note, nominations by political entities are a common cause of concern for the SCA.⁷⁸⁷¹
57. **In any case, it is essential to include specific provisions setting out clear, predetermined, fair and objective criteria for the identification and evaluation of candidates at all stages of the process.** To ensure an inclusive process, the legal drafters should also consult with various stakeholders, including civil society, when determining the most appropriate criteria and procedures for this purpose.⁷⁹ As underlined in ODIHR's *Handbook for NHRIs on Women's Rights and Gender Equality*, equitable representation of women and men throughout the organization – especially in senior management should also be ensured.⁸⁰ This may be done for instance by alternating the appointment of men and women to the senior positions, and by ensuring that senior

74 <<https://mrinstitutet.se/om-institutet/verksamhetsplan-for-2022/>>.

75 The SCA considers that the requirement for pluralism extends to the selection process, see e.g., SCA, Report November 2008, pp. 4-5.

76 See for example, SCA Report, May 2018, p. 36. See also, Langtry & Roberts Lyer, *National Human Rights Institutions: Rules, Requirements, and Practice* (OUP, 2021), p. 129.

77 See e.g., ODIHR, *Opinion on the Draft Law Amending and Supplementing the Ombudsman Act of Bulgaria* (29 March 2017), para. 25.

78 See e.g., Langtry & Roberts Lyer, *National Human Rights Institutions: Rules, Requirements, and Practice* (2021), p. 133.

79 See e.g., ODIHR, *Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland*, 6 February 2017, paras. 46-47; and Venice Commission, *Opinion on the draft Constitutional Law on the Human Rights Defender*, adopted by the Venice Commission at its 109th Session (Venice, 9-10 December 2016), paras. 32-33.

80 ODIHR, *Handbook for National Human Rights Institutions on Women's Rights and Gender Equality*, 4 December 2012,

appointments reflect gender balance.⁸¹ Hence, pluralism and gender balance should also be taken into account in the criteria for selection of the Director and the Board and at each stage of the application, screening, selection and appointment process.

RECOMMENDATION D.

To include detailed provisions on the application, screening, selection and appointment procedure for the Director and Board members, reflecting an open, public, broad, merit-based, transparent and participatory process throughout, including provisions on the involvement of civil society, and specific provisions setting out clear, fair, public and objective criteria for the identification and evaluation of candidates at all stages of the process, and to ensure pluralism and gender balance in the composition of the Board.

6.4. Security of Tenure

58. The Paris Principles address general questions of independence and functionality of NHRIs. In terms of mandates for members of NHRIs, Principle B.3 on the “Composition and guarantees of independence and pluralism” emphasizes the importance of stable mandates, noting that without such stability, there can be no real independence. In its General Observations, the SCA also emphasizes the importance of “*ensur[ing] the continuity of [the NHRI’s] programs and services*”.⁸² Principle B.3 further states that members of NHRIs shall be appointed via a special act that shall establish the specific duration of their mandate.
59. As already mentioned, whether an NHRI can play its role within the state to the full extent depends on various factors, including political and legal guarantees of independence. One such guarantee is the security of tenure of NHRI members. The SCA recommends fixed terms of office (from 3 to 7 years, renewable once) clearly defined in the legislation.⁸³ The Venice Principles recommend a term of office of not less than 7 years for Ombudspersons, preferably non-renewable.⁸⁴
60. The establishment of term limits allows NHRI leadership to act without any interference from the executive or the legislative branches, and to act without fear of dismissal for making decisions that are unpopular or contrary to the will of an executive or prevailing political powers. The security of tenure of NHRI leadership also ensures stability of the office and reduces the risk of political influence.⁸⁵
61. Sections 6 and 7 of the Act provides for a six-year term for the Director and five-year term for the Board. Section 9 appears to regulate the term of office, requiring a five-year period to pass before a Director can be appointed to the Board, or vice-versa, and would thus appear to impose a “cooling-off” period of 5-years between appointments. The Venice Commission has previously recommended reconsideration of a 5-year term in

81 Ibid. See also e.g., ODIHR, Opinion on Draft Amendments to Ensure Equal Rights and Opportunities for Women and Men in Political Appointments in Ukraine (2013), paras. 32-35; and French Law n ° 2014-873 of 4 August 2014 for real equality between women and men, Articles 66 and 75, which provide that said appointments shall be annulled if gender balance is not respected (except for appointments of members from the under-represented gender).

82 SCA General Observation 2.2.

83 SCA General Observation 2.2.

84 Venice Commission, Venice Principle 10.

85 ODIHR, Urgent Note focuses on the issue of the continuation of ombudspersons in the transition period following the end of their terms of office until the appointment of a new office-holder in Poland (2020).

favour of a (non-renewable) longer term such as 7-year.⁸⁶ SCA General Observation 2.2 refers to the possibility of the mandate being renewed only once.

62. **In any case, the Act should be clarified to clearly provide whether the Board and Director’s mandate are renewable, and if yes, specify that it can only be renewed once, while providing for the process by which an incumbent may undertake a second term and whether they can ever be re-elected in the future, bearing in mind the above requirements for the selection and appointment process.**

6.5. Dismissal and Transition Period

63. NHRI legislation should contain an independent and objective dismissal process following predefined criteria, similar to that accorded to members of other independent state agencies.⁸⁷ The grounds for dismissal must be clearly defined and appropriately confined to those actions or circumstances which impact adversely on the capacity of the NHRIs to fulfil their mandates. As emphasized in SCA General Observation 2.1, 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. In any case, dismissal should not be based solely on the discretion of appointing authorities.⁸⁸
64. Section 7 of the Act provides that the Government has the exclusive responsibility to release a Board member from office, upon their request or in the case of “exceptional circumstances”. As noted above, the Board is composed of the Director and seven other members. It is unclear however, if this dismissal provision also applies to the Director, especially as the Ordinance 2021:1198 notes that the Board “may decide on a replacement for the Director”. Nonetheless, the present dismissal provision raises concern as the wording “exceptional circumstances” is overly broad and vague and open to various interpretation. Moreover, the Act is lacking sufficient information on the process for dismissal to be compliant with the Paris Principles.
65. The Venice Principles emphasize the importance of clear dismissal provisions: “[t]he Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law” (Principle 11). These shall relate solely to the essential criteria of “incapacity” or “inability to perform the functions of office”, serious “misbehaviour” or “misconduct”, which shall be narrowly interpreted.⁸⁹ **The Act should provide for clear and objective grounds for all cases of dismissal, while ensuring that they are limited to only serious grounds of misconduct or incompetence or to those actions which impact adversely on the capacity of the Director or member’s ability to fulfil her/his mandate.**
66. In addition, Section 7 lacks details on the dismissal procedure. In this respect, the SCA has stated that the dismissal process should not be based solely on the discretion of the

86 Venice Commission, Opinion on The Draft Law “On The Commissioner For Human Rights” of Kazakhstan, CDL-AD(2021)049, 13 December 2021, paras. 64-66.

87 SCA General Observation 2.1. See also SCA Report, November 2016, where the SCA specifically noted that “the enabling law of an NHRI must contain an independent and objective dismissal process similar to that accorded to members of other independent State agencies.”

88 Ibid. SCA General Observation 2.1. See also CoE Committee of Ministers Recommendation CM/Rec(2021)1 on NHRIs, which similarly provides for the need for a clear dismissal process: “To ensure independence, the enabling legislation of a NHRI should contain an objective dismissal process for the NHRI leadership, with clearly defined terms in a constitutional or legislative text. The dismissal process should be fair and ensure objectivity and impartiality and should be confined to only those actions which impact adversely on the capacity of the leaders of NHRIs to fulfil their mandate” (para. 5).

89 See SCA General Observation 2.1 and its Justification. See also Venice Commission, Venice Principle 11, and CoE Committee of Ministers Recommendation CM/Rec(2021)1 on NHRIs, para. 5.

appointing body. It is unclear how and on which basis the Government will determine early release from office. Moreover, the dismissal decision will be solely in the hands of the Government, with no mention of the involvement of the Institute or the parliament in the decision, which is highly problematic. Further, there is no mention of a right to appeal the decision to an independent body. The Venice Commission has previously recommended the need for a public and transparent procedure, including a procedure for challenging the dismissal before the courts.⁹⁰ **The Act should be amended to revise the dismissal grounds, provide clear and detailed provisions to ensure publicity and transparency of the dismissal process of a member that includes the right of appeal to an independent tribunal.**

67. There is no detail in the Act regarding the timeline or process for interim periods pending new appointments. Transitional provisions for leadership are important for the stability of NHRIs, either in case of early dismissals or when the mandate of the NHRI leadership comes to its end. Such provisions should cover the different possible scenarios where an office can become vacant, that is, through end of regular term of office, extraordinary end of the term due to death or incapacity, or due to resignation, dismissal following a due process procedure, and temporary inability to perform functions.⁹¹ CoE Committee of Minister’s Recommendation (2019)6 states that “*arrangements should be in place so that the post of the head of any NHRI does not stay vacant for any significant period of time*”.⁹² Moreover, as expressly recommended in Principle 13 of the Belgrade Principles, a 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*”.⁹³
68. ODIHR has specifically recommended that legislation should establish procedures to ensure NHRIs’ continuous functioning without interruption when an Ombudsperson’s term of office comes to an end, either through provisions allowing ombudspersons to continue their mandate until their successor is appointed or through the introduction of clearly defined rules, which would allow NHRIs to continue effectively performing their functions, for instance by having a deputy or a Board member perform the Director’s functions in the interim.⁹⁴ **In cases of early end of the term of Director or Board Members, the Act should ensure sufficient time for the selection and appointment process to ensure that the procedure for a replacement is Paris Principles-compliant. Also, when the Director’s term of office comes to an end prior to the appointment of a new Director, the Act should provide for an interim mechanism to ensure the Institute’s continuous functioning pending the appointment of the new office-holder.** This can be by allowing the incumbent to continue his/her mandate until the appointment of the new Director (which should be required within a set period, e.g. 3 months), or – where this is not possible due to the situation of the incumbent – by having a deputy head of the Institute being able, through a specific provision in the Act, to perform the Director’s functions in the interim.

90 Venice Commission, Venice Principle 11. See also e.g., Venice Commission, Opinion on The Draft Law “On The Commissioner For Human Rights” of Kazakhstan, CDL-AD(2021)049, 13 December 2021, paras. 76-79.

91 K Roberts Lyer, Change at the Top: The Necessity of Transitional Leadership Provisions in the Laws of Independent State-Based Institutions, *Journal of Human Rights Practice*, 2023.

92 CoE Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman institution, 16 October 2019, par. 3.

93 Human Rights Council Report on National institutions for the promotion and protection of human rights, 1 May 2012.

94 See e.g., ODIHR, Urgent Note on International Standards and Comparative Practices Regarding the Continuation of Ombudspersons’ Terms of Office until the Appointment of a New Office-Holder, 14 October 2020.

RECOMMENDATION E.1

To provide for clear and objective grounds for all cases of dismissal, while ensuring that they are limited to only serious grounds of misconduct or incompetence or to those actions which impact adversely on the capacity of the Director or member's ability to fulfil her/his mandate, while providing clear and detailed provisions to ensure publicity and transparency of the dismissal process of a member that include the right of appeal to an independent tribunal.

RECOMMENDATION E.2

To provide for an interim mechanism to ensure the Institute's continuous functioning pending the appointment of the new office-holder.

6.6. The Advisory Council

69. Section 10 provides that the Institute shall have an Advisory Council to “*provide advice and support*” by bringing the knowledge and experience of civil society organizations “*and other actors*”. This Council is appointed by the Board and the Act states it should have at least 10 members. While it is appropriate for the Institute to determine the purpose and procedures around the selection, appointment, term of office, and activities of this Council, in line with its independence as an NHRI, it would be beneficial to include more specification about this body in the Act. The composition, purpose and role of the Council should be clear, to avoid any concerns about its potential impact on the independence of the Institute. In particular, the powers and activities of the Council, membership, selection and appointment process, and regularity of meetings should be clearly set out in the Act, with due regard to the Paris Principles and particularly to the independence of the Institute. **Section 10 should be amended to include more detailed provisions on the composition of the Advisory Council, taking into account plurality, diversity and gender balance, as well as criteria for selection and appointment and term of office of the members to ensure that they are free from political influence.** The provisions on the Advisory Council should also take into account the requirements of the NMM.
70. The SCA strongly encourages NHRI co-operation with other human rights bodies, in particular with civil society.⁹⁵ The SCA emphasizes the importance of this aspect of NHRIs' role, requiring that it be provided for in enabling laws, and recommend formalizing the relationship with civil society organizations.⁹⁶ Engagement with civil society must be regular, and demonstrated as part of the SCA accreditation process. A lack of engagement is a serious cause for concern for the SCA.⁹⁷ If the Advisory Council is foreseen as the means by which the Institute has its ongoing formal engagement with civil society, the Act would benefit from more explicit reference to the requirement for close, consistent, regular, systematic and constructive engagement with civil society.⁹⁸

6.7. Pluralism

71. While not explicitly mentioned in the Act, the legislation does contain some welcome provisions to support pluralism. The composition of the Advisory Council, explicitly

95 See SCA General Observation 1.5.

96 SCA Report, May 2016, p. 10.

97 See GANHRI, The Marrakech Declaration 2018: Expanding the civic space and promoting and protecting human rights defenders with a specific focus on women: The role of national human rights institutions (adopted on 12 October 2018).

98 SCA Report, March/ April 2010, p. 5.

references a “broad composition” as that includes representatives of civil society, including organizations representing persons with disabilities. This is welcome, as are references to civil society, legal experts and academia in Section 8 (Board). However, the Act is silent on pluralism within the Institute at all levels. Paris Principle 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*”. It is important to note that pluralism refers to various kinds of diversity, including ethnic and linguistic minorities, persons with disabilities, and ensuring the equitable representation of women and men in the NHRI, including in leadership positions.

72. While there are diverse models for ensuring pluralism in the composition of NHRIs, the SCA has particularly noted that when both the leadership and the staff are representative of “*a society’s social, ethnic, religious and geographic diversity the public are more likely to have confidence that the NHRI will understand and be more responsive to its specific needs. Additionally, the meaningful participation of women at all levels is important to ensure an understanding of, and access for, a significant proportion of the population. Likewise, in multilingual societies, the NHRI’s capacity to communicate in all languages is key to its accessibility. The diversity of the membership and staff of an NHRI, when understood in this way, is an important element in ensuring the effectiveness of an NHRI and its real and perceived independence and accessibility.*”⁹⁹ General Observation 1.7 further notes that 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.*”¹⁰⁰ **The Act should provide for pluralism in the composition of the Institute at all levels and include reference to various kinds of diversity, including ethnic and linguistic minorities, persons with disabilities, and ensuring gender balanced representation in the NHRI at all levels, including in leadership positions.**
73. Gender balance should be taken into account in the appointment of the Director, the Board and staff of the Institute. The legal consequences in cases of non-compliance with these requirements, and a monitoring mechanism should be contemplated.¹⁰¹ To ensure the effectiveness of gender balance requirements, **the Act should specify the consequences in case of non-compliance with the minimum threshold.** It is also important to establish human resources policies, including a zero-tolerance policy towards harassment, sexual harassment, sexism and various forms of abuse. In addition, other organizational features that enable women and men to participate and advance in the NHRI on an equal footing should be considered and explicitly mentioned in the Act.¹⁰²

99 SCA General Observation 1.7. See also ODIHR, Opinion on the Draft Act on the Independent National Human Rights Institution of

Iceland, 6 February 2017; ODIHR Opinion on the Draft Amendments to the Law on Civil Service of Ukraine (10 May 2016); and ODIHR, Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland, 31 October 2017. 91

100 SCA General Observation 1.7.

101 See e.g., ODIHR, Comments on the Law on the Assembly and the Rules of Procedure of the Assembly from a Gender and Diversity Perspective (2019), para. 45. See also e.g., Report of the UN Working Group on the issue of discrimination against women in law and in practice, A/HRC/23/50, 19 April 2013, para. 39; and OSCE Gender Equality in Elected Office: A Six-Step Action Plan (2011), pp. 33-34. For instance, where a clear requirement is made to reflect a gender balance or promote diversity in the relevant legislation, a proposed list that does not reflect a gender balance could be referred back for revision by the relevant parliamentary group; see ODIHR, Opinion on Draft Amendments to Ensure Equal Rights and Opportunities for Women and Men in Political Appointments in Ukraine (2013), paras. 32-35. See also the French Law n ° 2014-873 of 4 August 2014 for real equality between women and men, Articles 66 and 75, which provide that said appointments shall be annulled if gender balance is not respected (except for appointments of members from the under-represented gender), though this will not render null and void the decisions that may have already been adopted by said body in the meantime.

102 See e.g., ODIHR, Handbook for National Human Rights Institutions on Women’s Rights and Gender Equality, 4 December 2012.

RECOMMENDATION F.

To expressly provide for pluralism in the composition of the Institute at all levels and include reference to various kinds of diversity, including ethnic and linguistic minorities, persons with disabilities, while ensuring gender balanced representation in the NHRI at all levels, including in leadership positions, and the development of gender- and diversity-sensitive human resources policies.

6.8. Compensation and Full-Time Membership of the Board

74. The SCA has previously recommended that the enabling law should clearly set out whether Board members are part-time or full-time.¹⁰³ The Act is silent as to the remuneration of the Board and whether they are full-time or part-time. **The SCA considers that NHRI Board Members should ideally be full-time and remunerated.¹⁰⁴ This is recommended even where the executive head is full time.¹⁰⁵** Having full-time, remunerated members is critical for the independence of the NHRI, in order for it to fulfil its mandate, to ward off corruption and for its public standing and perception. **Furthermore, where Board members remain employed by another entity, it should be explicitly provided for in the enabling law that they serve in the NHRI Board in their individual capacity. In these cases, professional activity must not conflict with their posts as Board members and should be subject to the approval of the Board. The terms for remuneration of members of the Board should be stated clearly in the enabling law.**

7. THE INSTITUTE'S POWERS AND FUNCTIONS

7.1. Restrictions and Limitations on the Institute's Powers and Functions

75. Section 11 of the Act limits the Institute's access to information about human rights, by listing bodies that are exempt from its requests. This includes "*quasi-judicial tribunals or bodies of administrative authorities with quasi-judicial functions*" as well as the Office of the Chancellor of Justice, the Parliamentary Ombudsmen and the Swedish National Audit Office. In principle, NHRIs should have a legally enforceable right to unrestricted and unannounced access to inspect and examine any public premises, documents, databases, equipment and assets¹⁰⁶. At times, this may also include those materials, which might otherwise be legally privileged or confidential.¹⁰⁷ The Act should provide for the grounds and the procedure for requesting and accessing such information. Any restriction, for instance on the ground of national security, should not be unreasonably or arbitrarily applied and it should be possible to challenge a refusal to communicate so-called "secret" information.¹⁰⁸ Further, the CRPD Committee has stated that NMM's should "*have expeditious and full access to information, databases, records, facilities, and premises, both in urban and rural or remote areas; unrestricted access to and*

¹⁰³ SCA Report, Northern Ireland, May 2016, p. 45.

¹⁰⁴ SCA General Observation 2.2. SCA Report, Malaysia, November 2015, p. 30. See also, SCA Report, Bahrain, May 2016, p. 8; SCA Report, Zambia, November 2016, p. 57, SCA Report, Denmark, November 2017, p. 42.

¹⁰⁵ SCA Report, Belgium, May 2018, p. 11.

¹⁰⁶ SCA General Observation 1.2

¹⁰⁷ See e.g., Venice Commission Principles, CDL-AD(2019)005, Principle 16.

¹⁰⁸ See e.g., ODIHR, Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland, 6 February 2017, para.

*interaction with any persons, entities, organisations or governmental bodies or entities with which the monitoring framework would require to be in contact; requests made by the monitoring framework are properly and addressed in a timely manner by implementing bodies; and training is available to its staff on a continuous basis.*¹⁰⁹ **In order to ensure that the Institute has full access to all materials they require for their work, the limitations in Section 11 should be removed.** Additionally, it may be beneficial to discuss further ways of strengthening the NHRI’s mandate to compel authorities to provide requested information and above-mentioned access.¹¹⁰ **To ensure this, the power to request information, which is central to the proper execution of the NHRI’s mandate, should be supported by specific sanctions for non-compliance, which should be set out in the Act.**¹¹¹

76. Section 2(2) provides that “*the Institute shall...submit proposals to the Government on the measures needed to ensure human rights*”. This appears to be out of line with the Paris Principles A.3(a) requirement that NHRIs have the ability to submit such proposals broadly “*to the Government, Parliament and any other competent body*”. Further, Principle C(c) requires NHRIs to “*publicise its opinions and recommendations...directly or through any press organ*”. The SCA places considerable emphasis on the importance of the publication of NHRI recommendations, describing the Paris Principles as containing a “*three-fold reinforcement of the obligation to make and publicize recommendations*”. **Even where an NHRI publicizes its recommendations in practice, the enabling law should specify that it has this power, and that it may make such proposals to the government, parliament or any competent body as it sees fit.**

7.2. Publicity of Reports

77. Section 3 of the Act obliges the Institute to prepare and submit an annual report to the Government. As noted above, the SCA has placed considerable emphasis on the creation and submission of annual, special and thematic reports by NHRIs and allowing for public scrutiny of the effectiveness of an NHRI.¹¹² State bodies should not have the authority to edit the NHRI’s annual report.¹¹³ The Venice Commission has made similar recommendations.¹¹⁴ **The Act should be amended to explicitly provide for the publication of all reports and recommendations by the Institute, without any form of involvement of the executive in the process.**
78. The SCA requires that annual reports of NHRIs be considered by parliament, and that this is explicitly provided for in enabling law.¹¹⁵ The UN Paris Principles make explicit reference to the submission of annual NHRI reports to Parliament in addition to Government. The SCA General Observation 1.11 specifies that the enabling law should establish a process whereby its reports are required to be widely circulated, discussed and considered by the legislature, and should preferably include an explicit power to table

109 UN CRPD Committee, Guidelines on independent monitoring frameworks and their participation in the work of the Committee - Annex to the CRPD Rules of Procedure, CRPD/C/1/Rev.1.

110 See 2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions, page 149.

111 See e.g., ODIHR, Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland, 31 October 2017, para. 63. See also Venice Commission, Opinion on the Draft Constitutional Law on the Human Rights Defender of Armenia, CDL-AD(2016)033, para. 29.

112 See also ODIHR Opinion on the Draft Amendments to the Act on Establishment of the Slovak National Centre for Human Rights (2019).

113 SCA Report, November 2013, p. 15.

114 Venice Commission, Opinion on The Draft Law “On the Commissioner for Human Rights” of Kazakhstan, CDL-AD(2021)049, 13 December 2021, para. 97.

115 SCA Report, October 2022, p. 12.

reports directly in the legislature,¹¹⁶ though approval of the report by the Parliament is not required, in keeping with the independence of NHRIs. **The Act should be amended to provide for direct submission of the Institute’s reports to and consideration by the Parliament.**

RECOMMENDATION G.1

To explicitly provide for the publication of reports and recommendations by the Institute and to allow the Institute to issue its recommendations to the parliament, government or other competent authority as it sees fit.

RECOMMENDATION G.2

To provide for the submission of the Annual Report to the Parliament, in addition to the Government, while ensuring that it is discussed and considered by the legislature.

8. ADEQUATE RESOURCES OF THE INSTITUTE

79. Adequate resources, including funding, are vital to the independent functioning of NHRIs. The State is expected to provide the NHRI with an appropriate level of funding for all its core operations and activities. The SCA considers that: “[t]o function effectively, an NHRI must be provided with an appropriate level of funding in order to guarantee its independence and its ability to freely determine its priorities and activities”.¹¹⁷ It must also have the power to allocate funding according to its priorities. In particular, adequate funding should ensure the “gradual and progressive realisation of the improvement of the NHRI’s operations and the fulfilment of its mandate.” CoE Recommendation (2021)1 similarly emphasizes the importance of funding.¹¹⁸ According to the Recommendation, adequate funding includes allocation of funding for accessible premises, which should include accessibility for persons with disabilities, staff salaries, well-functioning communications systems and sufficient resources for mandated activities, including in times of financial constraint.¹¹⁹
80. The mechanism for deciding on the budget of the Institute is not stated in the Act. At the same time, the absence of any detail on the budget in the Act raises concerns for the legislation’s proper implementation and guarantees that the Institute will be provided with adequate and ongoing financial, technical and human resources to fully carry out its mandate, beyond the year of its set-up, including its role as the NMM. **The Act should be amended to specify that the Institute shall be provided with adequate financial, technical and human resources to ensure the full, independent and effective discharge of the responsibilities and functions of the institution, including its role as NMM. Explicit reference should be made to funding for the NMM.**

116 See European Commission, 2023 Rule of Law Report, Country Chapter - Sweden, p. 23.

117 SCA General Observation 1.10.

118 Article 6 of the CoE Recommendation CM/Rec(2021)1, Appendix, notes that “Member States should provide NHRIs with adequate, sufficient and sustainable resources to allow them to carry out their mandate, including to engage with all relevant stakeholders in a fully independent manner and freely determine their priorities and activities.”

119 SCA General Observation 1.10.

81. In addition, there is no explicit reference in the Act to the principle of financial autonomy of the Institute. The SCA has clear recommendations on the importance of such autonomy, which notes that “[f]inancial systems should be such that the NHRI has complete financial autonomy as a guarantee of its overall freedom to determine its priorities and activities. National law should indicate from where the budget of the NHRI is allocated and should ensure the appropriate timing of release of funding, which is particularly important in ensuring an appropriate level of skilled staff.”¹²⁰ A separate budget line in the national budget should be provided for the NHRI.¹²¹ The SCA considers that there should not be any government interference, perceived or actual, in the financial autonomy of an NHRI. Decisions over and control of the allocated budget of the Institute must not be in the hands of the government, but in the control of the Institute itself, in line with its independence.¹²² In that regard it may be noted that a Government decision of 12 December 2022 set the budget for the Institute for the year 2023. Moving forward, the Institute should have the authority to submit its budget to parliament,¹¹⁷ in a manner that allows it to plan its activities in a timely way. Financial autonomy has also been emphasized as important for NMMs by the CRPD. **The Act should explicitly provide for the Institute’s financial autonomy and independent control over its allocated budget.**
82. Additionally, to increase the NHRI’s financial independence, some additional safeguards may also be contemplated. For instance, the Act may specify that the budgetary process should not be used to allocate/reduce funds from the budget in a manner that interferes with the NHRI’s independence.¹²³ The relevant legislation should also prescribe that the institution itself should submit its budget proposal to the parliament and that this proposal should be included in the national budget without changes.¹²⁴ In addition, legal provisions against unwarranted budgetary cutbacks could be introduced, including but not limited to the principle that compared to the previous year, any reductions in the NHRI’s budget should not exceed the percentage of reduction of the budgets of the Parliament or the Government.¹²⁵

RECOMMENDATION H.

To specify that the state will provide the Institute with adequate funding to cover the costs of human, financial, material and technical capacity to guarantee the proper implementation of its (broad) mandate both as NHRI and as National Monitoring Mechanism, while providing for the NHRI’s financial autonomy, full control over its allocated budget and safeguards against unwarranted budgetary cutbacks.

120 SCA General Observation 1.10.

121 See e.g., ODIHR, Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland, 6 February 2017. See also e.g., Venice Commission, Opinion on the Law on the People’s Advocate (Ombudsman) of the Republic of Moldova, CDLhttp://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)017-eAD(2015)017, para. 60.

122 Ibid. See also ODIHR Opinion on the Draft Law Amending Article 8 of the Law on the Human Rights Defender in Armenia. 117 SCA Report on South Africa (November 2017), p. 33.

123 ODIHR, Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland, 6 February 2017, para. 76.

124 Ibid. para. 76 (2017 ODIHR Opinion on NHRI of Iceland). See also 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), CDLAD(2007)020, paras. 8 and 30.VI.

125 Ibid. para. 76 (2017 ODIHR Opinion on NHRI of Iceland). See also Venice Commission, Opinion on the Draft Constitutional Law on the Human Rights Defender of Armenia, CDL-AD(2016)033, para. 69.

9. STAFFING

83. The Act is silent about how the Institute will be staffed, including the staffing level to be provided to the Institute, and how staff will be recruited and remunerated. While the provision on the independent operation of the Institute in Section 4, refers to the ability of the Institute to manage its operations, this is insufficient to meet the requirements of the Paris Principles as regards staffing. **NHRI enabling laws should include detailed provisions about staffing, in particular covering the right of the NHRI to determine its staffing structure and skills, recruitment, and independence.**
84. The SCA has previously 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.¹²⁶ Further, it is for the NHRI to determine the required skills and selection criteria for its staff,¹²⁷ including with a view to ensure diversity and gender balance at all levels. As regards the NMM, the SCA will consider whether they possess the appropriate skills and expertise.¹²⁸
85. Staff should be recruited according to an open, transparent and merit-based selection process that ensures pluralism (including in the context of gender, ethnicity, persons belonging to minority groups and persons with disabilities) and a staff composition that possesses the necessary skills required to fulfil the NHRI's and NMM's mandate, and that also ensures the equitable participation of women in the NHRI.¹²⁹ The Venice Principles similarly provide that the Ombudsperson “*shall be able to recruit his or her staff*” as does the Council of Europe Committee of Ministers 2021 Recommendation on NHRIs.¹³⁰ The Venice Commission has previously recommended that NHRI staff should not be civil servants, but have “*distinct special status*” regulated by the law.¹³¹
86. The independence of staff is critical to NHRIs. There should be specific mention in the Act of the autonomy and independence of the Institute's staff and to the terms and conditions for staff being equivalent and not lower than that of other public servants undertaking similar work and with similar qualifications and responsibilities, which is in keeping with the recommendations of the SCA.¹³² At the same time, most countries have human resources policies pertaining to their public services that apply to all public agencies and entities, including NHRIs.¹³³ It is generally considered that in such cases, NHRIs should nevertheless benefit from a certain flexibility in applying public service rules on recruitment and career advancement.¹³⁴ However, an NHRI does not only need to be independent, but it must also be seen to be independent.¹³⁵ NHRI members and staff should not be too closely connected to the public service or considered or perceived as

126 SCA General Observation 2.4.

127 SCA, Accreditation Report - Belgium (CEOOR) (March/April 2010), p. 11.

128 SCA General Observation 2.8.

129 Ibid. and SCA General Observation 1.7.

130 See Venice Commission, Venice Principle 22. See also the CoE Committee of Ministers' Recommendation CM/Rec(2021)1 on NHRIs, Appendix, Article 7.

131 Venice Commission, Armenia -Opinion on the legislation related to the Ombudsman's staff, CDL-AD(2021)35, para. 26.

132 SCA, Accreditation Report - Slovenia (HRORS) (March/April 2010), p. 9.

133 OHCHR, Handbook on National Human Rights Institutions - History, Principles, Roles and Responsibilities (2010), page 156.

134 Ibid. page 156 (2010 OHCHR Handbook on National Human Rights Institutions). See also UNDP-OHCHR, Toolkit for Collaboration with National Human Rights Institutions (December 2010), pages 173-174.

135 Ibid. page 39 (2010 OHCHR Handbook on NHRIs). See also, ODIHR- Venice Commission, Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro, (Venice, 14-15 October 2011), paras. 12, 27 and 29.

government employees.¹³⁶ The SCA has made it clear that the majority of NHRI staff should not be secondees, nor redeployed from other branches of the public sector. Further, senior staff should never be secondees.¹³⁷

87. **In light of the foregoing, the Act should specify that the Institute:**

- **shall have the authority to determine the structure and skills of its staff;**
- **shall have the authority to determine the criteria, procedures and methods for recruiting all of its staff, while ensuring pluralism and gender balance;**
- **in addition, the Act should provide for the autonomy and independence for the staff of the Institute.**

10. RECOMMENDATIONS RELATED TO THE PROCESS OF AMENDING THE ACT

88. OSCE participating States have committed to ensure that legislation will be “adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability” (1990 Copenhagen Document, para. 5.8).¹³⁸ Moreover, key commitments specify that “[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (1991 Moscow Document, para. 18.1).¹³⁹¹³⁷ The Venice Commission’s Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.¹⁴⁰

89. The SCA has emphasized that where NHRI laws are amended, an open, transparent and meaningful consultative process should be undertaken, including with the NHRI itself.¹⁴¹ It is thus essential that the NHRI be meaningfully consulted at all stages of the law-making process, from the preparation of the initial draft by the government, during parliamentary debates and until the adoption, as well as future evaluation of the legislation. It particularly emphasizes the important role of the legislature in relation to NHRIs.¹⁴² In addition, when devising or amending the legal and institutional framework for the protection and promotion of human rights, it is essential that civil society be included in the process and meaningfully consulted.¹⁴³

136 International Council on Human Rights Policy and OHCHR, Report on Assessing the Effectiveness of National Human Rights Institutions (2005), page 8.

137 See Langtry & Roberts Lyer, National Human Rights Institutions: Rules, Requirements, and Practice (2021), chapter 4.8, citing SCA, Report, November 2008, p.11; SCA, Report, May 2011, p. 16; SCA, Report, March 2012, pp. 13-14; SCA, Report, May 2011, p. 7; SCA, Report, October 2010, p. 4; SCA, Report, November 2016, p. 52.

138 See 1990 OSCE Copenhagen Document.

139 See 1991 OSCE Moscow Document.

140 See Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, Part II.A.5.

141 For example, concerning the development of the NHRI in Norway, the SCA recommended that “[a]n inclusive and consultative process to ensure broad support for a new NHRI should be initiated by the Government without delay”, emphasizing that “[t]he process should include the [existing institution], civil society groups and other stakeholders”; see SCA, 2011 Report, Norway, October 2011, pp. 1516.

142 See also the Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments (2012), which the OHCHR recommends to use as guidelines to strengthen co-operation between NHRIs and parliaments for the promotion and protection of human rights at the national level, especially para. 4, which states that “Parliaments, during the consideration and adoption of possible amendments to the founding law of a NHRI, should scrutinize such proposed amendments with a view to ensuring the independence and effective functioning of such institution, and carry out consultation with the members of NHRIs and with other stakeholders such as civil society organizations”; and paras. 27-28, which provide that “NHRIs should be consulted by Parliaments on the content and applicability of a proposed new law with respect to ensuring human rights norms and principles are reflected therein” and “Parliaments should involve NHRIs in the legislative processes, including by inviting them to give evidence and advice about the human rights compatibility of proposed laws and policies”.

143 UNDP-OHCHR, Toolkit for Collaboration with National Human Rights Institutions, December 2010, p. 57.

90. For consultations on amendments to legislation to be effective, they also need to be inclusive and involve consultations and comments by the public. To guarantee effective participation, consultation mechanisms must allow for input at an early stage and throughout the process,¹⁴⁴ meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). 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 the NHRI, human rights organizations, civil society and the general public, including marginalized groups, are fully informed and able to submit their views prior to the adoption of the law.¹⁴⁵
91. Given the potential impact of the Act on the exercise of human rights and fundamental freedoms, any amendment to the Act must be based on a proper in-depth review and assessment of the proposed options, including a careful and exhaustive review of the respective mandate(s) of the institutions involved in promoting and protecting human rights, jurisdiction, independence, powers and guarantees, to ensure compliance with international human rights instruments' requirements, make any necessary legislative amendments and provide any increase in human, financial, technical and material resources required to guarantee the proper implementation of the new or expanded mandate.¹⁴⁶
92. In light of the above, **the public authorities are encouraged to ensure that any future amendment to the Act is subjected to inclusive, extensive and effective consultations, including with the NHRI, civil society, as well as representatives of underrepresented communities, offering equal opportunities for women and men to participate. According to the principles stated above, such consultations should be inclusive, meaningful and take place in a timely manner. 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 that would efficiently evaluate the operation and effectiveness of the amended Act, once adopted.**¹⁴⁷

[END OF TEXT]

144 See e.g., ODIHR, Guidelines on the Protection of Human Rights Defenders (2014), Section II, Sub-Section G on the Right to participate in public affairs.

145 See e.g., ODIHR, Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland, Warsaw, 31 October 2017, para. 95.

146 UNDP-OHCHR, Toolkit for Collaboration with National Human Rights Institutions, December 2010, p. 57.

147 See e.g., OECD, International Practices on Ex Post Evaluation (2010).