



Télégrammes: UNATIONS, GENEVE
Téléc: 41 29 62
Téléphone: (41-22) 928 9377
Téléfax: (41-22) 928 9018
Internet www.ohchr.org
E-mail: vstefanov@ohchr.org



Address:
Palais des Nations
CH-1211 GENEVE
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Excellency,

Further to your letter dated September 13, I am pleased to enclose hereby a legal advice that the National Institutions and Regional Mechanisms Section (NIRMS) has prepared on the current draft law aimed at establishing the National Institute for Human Rights.

I take this opportunity to commend the efforts carried out by the Dutch Government to develop this draft law in a participatory and inclusive way. It reflects the advice provided by OHCHR and the Irish Human Rights Commission to the Equal Treatment Commission (ETC). In this regard, I would like to highlight the fruitful and proactive cooperation we had with the President of the ETC, Ms. Laurien Koster. Her office has played a key role in keeping us constantly updated on the efforts carried out in your country towards the establishment of the National Institute for Human Rights.

I would like to assure you that we stand ready to offer any further advice and assistance throughout the adoption of the enabling law and the actual establishment of the Dutch NHRI. Likewise, we stand ready to assist the institution, once established, to seek accreditation status before the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Vladlen Stefanov', written over a horizontal line.

Vladlen Stefanov
Chief, National Institutions and Regional Mechanisms
Section

Enclosure

Mr. Ernst Hirsch Ballin
Minister of the Interior and Kingdom Relations
Minister of Justice
The Netherlands
Tel: +31 70 426 6183
E-mail: sanne.lint@minbzk.nl

**OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
NATIONAL INSTITUTIONS AND REGIONAL MECHANISMS SECTION**

**Second Legal advice on the
“Draft Law Proposing the Netherlands Institute for Human Rights”**

I. BACKGROUND

The National Institutions and Regional Mechanisms Section (NIRMS) of the Office of the High Commissioner for Human Rights (OHCHR) has prepared this legal advice upon the request received from H.E. Ernst Hirsch Ballin, Minister of the Interior and Kingdom Relations of the Netherlands.¹ This advice is based on the “Draft Law proposing the Netherlands Institute for Human Rights Act”, enclosed in Mr. Hirsch’s correspondence.

II. COMMENTS ON THE DRAFT LAW

NIRMS wishes to commend the efforts carried out in order to ensure that the current draft law reflects almost all recommendations made in the NIRMS’ legal advice provided to the Equal Treatment Commission on 28 June 2010.

NIRMS recommendations included:

- ***Human Rights Mandate:*** The mandate of the institution has been further elaborated and specific functions have been spelled out. (Sections 1 and 3).
- ***Independence:*** A specific provision has been included regarding the independent nature of the institution (Section 4). The requirement of independence has also been incorporated in the provisions on the process of appointment of the institution’s members (Section 16.2).
- ***Selection and appointment process:*** A provision has been included regarding the establishment of an Advisory Council in charge of advising the Minister of Justice on the appointment of the members of the institution (Section 15). The Advisory Council includes members of civil society organizations active in the protection of human rights, trade unions, scholars, and national bodies, such as the Ombudsman, the Data Protection Authority and the Council for the Judiciary.
- ***Cooperation with other constituencies, especially NGOs:*** The current draft law includes a provision on the duty of the institution to cooperate with civil society organizations (Section 3 f). Civil society organizations are also mentioned as members of the Advisory Council (Section 15) and in connection with the issuance of the institution’s annual report (Section 21) and the publication of vacancies for members of the institution (Section 16.3).

¹ Letter dated September 13, 2010, addressed to Mr. Vladlen Stefanov, Chief of NIRMS.

- **Reporting:** The current draft law refers to reports on both, the activities undertaken by the institution (Section 21), and an annual report on the situation of human rights in the country (Section 3b). A report on findings is also envisaged every 5 years under Section 22.

NIRMS recommendations not included (see point 4 below):

- **Financial Autonomy:** In its previous legal advice, NIRMS recommended to make clear that the institution would enjoy financial autonomy and that it would not be subject to financial control which might affect its independence. NIRMS suggested that in practice, this could be translated into an independent budget line over which the institution had absolute management and control. The current draft law is silent on the issue of financial autonomy, although its Explanatory Memorandum states in section 4.1 that “Pursuant to the Paris Principles, the institution must also be able to control its own finances on the basis of agreed allocations from the national budget.” According to the Explanatory Memorandum, the Ministry of Justice shall approve the annual budget submitted by the institution.

1. Provisions on core institutional functions

NIRMS wishes to note that in the process of establishing a new national human rights institution, the enabling legislation is in itself a key tool to promote awareness about the new institution. Therefore, it is important to ensure that the structure of the enabling legislation addresses core institutional aspects in a manner that may facilitate the understanding of these provisions by a large public. Such aspects may include *inter alia* the mandate of the institution, its functions and responsibilities, its composition, methods of operation and quasi-jurisdictional competence (if any).

Recommendations:

- NIRMS would like to suggest the possibility to use headings and sub-headings in the different chapters and sections (i.e. “Mandate”, “Functions”, “Composition”, etc).
- NIRMS welcomes the fact that section 3 of the current draft provides for a comprehensive list of competences and responsibilities, in line with the Paris Principles. However, NIRMS would like to note that in the current draft, provisions on specific core functions of the institution are also spread through the whole text (i.e. sections 2, 3, 7, 10, 11 and 13). It is therefore recommended to re-organize these provisions, starting by an exhaustive list of the functions of the Institute for Human Rights (they are all currently listed in Section 3, with the exception of conducting on-site investigations) and then proceed to further elaborating them in subsequent sections.
- NIRMS would like to note the existence of a number of repetitions in provisions related to functions (i.e. Section 2a and section 3a and 3e).

2. Institution’s Mandate

Section 1: “1.3. The objectives of the Institute are to protect human rights in the Netherlands, including the right to equal treatment, and to promote compliance with these rights.”

a) Promotion and Protection of Human Rights

According to the Paris Principles, “*national institutions shall be vested with competence to protect and promote human rights*” (A.1). Although specific in nature, both the functions to promote and to protect are indeed closely inter-dependent and must be understood as a whole. In some cases, the institution can find itself performing its mandate through concrete activities that are related to both the promotion and protection realms.

For instance, by advocating for the ratification of international human rights treaties, the national institution may be achieving the result of raising awareness among the members of the legislative body about the international human rights norms (i.e. promotional mandate). Likewise, it might be the case that in doing so, the national institution may achieve the creation of the necessary synergies to strengthening the national system of protection of human rights, including by sensitizing and engaging decision-making officials about the need to expand the legal human rights national framework, through the ratification of international treaties.

Recommendations:

- NIRMS wishes to suggest the possibility of highlighting the promotional role of the national institution, by reformulating section 1 in order to bring together the protection and promotion of human rights. Such a rewording will capture the dynamic relation between these two functions.
- NIRMS would like to suggest that further in the text the notions of promotion and protection be jointly addressed, particularly in the provision where the functions are listed. (Section 3 in the current draft).

b) Human Rights Promotion

On the other hand, the promotion of human rights is a function aimed at raising awareness and strengthening the understanding of human rights among diverse groups and individuals. While these functions may eventually lead to a greater compliance with human rights, compliance itself is not the only objective that is expected from the promotion of human rights. Namely, the promotion of human rights also aimed at developing a culture of human rights and at moulding attitudes directed to the full development of the human personality and the sense of dignity. Various aspects of the promotional role played by the national institutions are mentioned in the Paris Principles, as described below:

Paris Principles:

“A national institution shall be vested with competence to protect **and promote** human rights” (A.1.)

“The national institutions may decide to **publicize** (its opinions, recommendations, proposals and reports)” (A3a)

“To assist in the formulation of **programmes for the teaching of, and research into, human rights** and to take part in their execution in schools, universities and professional circles” (A 3 b) iv f).

“To **publicize human rights** and efforts to combat all forms of discrimination, in particular racial discrimination, by **increasing public awareness, especially through information and education** and by making use of all press organs” (A 3 b) iv g)

“**Address public opinion** directly or through any press organ, particularly in order to publicize its opinions and recommendations” (C.3)

Recommendation:

- NIRMS wishes to recommend that the term “compliance” be removed from the text, in order to ensure that the mandate of the institution is described in a broad manner.
- NIRMS would like to suggest the following amendments in Section 3 (See bold underlined text).

Section 3

The duties of the Institute are as follows:

- a. To conduct research and investigations into the protection **and promotion** of human rights, including investigations as to whether a situation concerns discrimination and to adjudicate on this, as referred to in Section 10;
- b. To provide reports and make recommendations on the protection **and promotion** of human rights, including the provision of annual reports on the human rights situation in the Netherlands;
- c. To express opinions as referred to in Section 5;
- d. To provide information and to encourage and co-ordinate **promotion and** education about human rights;
- e. To encourage research and investigations into the protection of human rights;
- f. To co-operate on a long-term and regular basis with civil society organisations and with national, European, and international institutions that are active in the protection **and promotion** of one or more human rights, inter alia, by organising activities in co-operation with civil society organisations;
- g. To encourage the ratification of, the implementation of, and the compliance with treaties on human rights, and to encourage the revocation of reservations to such

treaties;

h. To encourage the implementation of and compliance with binding resolutions in the area of human rights adopted by international institutions;

i. To encourage the compliance with European or international recommendations on human rights.

3. Selection and appointment of members

According to Section 16, members of the institution shall be appointed by Royal Decree on the recommendation of the Ministry of Justice. The Advisory Council set up in section 15, will provide advice to the Ministry of Justice “taking account of the requirement of a competent and independent institute, and of the aim to ensure diversity in the composition of the institute” (Section 16.2).

Recommendation:

- NIRMS suggest enabling the Advisory Council with the function of coordinating a broad and open consultation process before advising the Minister of Justice on the appointment of the members of the institution.

Paris Principles:

B. Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

- (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;
- (b) Trends in philosophical or religious thought;
- (c) Universities and qualified experts;
- (d) Parliament;
- (e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

4. Financial Autonomy

The issue of financial autonomy was the only recommendation that was not taken on board in the current draft law. Section 4.1 of the Explanatory Memorandum elaborates on the issue of funding and administrative burden. While this section states that the institution must be able to control its own finances, it also stipulates that the Minister of Justice will be responsible for the costs of establishing the institution and that he/she will approve the annual budget submitted by the institution.

Recommendations:

- NIRMS wishes to recall the importance of including in the enabling law, a provision on the financial autonomy of the institution, in light of Paris Principles B.2: “The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the government and not to be subject to financial control which might affect this independence”.
- NIRMS wishes to draw the attention to the importance of ensuring an adequate budget in order for the institution to properly carry out its mandate.

5. Reporting function

The Paris Principles and the General Observations of the Sub-Committee on Accreditation place a particular emphasis on the reporting functions of the national human rights institutions. The Paris Principles refer to the issuance of “reports on any matters concerning the protection and promotion of human rights”, including the possibility for the national institution “to publicize them.”

These principles also include a list of possible areas these reports may relate to, such as the examination of legislation and administrative provisions, the situation of violation of human rights (including the national human rights situation), harmonization of national legislation and the formulation of programmes for the teaching of human rights (A.3).

As per the current draft law, it is possible to identify at least three reports: a) Annual report on the situation of human rights; b) annual report on the activities of the institution and c) Report of findings issued every 5 years.

The function to issue reports is described in the following sections of Chapter 1: Section 3b (reports on the protection of human rights, including annual reports on the human rights situation in the country), section 8.1 (publicity of the reports), and section 8.2 (discuss the reports with the concerned minister).

Further on, the draft law devotes Chapter 4 to “Annual Report and Report of Findings.” Section 21 refers to an “annual report” on the activities undertaken by the institution, which will be published and submitted to the National Ombudsman, the Data Protection Authority and civil society organizations. Section 22 states that every five years, the institute will prepare a report of findings on the effect in practice of this and other relevant Acts.

Recommendation:

- NIRMS welcomes the inclusion of strong reporting functions in the draft law. However, it wishes to suggest the possibility to further articulate all the sections related to this function, as to provide a comprehensive picture in this regard. For instance, the drafter may wish to consider placing the provisions currently under Chapter 4 in the Chapter where the functions of the institutions are spelled out.

Geneva, Switzerland. 15 October 2010.