

NOTE

"As of 24 January 2017, SCA recommendations contained in this report are considered final."

**GLOBAL ALLIANCE OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND  
PROTECTION OF HUMAN RIGHTS**

**Report and Recommendations of the Session of the Sub-Committee on Accreditation  
(SCA)**

**Geneva, 14 – 18 November 2016**

## SUMMARY OF RECOMMENDATIONS

<p><b><u>2. Re-Accreditation (Art. 15 of the GANHRI Statute)</u></b></p>
<p><b><u>2.1 Argentina: Defensor del Pueblo de la Nación (DPNA)</u></b>  <b>Decision:</b> The SCA decides that further consideration of the re-accreditation application of the DPNA will be <b>deferred</b> to its second session of 2017.</p>
<p><b><u>2.2 Australia: Australian Human Rights Commission (AHRC)</u></b>  <b>Recommendation:</b> The SCA recommends that the AHRC be re-accredited with <b>A</b> status.</p>
<p><b><u>2.3 Bosnia and Herzegovina: Human Rights Ombudsmen of Bosnia and Herzegovina (IHROBH)</u></b>  <b>Decision:</b> The SCA decides that further consideration of the re-accreditation application of IHROBH will be <b>deferred</b> to its second session of 2017.</p>
<p><b><u>2.4 Costa Rica: Defensoría de los Habitantes (DHCR)</u></b>  <b>Recommendation:</b> the SCA recommends that the DHCR be re-accredited with <b>A</b> status.</p>
<p><b><u>2.5 El Salvador: Procuraduría para la Defensa de los Derechos Humanos (PDDH)</u></b>  <b>Recommendation:</b> The SCA recommends that the PDDH be re-accredited with <b>A</b> status.</p>
<p><b><u>2.6 India: National Human Rights Commission (NHRCI)</u></b>  <b>Decision:</b> The SCA decides that further consideration of the re-accreditation application of the NHRCI will be <b>deferred</b> to its second session of 2017.</p>
<p><b><u>2.7 Jordan: The National Centre for Human Rights (NCHR)</u></b>  <b>Recommendation:</b> The SCA recommends that the NCHR be re-accredited with <b>A</b> status.</p>
<p><b><u>2.8 Malawi: Malawi Human Rights Commission (MHRC)</u></b>  <b>Recommendation:</b> The SCA recommends that the MHRC be re-accredited with <b>A</b> status.</p>
<p><b><u>2.9 Mauritania: Commission Nationale des droits de l'homme (CNDH)</u></b>  <b>Decision:</b> The SCA decides that further consideration of the re-accreditation application of the CNDH will be <b>deferred</b> to its second session of 2017.</p>
<p><b><u>2.10 Mexico: Comisión Nacional de los Derechos Humanos (CNDH)</u></b>  <b>Recommendation:</b> The SCA recommends that the CNDH be re-accredited with <b>A</b> status.</p>
<p><b><u>2.11 Namibia: Office of the Ombudsman (Ombudsman)</u></b>  <b>Decision:</b> The SCA decides that further consideration of the re-accreditation application of the Ombudsman will be <b>deferred</b> to its second session of 2017.</p>

<p><b><u>2.12 Nicaragua: Procuraduría para la Defensa de los Derechos Humanos (PDDH)</u></b>  <b>Recommendation:</b> The SCA decides that further consideration of the re-accreditation application of the PDDH will be <b>deferred</b> to its second session of 2017.</p>
<p><b><u>2.13 Nigeria: National Human Rights Commission (NHRC)</u></b>  <b>Recommendation:</b> The SCA recommends that the NHRC be re-accredited with <b>A</b> status.</p>
<p><b><u>2.14 Tanzania: Commission for Human Rights and Good Governance of (CHRAGG)</u></b>  <b>Decision:</b> The SCA decides that further consideration of the re-accreditation application of the CHRAGG will be <b>deferred</b> to its second session of 2017.</p>
<p><b><u>2.15 Zambia: Human Rights Commission (HRCZ)</u></b>  <b>Decision:</b> The SCA decides that further consideration of the re-accreditation application of the HRCZ will be <b>deferred</b> to its second session of 2017.</p>
<p><b>3. Review (Art. 16.2 of the GANHRI Statute)</b></p>
<p><b><u>3.1 Burundi: Commission nationale indépendante des droits de l’homme (CNIDH)</u></b>  <b>Recommendation:</b> The SCA recommends that the CNIDH be downgraded to <b>B</b> status.</p>

## **Report, Recommendations, and Decisions of the Session of the SCA, 14 – 18 November 2016**

### **1. BACKGROUND**

- 1.1. In accordance with the Statute (Annex I) of the Global Alliance of National Institutions for the Promotion and Protection of Human Rights (GANHRI), the SCA considers and reviews applications for accreditation, reaccreditation and special or other reviews received by the National Institutions, Regional Mechanisms and Civil Society Section (NRCS) of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in its capacity as the GANHRI Secretariat, and to make recommendations to the GANHRI Bureau members with regard to the compliance of applicant institutions with the Paris Principles (Annex II). The SCA assesses compliance with the Paris Principles in law and in practice.
- 1.2. In accordance with the SCA Rules of Procedure, the SCA is composed of NHRI representatives from each region: Canada for the Americas (Chair), Mauritania for Africa, Jordan for Asia-Pacific and France for Europe. During the consideration of the re-accreditation applications of Mauritania and Jordan, the relevant regions were represented by NHRI representatives from Morocco and Qatar, respectively.
- 1.3. The SCA convened from 14 to 18 November 2016. OHCHR participated as a permanent observer and in its capacity as GANHRI Secretariat. In accordance with established procedures, the Geneva-based office of GANHRI and regional coordinating committees of NHRIs were invited to attend as observers. The SCA welcomed the participation of the GANHRI Geneva Representative and representatives from the Secretariat of the APF, ENNHRI and NANHRI.
- 1.4. Pursuant to article 15 of the Statute, the SCA also considered applications for re-accreditation from the NHRIs of Argentina, Australia, Bosnia and Herzegovina, Costa Rica, El Salvador, India, Jordan, Malawi, Mauritania, Mexico, Namibia, Nicaragua, Nigeria, Tanzania and Zambia.
- 1.5. Pursuant to article 16.2 of the Statute, the SCA conducted a special review of the NHRI of Burundi.
- 1.6. In accordance with the Paris Principles and the GANHRI SCA Rules of Procedure, the classifications for accreditation used by the SCA are:
  - A:** Compliance with the Paris Principles;
  - B:** Not fully in compliance with the Paris Principles or insufficient information provided to make a determination;
- 1.7. The General Observations (Annex III), as interpretative tools of the Paris Principles, may be used to:
  - a) Instruct institutions when they are developing their own processes and mechanisms, to ensure Paris Principles compliance;
  - b) Persuade domestic governments to address or remedy issues relating to an institution's compliance with the standards articulated in the General Observations;

- c) Guide the SCA in its determination of new accreditation applications, re-accreditation applications or other review:
  - i) If an institution falls substantially short of the standards articulated in the General Observations, it will be open for the SCA to find that it was not Paris Principle compliant.
  - ii) If the SCA has noted concern about an institution's compliance with any of the General Observations, it may consider what steps, if any, have been taken by an institution to address those concerns in future applications. If the SCA is not provided with proof of efforts to address the General Observations previously made, or offered no reasonable explanation why no efforts had been made, it would be open to the SCA to interpret such lack of progress as non-compliance with the Paris Principles.
  
- 1.8.** The SCA notes that when specific issues are raised in its report in relation to accreditation, re-accreditation, or special reviews, NHRIs are required to address these issues in any subsequent application or other review.
  
- 1.9.** Pursuant to Article 12 of the Statute, where the SCA comes to an accreditation recommendation, it shall forward that recommendation to the GANHRI Bureau whose final decision is subject to the following process:
  - i) The recommendation of the SCA shall first be forwarded to the applicant;
  - ii) An applicant can challenge a recommendation by submitting a written challenge to the GANHRI Chairperson, through the GANHRI Secretariat, within twenty eight (28) days of receipt.
  - iii) Thereafter the recommendation will be forwarded to the members of the GANHRI Bureau for decision. If a challenge has been received from the applicant, the challenge together with all relevant material received in connection with both the application and the challenge will also be forwarded to the members of the GANHRI Bureau;
  - iv) Any member of the GANHRI Bureau who disagrees with the recommendation shall, within twenty (20) days of its receipt, notify the Chair of the SCA and the GANHRI Secretariat. The GANHRI Secretariat will promptly notify all GANHRI Bureau members of the objection raised and will provide all necessary information to clarify that objection. If within twenty (20) days of receipt of this information at least four members of the GANHRI Bureau coming from not less than two regional groups notify the GANHRI Secretariat that they hold a similar objection, the recommendation shall be referred to the next GANHRI Bureau meeting for decision;
  - v) If at least four members coming from two or more regional groups do not raise objection to the recommendation within twenty (20) days of its receipt, the recommendation shall be deemed to be approved by the GANHRI Bureau;
  - vi) The decision of the GANHRI Bureau on accreditation is final.
  
- 1.10.** At each session the SCA conducts a teleconference with every NHRI. It may also consult with and seek further information from NHRIs where necessary. In addition, OHCHR desk officers and, as appropriate, OHCHR field officers were available to provide further information, as needed.

- 1.11. Pursuant to Article 18.1 of the statute, any decision that would serve to remove accredited "A" status from an applicant can only be taken after the applicant is informed of this intention and is given the opportunity to provide in writing, within one (1) year of receipt of such notice, the written evidence deemed necessary to establish its continued conformity to the Paris Principles.
- 1.12. At any time, the SCA may receive information that raises concern that the circumstances of a NHRI have changed in a way that affects its compliance with the Paris Principles, and the SCA may then initiate a special review of that NHRI's accreditation status. When considering whether or not to initiate a special review, the SCA has adopted a new procedure whereby, in addition to written submissions made by the NHRI, civil society and any other stakeholder, the NHRI is afforded the opportunity to make an oral statement to the SCA during the session.
- 1.13. Pursuant to Article 16(3), any review of the accreditation classification of a NHRI must be finalized within 18 months.
- 1.14. The SCA acknowledges the high degree of support and professionalism of the GANHRI Secretariat (OHCHR-NRCS).
- 1.15. The SCA shared the summaries prepared by the Secretariat with the concerned NHRIs before the consideration of their applications and gave one week to provide any comments on them. The summaries are only prepared in English, due to financial constraints. Once the recommendations of the SCA are adopted by the GANHRI Bureau, the report of the SCA is placed on the GANHRI website (<http://nhri.ohchr.org/>).
- 1.16. The SCA considered information received from civil society. The SCA shared that information with the concerned NHRIs and considered their responses.
- 1.17. **Notes:** The GANHRI statute, the Paris Principles and the General Observations referred to above can be downloaded in Arabic, English, French and Spanish from the following links:
1. The GANHRI Statute:  
<http://nhri.ohchr.org/EN/AboutUs/Governance/Pages/Statute.aspx>
  2. The Paris Principles and General Observations:  
<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx>

## 2. SPECIFIC RECOMMENDATIONS - RE-ACCREDITATION APPLICATIONS (Art. 15 of the GANHRI Statute)

### 2.1 Argentina: Defensoria del Pueblo de la Nación Argentina (DPNA)

**Decision:** The SCA decides that further consideration of the re-accreditation application of the DPNA will be **deferred** to its second session of 2017.

**The SCA notes with concern:**

#### 1. Selection and appointment

The position of Ombudsperson has been vacant since 2009. Despite the requirement of Article 13 of the enabling Law that one of the Deputy Ombudspersons be officiated as acting Ombudsperson, the SCA notes that the DPNA is currently headed by the General Undersecretary who was appointed by the National Congress.

The delay in the appointment of the Ombudsperson and Deputy Ombudspersons could restrict DPNA's ability to speak out on significant and controversial human rights concerns. The SCA acknowledges the recent establishment of the Permanent Bicameral Commission, which is expected to lead to the appointment of an Ombudsperson and two Deputy Ombudspersons.

The SCA encourages a prompt resolution of the process of appointing the Ombudsperson and Deputy Ombudspersons of the DPNA.

The SCA further notes that the process for selection and appointment currently enshrined in the enabling Law is not sufficiently broad and transparent. In particular, it does not:

- require the advertisement of vacancies;
- establish clear and uniform criteria upon which all parties assess the merit of eligible applicants; and
- promote broad consultation and / or participation in the application, screening, selection and appointment process.

It is critically important to ensure the formalization of a clear, transparent and participatory selection and appointment process for an NHRI's decision-making body in relevant legislation, regulations or binding administrative guidelines, as appropriate. A process that promotes merit-based selection and ensures pluralism is necessary to ensure the independence of, and public confidence in, the senior leadership of an NHRI.

The SCA encourages the DPNA to advocate for the formalization and application of a process that includes requirements to:

- a) Publicize vacancies broadly;
- b) Maximize the number of potential candidates from a wide range of societal groups and educational qualifications;
- 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 individual capacity rather than on behalf of the organization they represent.

The SCA refers to Paris Principle B.1 and to General Observation 2.2 on 'Selection and appointment of the governing body'.

## **2. Human rights mandate**

The DPNA's enabling Law provides for a limited promotion mandate. The SCA notes, however, that in practice the DPNA undertakes promotional activities.

The SCA is of the view that an NHRI should be legislatively mandated with specific functions to both promote and protect human rights. It understands 'promotion' to include those functions which seek to create a society where human rights are more broadly understood and respected. Such functions may include education, training, advising, public outreach and advocacy.

The SCA notes that draft amendments to the enabling Law have been laid before Parliament, and encourages the DPNA to continue to advocate for appropriate amendments to its enabling Law to make its promotional mandate explicit. Until such time as the amendments are passed, the SCA encourages the DPNA to continue interpreting its mandate broadly.

The SCA refers to Paris Principle A.1, A.2 and A.3 and to its General Observation 1.2 on 'Human Rights Mandate'.

## **3. Adequate funding**

The SCA notes that the DPNA has experienced a reduction in funding and an increase in functions.

The SCA emphasizes that, to 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.

In particular, adequate funding should, to a reasonable degree, ensure the gradual and progressive realization of the improvement of the institution's operations and the fulfilment of its mandate. Provision of adequate funding by the State should, at a minimum, include the following:

- a) the allocation of funds for premises that is accessible to the wider community, including for persons with disabilities. In certain circumstances, in order to promote independence and accessibility, this may require that offices are not co-located with other government agencies. Where possible, accessibility should be further enhanced by establishing a permanent regional presence;
- b) salaries and benefits awarded to its staff comparable to those of civil servants performing similar tasks in other independent institutions of the State;
- c) remuneration of members of its decision-making body (where appropriate);
- d) the establishment of well-functioning communications systems including telephone and internet; and
- e) the allocation of a sufficient amount of resources for mandated activities. Where the NHRI has been designated with additional responsibilities by the State, additional financial resources should be provided to enable it to assume the responsibilities of discharging these functions.

Such funding should be regularly released and in a manner that does not impact adversely on its functions, day-to-day management and retention of staff.

The SCA encourages the DPNA to continue to advocate for adequate funding to fulfil its mandate effectively.

The SCA refers to Paris Principle B.2 and to its General Observation 1.10 on 'Adequate funding'.

**The SCA further notes:**

#### **4. Cooperation with civil society**

The SCA highlights that regular and constructive engagement with all relevant stakeholders is essential for NHRIs to fulfil their mandates effectively. In this regard it acknowledges the DPNA's engagement and cooperation with civil society organizations.

The SCA encourages the DPNA to develop, formalise and maintain working relationships, as appropriate, with other domestic institutions established for the promotion and protection of human rights, including civil society organizations.

The SCA refers to Paris Principles C (g) and to its General Observation 1.5 on 'Cooperation with other human rights bodies'.

### **2.2 Australia: Australian Human Rights Commission (AHRC)**

**Recommendation:** The SCA recommends that the AHRC be re-accredited with **A** status.

**The SCA notes with concern:**

#### **1. Selection and appointment**

The Australian Human Rights Commission Act and a number of Anti-Discrimination Acts provide that the Governor-General appoints members of the Commission on the recommendation of the Attorney General.

The SCA notes that some merit criteria are provided in the relevant enabling laws, and that the process for the assessment of candidates is specified in the "Merit and Transparency Guidelines" of the Australian Public Service Commission (APSC). The Guidelines include requirements to: advertise vacancies; provide detailed selection criteria; and assess candidates by a panel that includes the independent representative of the APSC whose role is to ensure the process is in accordance with the Guidelines. On the completion of the assessment process, the panel determines a pool of suitable candidates and provides a report to the Commissioner of the APSC for endorsement and transmission to the Attorney General. The Attorney-General then writes to the Prime Minister seeking approval for the candidate to be appointed as an AHRC Commissioner by the Governor-General.

However, the SCA notes that: if the Attorney-General is not satisfied with the proposed candidates, he or she may unilaterally propose an alternate appointee; and that, in one instance in 2013, the Attorney-General proposed the appointment of a Commissioner without following the merit-based selection process outlined above. Such appointment has

the potential to bring into question the legitimacy of the appointees and the independence of the NHRI. The SCA is of the view that it is critically important to ensure the formalization of a clear, transparent and participatory selection and appointment process for an NHRI's decision-making body, and the application of the established process in all cases.

The SCA notes that AHRC has proposed amendments to formalize the above selection process in its enabling law, and that it continues to advocate for such amendments. The SCA encourages the AHRC to continue to advocate for a selection process that specifies explicit requirements to:

- a) Publicize vacancies broadly;
- b) Maximize the number of potential candidates from a wide range of societal groups and educational qualifications;
- 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 individual capacity rather than on behalf of the organization they represent.

The SCA refers to Paris Principle B.1 and to its General Observation 1.8 on 'Selection and appointment of the decision-making body of NHRIs'.

## **2. Dismissal process**

In accordance with section 41 of the AHRC Act, section 102 of the Sex Discrimination Act, section 119 of the Disability Discrimination Act, section 34 of the Racial Discrimination Act and section 53 G of the Age Discrimination Act, the Governor-General may remove the Commissioner on the advice of the Executive Council, for the following reasons: (i) physical or mental incapacity; (ii) misbehaviour; (iii) absence from duty; and (iv) bankruptcy under their respective applicable above cited laws. The precise process for dismissal is not further described in the Act.

The SCA is of the view that, in order to address the requirement for a stable mandate, which is important in reinforcing independence, 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. This process should apply uniformly to all nominating entities.

The grounds for dismissal must be clearly defined and appropriately confined to those actions that impact adversely on the capacity of the member to fulfil his or her mandate. Where appropriate, the legislation should specify that the application of a particular ground must be supported by the decision of an appropriate body with independent jurisdiction. The dismissal must be made in strict conformity with all the substantive and procedural requirements as prescribed by law. It should not be allowed based solely on the discretion of the appointing authorities.

These requirements ensure the security of tenure of the members of the governing body and are essential to ensure the independence of, and public confidence in, the senior leadership of an NHRI. The SCA accordingly urges the AHRC to advocate for an independent and objective dismissal process regarding the grounds already recognised in the AHRC Act.

The SCA refers to Paris Principle B.3 and to its General Observation 2.1 on ‘Guarantee of tenure for members of the NHRI decision-making body’.

### **3. Adequate funding and financial autonomy**

The SCA expresses concern about cuts to the AHRC budget since 2014-15.

The SCA again notes, with concern, the impact of the application of annual efficiency dividends which erode the AHRCs base level of funding and therefore its capacity to fulfil its legislative mandate. The SCA is also concerned about the conferral of work and the appointment of additional commissioners without an additional budget allocation.

The SCA reiterates that, to function effectively, an NHRI must be provided with an appropriate level of funding in order to guarantee its ability to freely determine its priorities and activities. Further the NHRI ought to be provided with adequate funding for its operations and ensures that the Commission retains adequate discretionary funding to independently set its own program of work. In particular, adequate funding should, to a reasonable degree, ensure the gradual and progressive realization of improvement in the NHRI’s operations and the fulfilment of its mandate.

Provision of adequate funding by the State should, at a minimum, include the following:

- a) The allocation of funds for premises which are accessible to the wide community, including for persons, including for persons with disabilities. In certain circumstances, in order to promote independence and accessibility, this may require that offices are not co-located with government agencies. Where possible, accessibility should be further enhanced by establishing a permanent regional presence;
- b) Salaries and benefits awarded to staff comparable to those of civil servants performing similar tasks in other independent institutions of the State;
- c) Remuneration of members of the decision-making body (where appropriate);
- d) The establishment of a well-functioning communications system including telephone and internet; and
- e) The allocation of a sufficient amount of resources for mandated activities. Where the NHRI has been designated with additional responsibilities by the State, additional financial resources should be provided to enable it to assume the responsibilities of discharging these functions.

The SCA encourages the AHRC to continue to advocate for an appropriate level of funding to carry out its mandate including, where appropriate, the establishment of regional offices.

The SCA refers to Paris Principle B.2 and to its General Observations 1.10 on ‘Adequate funding’ and 2.8 on ‘Administrative regulation’.

**The SCA further notes:**

### **4. Limitation on mandate**

The current definition of human rights in the Act does not explicitly refer to either the Convention against Torture or the International Covenant on Economic, Social and Cultural rights.

The SCA acknowledges that the AHRC interprets its mandate to encompass all human rights.

The Paris Principles require that an NHRI must be legislatively mandated for both the promotion and protection of all human rights.

The SCA urges the AHRC to continue advocating for amendment of the definition of 'human rights' within the AHRC Act to include the seven core human rights treaties ratified by Australia (matching the definition used by the Parliamentary Joint Committee on Human Rights).

The SCA refers to Paris Principles A.1, A.2 and A.3 and to its General Observation 1.2 and 2.7 on 'Human rights mandate.'

## **5. Tenure**

The SCA notes the provisions of sections 37 of the AHRC Act, 97 of the Sex Discrimination Act, 114 of the Disability Discrimination Act, 30 of the Racial Discrimination Act and 53 B of the Age Discrimination Act, which each provide that members can be appointed for a term not exceeding seven years and that they are eligible for re-appointment, with no limit on the number of times re-appointment can occur.

As a proven practice, the SCA encourages that a term of between three (3) and seven (7) years with the option to renew once be provided for in an NHRI's enabling law.

The SCA refers to Paris Principle B.3 and to its General Observation 2.1 'Guarantee of tenure for members of the National Human Rights Institution decision-making body'.

### **2.3 Bosnia and Herzegovina: Human Rights Ombudsmen of Bosnia and Herzegovina (IHROBH)**

**Decision:** The SCA decides that further consideration of the re-accreditation application of IHROBH will be deferred to its second session of 2017.

The SCA commends the efforts of the IHROBH in advocating for a stronger legislative framework, and it encourages the IHROBH to continue these efforts. The SCA notes that the IHROBH intends to propose legislative amendments.

The SCA commends the work undertaken by IHROBH to address the SCA's recommendations of 2010.

#### **The SCA notes with concern:**

##### **1. Human rights mandate**

The enabling law of IHROBH provides for a limited promotion mandate.

The SCA understands 'promotion' to include those functions which seek to create a society where human rights are more broadly understood and respected. Such functions may include education, training, advising, public outreach and advocacy; as well as encouraging ratification and implementation of international standards and engagement with the international human rights system.

While the SCA acknowledges that IHROBH interprets its mandate broadly and undertakes promotion of human rights activities, including in relation to international human rights

mechanisms, it encourages IHROBH to advocate for legislative changes to explicitly include specific functions to both promote and protect human rights.

The SCA refers to Paris Principle A.3 and to its General Observations 1.2 on 'Human rights mandate' and 1.3 on 'Encouraging ratification or accession to international human rights instruments',

## **2. Selection and appointment**

In accordance with the law the Ombudsmen are appointed by the parliamentary assembly. The SCA is of the view that the selection process currently enshrined in the existing Law is not sufficiently broad and transparent, in that it does not specify the process for achieving broad consultation and/or participation in the application, screening, selection and appointment process.

It is critically important to ensure the formalization of a clear, transparent and participatory selection and appointment process for an NHRI's decision-making body in relevant legislation, regulations or binding administrative guidelines, as appropriate. A process that promotes merit-based selection and ensures pluralism is necessary to ensure the independence of, and public confidence in, the senior leadership of an NHRI.

The SCA encourages the IHROBH to continue to advocate for the formalization and application of a process that includes requirements to:

- a) Publicize vacancies broadly;
- b) Maximize the number of potential candidates from a wide range of societal groups and educational qualifications;
- 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 individual capacity rather than on behalf of the organization they represent.

The SCA refers to Paris Principle B.1 and to its General Observation 1.8 on 'Selection and appointment of the decision-making body of NHRIs'.

## **3. Dismissal**

In accordance with article 12 of the Law, the Ombudspersons can be dismissed on account of inability to carry out their functions. The SCA is of the view that this provision should be made explicit in the Law to avoid misinterpretation.

Further, the Ombudspersons are dismissed by the Parliamentary Assembly. The Law does not provide further details on the dismissal process.

The SCA emphasizes that, in order to address the requirement for a stable mandate, which is important in reinforcing independence, 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.

The grounds for dismissal must be clearly defined and appropriately confined to those actions that impact adversely on the capacity of the member to fulfill his or her mandate.

Where appropriate, the legislation should specify that the application of a particular ground must be supported by the decision of an appropriate body with independent jurisdiction. The dismissal must be made in strict conformity with all the substantive and procedural requirements as prescribed by law. It should not be allowed based solely on the discretion of the appointing authorities.

The SCA is of the view that such requirements ensure the security of tenure of the members of the governing body and are essential to ensure the independence of, and public confidence in, the senior leadership of an NHRI.

The SCA refers to Paris Principle B.3 and to its General Observation 2.1 on 'Guarantee of tenure for members of the NHRI decision-making body'.

#### **4. Adequate funding and financial autonomy**

The IHROBH reports that it has experienced significant budget cuts. It further reports that, of the 89 positions envisioned for the organization, only 56 are currently staffed, and that it is unable to plan for the hiring of additional staff due to its budgetary situation.

Further, in accordance with article 39 of the existing Law, the financial appropriation necessary for the functioning of the IHROBH is included in the budget of the Presidency of Bosnia and Herzegovina. The existing Law does not specify the process by which this budget allocation is made, does not specify whether it appears as a separate budget line, and does not provide for the financial autonomy of the IHROBH over the budget allocation. The SCA also notes that the IHROBH has indicated that its most recent audit report called for greater financial independence for the IHROBH.

The SCA emphasizes that, to 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. In particular, adequate funding should, to a reasonable degree, ensure the gradual and progressive realization of improvement in the NHRI's operations and the fulfilment of its mandate.

Provision of adequate funding by the State should, at a minimum, include the following:

- a) The allocation of funds for premises which are accessible to the wide community, including for persons, including for persons with disabilities. In certain circumstances, in order to promote independence and accessibility, this may require that offices are not co-located with government agencies. Where possible, accessibility should be further enhanced by establishing a permanent regional presence;
- b) Salaries and benefits awarded to staff comparable to those of civil servants performing similar tasks in other independent institutions of the State;
- c) Remuneration of members of the decision-making body (where appropriate);
- d) The establishment of a well-functioning communications system including telephone and internet; and
- e) The allocation of a sufficient amount of resources for mandated activities. Where the NHRI has been designated with additional responsibilities by the State, additional financial resources should be provided to enable it to assume the responsibilities of discharging these functions.

Funds should be allocated to a separate budget line item applicable only to the NHRI. The NHRI should have complete autonomy over the allocation of its budget. Such funding should

be regularly released and in a manner that does not impact adversely on its functions, day-to-day management and retention of staff.

Although, IHROBH stated that other institutions in Bosnia and Herzegovina are facing similar budgetary challenges, the SCA encourages IHROBH to continue advocating for an appropriate level of funding to carry out its mandate, including for its upcoming NPM function, as well as necessary amendments to its enabling Law to ensure financial autonomy.

The SCA refers to Paris Principle B.2 and to its General Observation 1.10 on 'Adequate funding of NHRIs'.

#### **The SCA further notes:**

##### **5. Immunity**

Article 16 of the existing Law provides that the Ombudsperson shall not be prosecuted, subjected to investigation, arrested, detained or tried for the opinions expressed or for the decisions taken in the exercise of powers associated with his or her duties. The existing Law does not, however, appear to protect the Ombudsperson from civil liability.

External parties may seek to influence the independence of an NHRI by initiating, or by threatening to initiate, legal proceedings against a members. For this reason, NHRI legislation should include provisions to protect members from legal liability for acts undertaken in good faith in their official capacity. Such a provision promotes:

- security of tenure;
- the NHRI's ability to engage in critical analysis and commentary on human rights issues free from interference;
- the independence of senior leadership; and
- public confidence in the NHRI.

The SCA encourages the IHROBH to continue to advocate for amendments to its enabling Law.

The SCA refers to Paris Principle B.3 and to its General Observation 2.3 on 'Guarantee of functional immunity.'

##### **6. Annual report**

In accordance with article 34 of the Law, the annual report of IHROBH is distributed to a number of entities. However, there is no requirement in the enabling Law that the annual report is considered by or discussed in the relevant Parliaments.

The SCA is of the view that it is preferable for the enabling law of an NHRI provide that the legislature discuss and consider the reports of the NHRI, so as to ensure that its recommendations are properly considered, and to promote action on them.

The SCA recommends that the IHROBH advocate for the inclusion in its enabling law of a process whereby its reports are discussed and considered by the legislature.

The SCA refers to Paris Principle A.3 and to its General Observation 1.11 on 'Annual reports of NHRIs'.

## **7. Cooperation with civil society**

The SCA highlights that regular and constructive engagement with all relevant stakeholders is essential for NHRIs to fulfil their mandates effectively. In this regard it acknowledges the IHROBH engagement and cooperation with civil society organizations.

The SCA encourages the IHROBH to develop, formalise and maintain working relationships, as appropriate, with other domestic institutions established for the promotion and protection of human rights, including civil society organizations.

The SCA refers to Paris Principles C (g) and to its General Observation 1.5 on 'Cooperation with other human rights bodies'.

## **8. Interaction with the international human rights system**

While the IHROBH notes that it interacts with the regional and international human rights system, the Law does not explicitly provide for this function.

The Paris Principles recognize that monitoring and engaging with the international human rights system, in particular the Human Rights Council and its mechanisms (Special Procedures and Universal Periodic Review) and the United Nations Human Rights Treaty Bodies, can be an effective tool for NHRIs in the promotion and protection of human rights domestically.

The SCA encourages IHROBH to advocate for changes in its enabling law to explicitly allow the institution to interact with the regional and international human rights system. It highlights that effective engagement with the international human rights system may include:

- submitting parallel or shadow reports to the Universal Periodic review, Special Procedures mechanisms and Treaty Bodies;
- making statements during debates before review bodies and the Human Rights Council;
- assisting, facilitating and participating in country visits by United Nations experts, including special procedures mandate holders, treaty bodies, fact finding missions and commissions of inquiry; and
- monitoring and promoting the implementation of relevant recommendations originating from the human rights system.

In considering their engagement with the international human rights system, NHRIs are encouraged to actively engage with the OHCHR, the GANHRI, its Regional NHRI Coordinating Committees, and other NHRIs, as well as international and national NGOs and civil society organization.

The SCA refers to Paris Principle A.3 and to its General Observation 1.4 on 'Interaction with the International Human Rights System'.

## STATEMENT OF COMPLIANCE WITH THE PARIS PRINCIPLES OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION

- [6 October 2021] -

### CHARACTER OF THE NHRI

#### 1. ESTABLISHMENT

***The Paris Principles state that an institution's mandate shall be clearly set forth in a constitutional or legislative text (...).***

*The GANHRI has adopted the following General Observation on the Establishment of NHRIs: "An NHRI must be established in a constitutional or legal text. Creation by an instrument of the Executive is not adequate to ensure permanency and independence"*

Discuss the instruments that establish the NHRI. Please explain:

- When and by what enabling law the NHRI was established;
- The legal status is of the NHRI, i.e. whether it has been established by legislation or if it is entrenched in the Constitution;
- If there is any other mechanism that gives the NHRI its legitimacy;
- The geographic jurisdiction of the NHRI.

#### **RESPONSE:**

The Australian Human Rights Commission (Commission) was established on an ongoing basis in 1986 by the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).<sup>1</sup> The Commission's mandate is not entrenched in the Australian Constitution.

The AHRC Act sets out the Commission's powers and functions – see, in particular, section 11. The Commission also has functions conferred on it by the following federal discrimination laws:

- *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act) ss 44, 48
- *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act) s 20
- *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act) ss 55, 64, 67
- *Age Discrimination Act 2004* (Cth) (Age Discrimination Act) ss 44, 53.

The Commission also has functions conferred on it in the following Commonwealth enactments:

- *Native Title Act 1993* (Cth) (Native Title Act) s 209
- *Fair Work Act 1996* (Cth) (Fair Work Act) ss 161, 218.

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<sup>1</sup> *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) <<https://www.legislation.gov.au/Details/C2017C00143>>.

The above legislation is attached in Supporting Documents: '1. Australian Human Rights Commission Act', '2. Sex Discrimination Act', '3. Racial Discrimination Act', '4. Disability Discrimination Act', '5. Age Discrimination Act', '6. Native Title Act', '7. Fair Work Act'.

The Commission is designated as a Commonwealth corporate entity under the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act).<sup>2</sup> This enables the Commission to manage its financial operations independently of government control, and establishes the financial management practices and reporting obligations that the Commission must satisfy.

Australia is a federated country, with legislative authority split between the Commonwealth and state and territory governments. There are equal opportunity, human rights or anti-discrimination commissions, and Children's commissioners, in each state and territory. The Commission's functions apply across the full geographic region of Australia.

## **2. INDEPENDENCE**

***Independence is a fundamental pillar of the Paris Principles. All the provisions in the section "Composition and guarantees of independence and pluralism" aim to ensure independence through composition, representation, infrastructure, stable mandate of the NHRI.***

*The GANHRI has adopted the following General Observation on the **administrative regulation** of NHRIs: "The classification of an NHRI as a public body has important implications for the regulation of its accountability, funding, and reporting arrangements. In cases where the administration and expenditure of public funds by an NHRI is regulated by the Government, such regulation must not compromise the NHRI's ability to perform its role independently and effectively. For this reason, it is important that the relationship between the Government and the NHRI be clearly defined".*

*To preserve the independence of members, the GANHRI has strongly recommended that "provisions be included in national law to protect legal liability for actions undertaken in the official capacity of the NHRI".*

Discuss the mechanisms that guarantee the independence of the NHRI. Please explain:

- The nature of the Institution's accountability (i.e. whether the NHRI is accountable to parliament, a ministry, government department, head of state, etc.);
- Whether or not the NHRI receives instruction from the government;
- By what means conflicts of interest are avoided;
- Whether or not members incur legal liability for actions taken in their official capacity.

### **RESPONSE:**

The Commission's functions, as set out in section 11 of the AHRC Act, are exercised independently of government:

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<sup>2</sup> *Public Governance, Performance and Accountability Act 2013* (Cth)  
<<https://www.legislation.gov.au/Details/C2013A00123>>.

- There is no oversight or approval required from the government for the manner in which the Commission undertakes its work. For example, when the Commission exercises its functions under section 11 to make an examination or hold an inquiry, section 14 of the Act states that it should do so *in such manner as it thinks fit*.
- Section 10 of the AHRC Act sets out duties of the Commission, for example to perform its functions with regard to the indivisibility and universality of rights. It also states that the duties of the Commission are *not enforceable in proceedings of a court* (AHRC Act s 10(2)), which provides a further guarantee of independence in decision making by the Commission in relation to which issues it will exercise its functions.
- Sections 11(1)(e), (j), (k) and (m) of the AHRC Act enable the Attorney-General for Australia to request the Commission to exercise various functions – such as to examine enactments for compliance with human rights or to report on actions that the government should take to better implement human rights. There is, however, no capacity for the Attorney-General to direct or approve the findings that the Commission reaches. It is rare for the Attorney-General to request the Commission to perform certain of its functions. Usual practice is that any terms of reference are negotiated with the Commission, as well as also providing necessary funding to undertake any commissioned review or inquiry. Most recently in 2021, the Australian Government requested that the Commission undertake an Independent Review into Commonwealth Parliamentary Workplaces.<sup>3</sup> The conduct of the review is independent of government and fully resourced.

The Commission operates under the PGPA Act. This requires the Commission to have a range of financial and non-financial reporting mechanisms in place. This includes preparing an annual Corporate Plan which sets out the work priorities and strategic focus determined by the Commission, and reporting on financial and non-financial performance in an Annual Report and annual performance statement. The PGPA Act requires that the Commission lodge such documents with the portfolio minister (Attorney-General) and Minister for Finance. Such lodgement is not for approval but simply to ensure compliance.

The Commission is also accountable to the Federal Parliament of Australia. The Commission formally transmits its reports to the responsible Minister who is then required by law to table these in Parliament within 15 sitting days of being transmitted. There is no discretion for the Minister not to table the reports, or to alter the reports in any way. The Commission must provide the Annual Report to the Attorney-General,<sup>4</sup> which is tabled in Parliament.<sup>5</sup> The Commission's most recent Annual Report is for the financial year 2019-2020.<sup>6</sup> This is attached as Supporting Document '11. Annual Report 2019-2020'. The Commission's 2020-2021 Annual Report is due to be released publicly at the end of October 2021 and will then be available online.<sup>7</sup>

The Commission is also accountable for its expenditure through the Consideration of Budget Estimates by the Senate Legislation Committee on Legal and Constitutional Affairs. The

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<sup>3</sup> Australian Human Rights Commission, *Independent Review into Commonwealth Parliamentary Workplaces* <<https://humanrights.gov.au/CPWReview>>.

<sup>4</sup> AHRC Act s 45; *Public Service Act 1999* (Cth) <<https://www.legislation.gov.au/Details/C2019C00057>> s 70.

<sup>5</sup> AHRC Act s 46.

<sup>6</sup> Australian Human Rights Commission, *Annual Report 2019-2020* (2020) <<https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2019-2020>>.

<sup>7</sup> Australian Human Rights Commission, *Annual Reports Index* <<https://humanrights.gov.au/our-work/commission-general/publications/annual-reports-index>>.

Estimate Committee's function is to monitor the performance of government agencies and consider estimates of proposed expenditure. During the Estimates process, the Commission Members are questioned directly by the Committee about the objectives, operational procedures and efficiency of the programs for which the Commission is responsible. These proceedings are in line with the Estimates processes for public service departments and other Commonwealth agencies.<sup>8</sup>

There are mechanisms in place to avoid conflict of interest among commission members. For example, both the AHRC Act and the PGPA Act require that a member of the Commission who has a material personal interest that relates to the affairs of the Commission must disclose details of the interest.<sup>9</sup> This is done through an annual disclosure process as well as requiring declarations of any conflict of interest at the commencement of Commission meetings.

Section 48 of the AHRC Act also protects the Commission from legal liability for the performance of functions as follows: the Commission, a member of the Commission, and any person acting for or on behalf of the Commission or a member of the Commission, is not liable to an action or proceeding for damages for or in relation to an act done, or omitted to be done, in good faith in performance of any function or power conferred on the Commission or the member.<sup>10</sup>

### **3. COMPOSITION, APPOINTMENT PROCESS, TENURE**

#### **3.1 Composition**

***The Paris Principles state that "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 promotion and protection 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;***

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<sup>8</sup> Parliament of Australia, No. 5 - Consideration of Estimates by the Senate's Legislation Committees (September 2021)  
<[http://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Senate\\_Briefs/Brief05](http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Senate_Briefs/Brief05)>; Parliament of Australia, Senate Standing Committees on Legal and Constitutional Affairs  
<[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs)>.

<sup>9</sup> AHRC Act s 41(2)(e); PGPA Act s 29.

<sup>10</sup> AHRC Act s 48.

**(e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).**

The GANHRI has adopted the following **General Observations on the composition and pluralism of NHRIs:**

- **Ensuring pluralism:** The Sub-Committee notes there are diverse models of ensuring the requirement of pluralism set out in the Paris Principles. However, the Sub-Committee emphasises the importance of National Institutions to maintain consistent relationships with civil society and notes that this will be taken into consideration in the assessment of accreditation applications. The Sub-Committee observes that there are different ways in which pluralism may be achieved through the composition of the National Institution, for example:

1. Members of the governing body represent different segments of society as referred to in the Paris Principles;
2. Pluralism through the appointment procedures of the governing body of the National Institution, for example, where diverse societal groups suggest or recommend candidates;
3. Pluralism through procedures enabling effective cooperation with diverse societal groups, for example advisory committees, networks, consultations or public forums; or
4. Pluralism through diverse staff representing the different societal groups within the society.

The Sub-Committee further emphasises that the principle of pluralism includes ensuring the meaningful participation of women in the National Institution.

- **Government representatives on National Institutions:** The Sub-Committee understands that the Paris Principles require that Government representatives on governing or advisory bodies of National Institutions do not have decision making or voting capacity.

Discuss how your NHRI meets the requirement of pluralism. Please explain:

- Whether your founding law requires a diverse composition of members;<sup>11</sup>
- Which authority/group may nominate candidates for membership;
- The composition of the NHRI's membership, i.e. what positions are created by the enacting law and what positions are currently filled and are in operation (Please include heads and deputy heads of the organization);
- How the groups mentioned at the letters a-e as above are represented;
- Representation of women;
- Representation of ethnic or minority groups (e.g. indigenous, religious minorities, etc);
- Representation of particular groups (e.g. people with a disability, etc);

### **RESPONSE:**

The plurality of the Commission is guaranteed by specifying the roles of different commission members. The Commission's legislation specifies that the Commission is

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<sup>11</sup> Members refers to those individuals that are appointed or elected under the NHRI's founding law (i.e. Chair, Commissioners, Ombudsmen, Deputy Ombudsmen) and with whom the NHRI's functions are vested.

comprised of up to 7 specific purpose commissioners and a President.<sup>12</sup> The following commission members are appointed under the AHRC Act:

- the President
- the Human Rights Commissioner
- the Aboriginal and Torres Strait Islander Social Justice Commissioner
- the National Children’s Commissioner.<sup>13</sup>

The following commissioners are appointed under federal discrimination laws:

- the Sex Discrimination Commissioner – Sex Discrimination Act s 96
- the Age Discrimination Commissioner – Age Discrimination Act s 53A
- the Disability Discrimination Commissioner – Disability Discrimination Act s 113
- the Race Discrimination Commissioner – Racial Discrimination Act s 29.

The legislation governing the Commission states that a person is only qualified to be appointed to be the Aboriginal and Torres Strait Islander Social Justice Commissioner if the Governor-General of Australia is satisfied that the person has significant experience in the community life of Indigenous peoples;<sup>14</sup> and that for appointments to other commissioner positions, the Governor-General is satisfied that the person has the necessary qualifications, knowledge and experience.<sup>15</sup>

As at September 2021, the Commission’s members include:

- five women (with one additional due to commence 22 November 2021)
- a Commissioner who is an Indigenous Australian and has extensive experience in Indigenous affairs
- a Commissioner with lived experience of disability
- a Commissioner from a culturally diverse background.

Commissioners have been selected from a range of backgrounds including members who are academics, former parliamentarians, Chief Executive Officers of non-government organisations and research institutes, and former commissioners of state level human rights commissions.

Presidents have been judicial officers, statutory office holders or academics.

As noted below, there are no restrictions on who can nominate candidates for membership. Australian Government guidelines exist on merit-based selection processes, which also cover the Commission.

### 3.2 Selection and appointment

*The GANHRI has adopted the following **General Observations on selection and appointment**:*

<sup>12</sup> AHRC Act s 8(1).

<sup>13</sup> President: AHRC Act s 8A; Human Rights Commissioner: AHRC Act s 8B; Social Justice Commissioner: AHRC Act s 46B; Children’s Commissioner: AHRC Act s 46MA.

<sup>14</sup> AHRC Act s 46B(2).

<sup>15</sup> Children’s Commissioner: AHRC Act s 46MC(2); Race Discrimination Commissioner: Racial Discrimination Act s 29(2); Sex Discrimination Commissioner: Sex Discrimination Act s 96(2); Disability Discrimination Commissioner: Disability Discrimination Act s 113; Age Discrimination Commissioner: Age Discrimination Act s 53A(2).

• **Selection and appointment of the governing body:** *The Sub-Committee notes the critical importance of the selection and appointment process of the governing body in ensuring the pluralism and independence of the National Institution. In particular, the Sub-Committee emphasises the following factors:*

1. *A transparent process*
2. *Broad consultation throughout the selection and appointment process*
3. *Advertising vacancies broadly*
4. *Maximising the number of potential candidates from a wide range of societal groups*
5. *Selecting members to serve in their own individual capacity rather than on behalf of the organization they represent.*

Discuss how members of the NHRI are selected and appointed. Please explain:

- The legal provisions (in your founding law or elsewhere) regarding the selection and appointment of members to the NHRI;
- The selection process and appointment procedure in practice (please indicate how publicity, transparency, broad consultation, openness to different groups of societies are enshrined in the enabling legislation and operate in practice);
- Whether and how these procedures ensure adequate representation of civil forces (e.g., civil society) involved in the promotion and protection of human rights
- Cooperation with the representatives of the groups mentioned above in 3.1;
- Membership criteria;

### **RESPONSE:**

The appointment of President and Commissioners is made by the Governor-General of Australia on the recommendation of the Executive Government. The process, as outlined below, is overseen by the Attorney-General.

To fill the positions of President and Commissioners, advertisements are placed online and in the national press. A selection committee is appointed by the Executive Government to ensure that each person appointed to the position of President or Commissioner has the appropriate qualifications, skills, knowledge and experience, as required by the relevant legislative provisions.<sup>16</sup>

The process is guided by a merit-based assessment policy and guidelines administered by the Australian Public Service Commission (APSC guidelines) for the selection of statutory office holders.<sup>17</sup>

These apply across all government appointment processes, including the Commission.

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<sup>16</sup> Children's Commissioner: AHRC Act s 46MC(2); Race Discrimination Commissioner: Racial Discrimination Act s 29(2); Sex Discrimination Commissioner: Sex Discrimination Act s 96(2); Disability Discrimination Commissioner: Disability Discrimination Act s 113; Age Discrimination Commissioner: Age Discrimination Act s 53A(2); Aboriginal and Torres Strait Islander Social Justice Commissioner: AHRC Act s 46B(2).

<sup>17</sup> Australian Public Service Commission, *Government's Merit and Transparency Policy* (11 December 2020) <<https://www.apsc.gov.au/working-aps/governments-merit-and-transparency-policy>>.

A summary of the APSC guidelines as they apply to the members of the Commission is as follows:

- The Attorney-General will advise incumbents, in writing, at least four months before the expiry of their appointment whether it is intended to reappoint them, not reappoint them, or to advertise the position to test the field.
- A merit-based and transparent process will apply for filling vacancies, with the following features:
  - oversight of the advertising process and assessment of applicants' claims are to be undertaken by the Secretary of the Attorney-General's Department and the Australian Public Service Commissioner (or their representatives)
  - vacancies will be advertised at a minimum on the APSjobs website and in the national press
  - an assessment panel will consider the claims of applicants against the selection criteria
  - the assessment panel will consist of the Secretary and a representative of the Public Service Commissioner and other panel members, if the Secretary decides, having regard to the legislative provisions, for example to maintain gender balance and provide specialist expertise
  - selections will be made against a core set of selection criteria, supplemented by additional criteria agreed to by the Minister and Secretary
  - a report endorsed by the Public Service Commissioner, will be provided by the Secretary to the Minister recommending shortlisted candidates.
- All appointments are to be made for a period of five years unless individual appointees advise in writing that they are seeking a shorter period, or the relevant legislation stipulates a different period, or other special circumstances arise justifying a shorter term.
- All costs associated with filling the vacancy, such as advertising, will be borne by the Commission.<sup>18</sup>

The Australian Public Service Commissioner plays an important role in ensuring that the assessment of candidates is based on merit. A representative of the Australian Public Service Commissioner is involved in the short listing of applicants, participates in the assessment panel or nominates a representative to participate in his or her place, and endorses the Secretary's selection report prior to the Secretary reporting to the Attorney-General. The Attorney-General is responsible for making the final recommendation of appointment to the Prime Minister and Cabinet. The Attorney-General must then seek the Governor-General's approval as required by the AHRC Act.

Where the Attorney-General decides not to appoint a candidate recommended by the assessment panel, the Attorney-General must write to the Prime Minister outlining the reasons for this decision.

The following appointments were made to the Commission between the last accreditation period, July 2015, and 1 July 2021:

- Sex Discrimination Commissioner – term commenced 18 April 2016 and renewed for 2 years on 1 April 2021
- Age Discrimination Commissioner – term commenced 29 July 2016 and renewed for 2 years on 1 April 2021

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<sup>18</sup> Australian Public Service Commission, *Government's Merit and Transparency Policy* (11 December 2020) <<https://www.apsc.gov.au/working-aps/governments-merit-and-transparency-policy>>.

- Human Rights Commissioner – term commenced 1 August 2016
- Disability Discrimination Commissioner – term commenced 1 August 2016
- Aboriginal and Torres Strait Islander Social Justice Commissioner – term commenced 3 April 2017
- President – term commenced 30 July 2017
- Race Discrimination Commissioner – term commenced 8 October 2018
- Disability Discrimination Commissioner – term commenced 7 May 2019
- National Children’s Commissioner – term commenced 2 November 2020
- Human Rights Commissioner – term commences 22 November 2021.

The Commission website summarises the work experience of each commissioner and demonstrates the expertise that they bring to their roles.<sup>19</sup>

Appointment processes for most commissioner positions and the role of President have been filled following extensive national advertising and merit-based selection processes, in accordance with the above mentioned APSC guidelines.

For example, the Age Discrimination Commissioner, Disability Discrimination Commissioner and Human Rights Commissioner were all appointed in 2016 following a nationally advertised recruitment process.

Vacancies for the three positions were advertised electronically and in the national media. A five-person selection panel was formed to assess candidates. Of the 157 people who applied for the positions, the selection panel formed a shortlist of 23 persons who were all considered of high quality. These applicants went through a range of interview processes before the panel made recommendations for each position to the Attorney-General.

The Sex Discrimination Commissioner, Aboriginal and Torres Strait Islander Social Justice Commissioner, Race Discrimination Commissioner and President were all appointed through merit-based selection processes between 2016 and 2018.

In 2019, the then incumbent Disability Discrimination Commissioner was appointed to a new statutory role on the Royal Commission on violence, abuse and neglect of people with disabilities. This followed a selection process for Royal Commissioners, utilising the APSC Guidelines. The Government announced the appointment of a new Disability Discrimination Commissioner at the same time, which enabled the AHRC to have an incumbent Disability Discrimination Commissioner, with the necessary qualifications and skills and lived experience of disability, in time for Australia’s appearance before the UN Committee on the Rights of Persons with Disabilities. The APSC guidelines include an exemption from a full selection process where there is an urgent requirement to fill a position.<sup>20</sup>

In 2020, the National Children’s Commissioner position was publicly advertised nationally, and an appointment made following a merit-based selection process in accordance with the APSC guidelines.

In 2021, a new Human Rights Commissioner was appointed without such a process. The legislation does not set out any specific qualifications required for a Human Rights Commissioner. The chosen person was selected from academia and has educational qualifications and a research background on human rights issues.

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<sup>19</sup> Australian Human Rights Commission, *Commissioners* (2021) <<https://humanrights.gov.au/about/commissioners>>.

<sup>20</sup> Australian Public Service Commission, *Government’s Merit and Transparency Policy* (11 December 2020) [2.6.6].

The APSC guidelines provide that there may be circumstances where the Attorney-General may consider a full selection process is inappropriate, including where there is an urgent requirement to fill a position, as in the case of the Disability Discrimination Commissioner above, or the availability of an eminent person 'where there would be little value in conducting a selection process'.<sup>21</sup> In these circumstances, the Attorney-General must request the Prime Minister's approval to fill a position without a full selection process. The Commission has been advised that the government complied with the APSC guidelines for this process.

In preparing this document, the Commission requested information from the Attorney-General's Department describing the selection processes undertaken for each commissioner appointment since 2016. The information provided by the Government is provided as Supporting Document '12. Attorney-General's Department List of Appointments 2016-2021'.

The Commission has regularly advocated for all appointment processes to be publicly advertised and merit based. This advocacy has taken the form of:

- letters from the President to the Attorney-General and Minister for Foreign Affairs
- briefings of the Attorney-General and the Attorney's office
- briefings of the Attorney-General's Department and the Department of Foreign Affairs
- statements in parliamentary processes such as public hearings of the Senate Estimates Committee.

The Commission has also made recommendations to the Government in publicly released discussion papers and reports to strengthen the governing legislation in accordance with the Paris Principles.<sup>22</sup> For example, in 2019 the Commission released a discussion paper that proposed reforms to the AHRC Act including:

- Specify that all commissioner appointments can only be made following a clear, transparent, merit-based and participatory selection and appointment process.
- Including a reference to the Paris Principles in the objects clause of the legislation acknowledging that the AHRC is intended to be a Paris Principles compliant national human rights institution.
- Including a definition of human rights in the AHRC Act that references all of Australia's international human rights obligations.<sup>23</sup>

The final report of the Commission on discrimination law reform, the Discrimination Law Reform Position Paper, to be released in October 2021, will similarly contain these recommendations.

The Commission is currently engaged with discussions with the Government about clarifying the selection process for Commissioners to ensure consistency with the Paris Principles. The

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<sup>21</sup> Australian Public Service Commission, *Government's Merit and Transparency Policy* (11 December 2020) [2.6.6].

<sup>22</sup> Australian Human Rights Commission, *Discussion paper: Priorities for federal discrimination law reform* (2019) <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-priorities-federal-discrimination-law>>; Australian Human Rights Commission, *Free and Equal* <<https://humanrights.gov.au/free-and-equal>>.

<sup>23</sup> Australian Human Rights Commission, *Discussion paper: Priorities for federal discrimination law reform* (2019) <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-priorities-federal-discrimination-law>> p. 26.

Commission will update the SCA on these negotiations at the time of our accreditation review.

Examples of verbal advocacy on selection processes undertaken by the Commission about this issue include:

- On 24 March 2021, the President met with the Assistant Minister responsible for the Commission regarding consideration by the government to remove funding for the Human Rights Commissioner position (on the basis that the incumbent in the role would not be re-appointed and the role not filled). The President encouraged consideration of extension for the incumbent Human Rights Commissioner, and that any proposed other appointment be undertaken through an advertised open process.
- On 1 April 2021, the Attorney-General's Chief of Staff telephoned the President to advise of the extension of the terms of the Sex Discrimination Commissioner and Age Discrimination Commissioner, but that the incumbent Human Rights Commissioner was not being extended. There was no discussion about alternative appointments to the role.
- On 8 July 2021, the President and Attorney-General spoke on the phone. In relation to the Human Rights Commissioner role, the Attorney indicated she was considering making an appointment. The President emphasised that the position was unfunded and recommended an open process, if considering appointment.
- On 27 September 2021, the President spoke with the Secretary of the Attorney-General's Department, regarding the upcoming accreditation process, requesting information from the Government to include in our application. The issue of appointment processes was discussed.

The following letters indicate the way in which selection processes have been conducted and the Commission's advocacy on ensuring Paris Principles compliance processes are adopted:

**4 April 2016** – Supporting Document '13. Letter from Attorney-General to chair of selection panel':

- Regarding selection panel for Human Rights Commissioner, Age Discrimination Commissioner, Disability Discrimination Commissioner
- Sets out guidance on the government's expectations on the qualities and experience of shortlisted candidates - notably, this includes that they be a 'strong and effective advocate for human rights' with an ability to work with the government and to be critical of government where required
- Confirms that the process should be consistent with the APSC Merit and Transparency Guidelines and relevant legislation (AHRC Act & Age and Disability Discrimination Acts).

**23 August 2016** – Supporting Document '14. Letter from Attorney-General to President':

- Requests the President participate in the selection panel for the Aboriginal and Torres Strait Islander Social Justice Commissioner
- Advises that the process will be consistent with the APSC Merit and Transparency Guidelines.

**8 February 2017** – Supporting Document '15. Letter from President to Attorney-General':

- Informs the Minister of the outcome of the Commission's SCA review and that the Commission was re-accredited with A status. The letter highlights the recommendations of the SCA and requests further discussion of the sub-committee's recommendations and Paris Principles with the Government.

**8 February 2017** – Supporting Document ‘16. Letter from President to Minister for Foreign Affairs’:

- Informs the Minister of the outcome of the Commission’s SCA review and that the Commission was re-accredited with A status. The letter highlights the recommendations of the SCA and requests further discussion of the sub-committee’s recommendations and Paris Principles with the Government.

**3 April 2019** – Supporting Document ‘17. Letter from Attorney-General to President’:

- Informs the President that the government is seeking to appoint a new Disability Discrimination Commissioner after the end of Alistair McEwin’s term and acknowledges the significance of the role
- Appoints President as acting Commissioner while consideration is given to filling the role.

The appointment of Commissioners has also been raised with the Commission in Senate Estimates processes on a number of occasions. In this questioning, the Government has provided details about selection processes used for appointments and confirmed the application of the APSC guidelines to these appointment processes. The Commission has also reinforced the importance of merit-based selection processes being conducted, as well as the need for appropriate resourcing for commissioners to conduct their roles.<sup>24</sup>

### 3.3. Tenure

***The Paris Principles state that in order to ensure a stable mandate for the members of the national institution, without which there can be no real***

<sup>24</sup> See senate estimates transcripts. 24 May 2018, discusses the appointment process for Race Discrimination Commissioner and a merit-based selection process (p. 10, 13, 20): <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F262f0c77-b396-4951-a99c-3c3d2a00b022%2F0002%22>; 25 May 2017, discusses the appointment process for the President (p. 99-103): (<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F2bf64e84-7744-4cff-a503-a6b0ca159860%2F0003%22>; 28 Feb 2017, discusses the appointment of the new Aboriginal and Torres Strait Islander Social Justice Commissioner, resourcing and capacity constraints, and the Commission’s A status (p. 23, 28): <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F6aee39c2-452e-44fb-87dd-7e3638a03b83%2F0002%22>; 18 October 2016, discusses the appointment process for the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Commission’s role as an independent statutory body, and the Commission’s independence in accordance with the Paris Principles (p. 16, 17): <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F62329d4c-8d92-49bc-b22c-b9371dd27824%2F0002%22>; 5 May 2016, discusses the appointment process for Human Rights, Age Discrimination and Disability Discrimination Commissioner (p. 6, 58): <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2Fdf59a2-9694-43a8-bb17-3c452655dca6%2F0002%22>; 9 February 2016, discusses the appointment process of the Sex Discrimination Commissioner (p. 12-17): <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2Fdf59a2-9694-43a8-bb17-3c452655dca6%2F0002%22>.

***independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.***

*The GANHRI has adopted the following **General Observations on membership tenure:***

- **Full-time Members:** *Members of the NHRIs should include full-time remunerated members to:*
  1. *Ensure the independence of the NHRI free from actual or perceived conflict of interests;*
  2. *Ensure a stable mandate for the members;*
  3. *Ensure the ongoing and effective fulfilment of the mandate of the NHRI.*
- **Guarantee of tenure for members of governing bodies:** *Provisions for the dismissal of members of governing bodies in conformity with the Paris Principles should be included in the enabling laws for NHRIs.*
  1. *The dismissal or forced resignation of any member may result in a special review of the accreditation status of the NHRI;*
  2. *Dismissal should be made in strict conformity with all the substantive and procedural requirements as prescribed by law;*
  3. *Dismissal should not be allowed based on solely the discretion of appointing authorities.*

Discuss how the tenure of the NHRIs' members is ensured. Please explain:

- The terms of office of members (and if it is specified in the founding law);
- Whether members are full and/or part-time;
- Whether the members receive adequate remuneration;
- Whether the members' terms are renewable;
- The grounds and procedures for dismissal and/or resignation of a member and how they operate in practice;
- If there is an advisory body in addition to the members, and if so, please set out the membership requirements of this body.

### **RESPONSE:**

Office Holders are appointed by the Governor-General either under the AHRC Act or under the relevant federal discrimination legislation.

- The President, Human Rights Commissioner, Aboriginal and Torres Strait Islander Social Justice Commissioner, and the National Children's Commissioner are appointed under the AHRC Act<sup>25</sup>
- The Sex Discrimination Commissioner is appointed under the Sex Discrimination Act<sup>26</sup>
- The Disability Discrimination Commissioner is appointed under the Disability Discrimination Act<sup>27</sup>

<sup>25</sup> AHRC Act ss 8A, 8B, 46B, 46MC.

<sup>26</sup> Sex Discrimination Act s 96.

<sup>27</sup> Disability Discrimination Act s 113.

- The Race Discrimination Commissioner is appointed under the Racial Discrimination Act<sup>28</sup>
- The Age Discrimination Commissioner is appointed under the Age Discrimination Act.<sup>29</sup>

Members are appointed for a term not exceeding seven years. Usually, initial appointments are for a five-year term. Members are eligible for reappointment.<sup>30</sup>

Members may be full or part-time as agreed on appointment. The Human Rights Commissioner and the Age Discrimination Commissioner must be full-time.<sup>31</sup> At present all members are full time.

Members are remunerated as Statutory Office Holders under a formal determination by the independent Remuneration Tribunal.<sup>32</sup> Salaries and allowances are reviewed by the Remuneration Tribunal on an annual basis.

Termination may occur for reasons such as the incapacity, misbehaviour, absence from duty or bankruptcy of the appointee.<sup>33</sup> In addition, the Governor-General may terminate the appointment of the Disability Discrimination Commissioner because of a disability which renders the Commissioner incapable of performing the inherent requirements of the office.<sup>34</sup>

If the legislation requires termination by the Governor-General, termination occurs on the advice of the Executive Council. Where the legislation requires specific grounds to be met, an appropriate statement of the grounds must be included in the explanatory memorandum accompanying the instrument of termination.<sup>35</sup>

No President or Commissioner has ever been terminated.

## **4. ORGANIZATIONAL INFRASTRUCTURE**

### **4.1 Infrastructure**

***The Paris Principles state that the national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate***

<sup>28</sup> Racial Discrimination Act s 29.

<sup>29</sup> Age Discrimination Act s 53A.

<sup>30</sup> AHRC Act s 37; Sex Discrimination Act s 97; Disability Discrimination Act s 114; Racial Discrimination Act s 30; Age Discrimination Act s 53B.

<sup>31</sup> AHRC Act s 8B; Age Discrimination Act s 53B.

<sup>32</sup> AHRC Act s 38; Sex Discrimination Act s 98; Disability Discrimination Act s 115; Racial Discrimination Act s 31; Age Discrimination Act 53C; Remuneration Tribunal, *2015/21 Remuneration and Allowances for Holders of Full-Time Public Office* (December 2015)

<<https://www.remtribunal.gov.au/sites/default/files/2021-01/2015-21%20Principal%20Determination%20-%20Remuneration%20and%20Allowances%20for%20Holders%20of%20Full-Time%20Public%20Office.pdf>>.

<sup>33</sup> AHRC Act s 41; Sex Discrimination Act s 102; Disability Discrimination Act s 119; Racial Discrimination Act s 34; Age Discrimination Act s 53G.

<sup>34</sup> Disability Discrimination Act s 119.

<sup>35</sup> Department of the Prime Minister and Cabinet, *Federal Executive Council Handbook 2021* <<https://pmc.gov.au/sites/default/files/publications/executive-council-handbook-2021.pdf>> p.23.

***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 be subject to financial control which might affect its independence.***

Discuss the NHRI's infrastructure.

Please explain:

- The organisational structure of the NHRI;
- How the NHRI's infrastructure (including staff and resources) is allocated;
- How the NHRI's infrastructure allows it to function according to its mandate;
- Evidence that the NHRI is adequately resourced and staffed.

Please provide:

- An organizational chart of the NHRI's structure.

### **RESPONSE:**

The Commission is a collegiate body made up of a President and seven Commissioners. The President is the senior member of the Commission and is responsible for managing the administrative affairs of the Commission.<sup>36</sup>

The Commission is supported by a Senior Executive Group comprising: Chief Executive; Senior Executive – Investigation and Conciliation Services, Senior Policy Executive – Human Rights and Strategy, Senior Policy Executive – Partnerships & International Engagement, General Counsel, Director – Public Engagement, Chief Financial Officer, Chief Information Officer, and Director – Human Resources.

The Commission currently has a total of 181 staff (167 full-time equivalent) across the following areas:

- President, Commissioners and Chief Executive (9 people)<sup>37</sup>
- Executive support (8 people)
- Policy/advisory/program staff (32 people)
- Investigation and conciliation staff (29 people)
- Corporate Services: human resources, finance, administration, Information technology (21.7 people)(this includes staff who provide services to another statutory agency (the Office of the Australian Information Commissioner) under a service delivery Memorandum of Understanding)
- Legal (6.4 people)
- Public Engagement (Communications, Digital Engagement, Knowledge Translation) (15.1 people)

Of these staff, 61.75 staff are employed in relation to externally funded projects (I.e., projects that are funded on an ad hoc basis, from government and non-government funding sources).<sup>38</sup>

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<sup>36</sup> AHRC Act s 8A.

<sup>37</sup> A Commissioner and Chief Executive positions are currently vacant. Senior Executive member acting in Chief Executive position to November 2021.

<sup>38</sup> Commission records, September 2021.

A copy of the Commission's high level organisational chart is provided as Supporting Document '18. Organisational Chart'.

The Commission receives an annual appropriation approved by the federal parliament. Staffing and budget is allocated by the President and Chief Executive across these support areas. Operational matters are managed by the Chief Executive, through delegation from the President. Most funding received is untied and can be applied at the discretion of the President.

Under the PGPA Act, the Commission can also source external funding from other sources. The Commission enters into partnerships and sponsorship arrangements for funding and receives significant pro-bono support from the private sector, particularly legal and consultancy firms. The Commission has internal controls to ensure that no external funding arrangements compromise the independence of the Commission.

The Commission also has an additional revenue stream through the provision of corporate services (Finance, ICT and payroll services) to the Office of the Australian Information Commissioner, a co-located federal government agency. This service delivery arrangement has supplemented Commission resourcing in its corporate functions for the past decade but will cease in June 2022.

The Commission has expressed concern about the sustainability of its funding base over many years. Challenges faced by the Commission since the previous accreditation review include:

- The appointment of 2 Commissioners without funding being provided (in particular, funding had been removed for the Disability Discrimination Commissioner in 2014, and was not restored when appointments to this role were made in 2016 and 2019; and funding was not provided when the Human Rights Commissioner was appointed in 2016, and is yet to be confirmed following the appointment of a Human Rights Commissioner in 2021)
- A sustained increase in complaints of discrimination and human rights breaches without any dedicated funding increases
- A substantial increase in complaints during the COVID-19 pandemic, with no additional funding support
- No general increase in the overall budget of the Commission, requiring increased property and staffing costs to be met through the existing appropriation.

In 2021, the Commission has identified that it is now facing significant financial challenges that affect its financial viability. The Commission's financial situation is a result of both having staffing beyond affordability levels, as well as the unfunded cost pressures referred to above.

The Commission has implemented internal budget controls and improved financial reporting to address the financial challenges. The Commission is working cooperatively with the government to develop and implement a pathway to financial sustainability. This includes the establishment of a steering committee to support the development of options to allow the Commission to transition to a sustainable financial footing by the end of the 2021-22 year, as far as practicable. The steering committee, comprising senior representatives from the government and the Commission, will provide the government with the basis upon which it determines the amount and timing of funding it will allocate from its reserves in 2021-22 to support the transition of the Commission to a sustainable financial footing. The Government has also provided the support of 2 financial services firms to assist the Commission to develop a plan to operate within its appropriated funding.

At this stage, it is not clear that the Commission can perform its statutory duties within the allocated funding, as it is insufficient to retain the necessary staff to undertake its functions. This is a matter that will form part of the steering committee's consideration of the appropriate funding for the Commission: the sustainable financial footing *to undertake the full range of statutory functions*, including support for eight statutory officeholders and a complaint-handling function.

This is a matter on which the Commission will update the SCA prior to our accreditation review in 2022.

## 4.2 Staffing

***The Paris Principles state that the NHRIs should be able to have its own staff.***

*The GANHRI has adopted the following General Observation on staffing:*

- ***Staff of an NHRI:*** *As a principle, NHRIs should be empowered to appoint their own staff.*
- ***Staffing by secondment:*** *In order to guarantee the independence of the NHRI, the Sub Committee notes, as a matter of good practice, the following:*
  1. *Senior level posts should not be filled with secondees;*
  2. *The number of seconded should not exceed 25% and never be more than 50% of the total workforce of the NHRI.*

Discuss the NHRI's staffing. Please explain:

- How staff of the NHRI are hired;
- If there are any limitations on the NHRI's authority to hire staff;
- Which current positions (if any) are filled by secondees;
- What percentage of the staff (including senior position) is seconded;
- Whether and how the staff reflects the principle of pluralism.

Please provide:

- A list of the staff of the NHRI or, if provided in another document, refer to the organisational chart illustrating the staffing structure of the NHRI (please indicate gender distribution).

### **RESPONSE:**

Staff of the Commission are hired under the *Public Service Act 1999* (Cth) section 22 – see also AHRC Act section 43 which confirms this. Staff are hired by the Commission through a standard Australian Public Service merit selection process. This requires advertising in the Commonwealth Government Gazette as a minimum but may include advertising on the Commission's website, on a range of professional and non-professional electronic job boards and list serves and through tertiary education institutes.

Following advertising, a selection panel is convened in accordance with a set selection process. This requires, for example, that the panel includes gender balance where possible. Where the position is one that works with particular sectors, the panel must also have representatives of that community (culturally diverse people, Indigenous peoples, people

Position	Name	Commencement Date	Expiry Date	Process followed	Reason why alternative approach taken	Number of applicants	Where advertised	Additional notes
Sex Discrimination Commissioner	Ms Kate Jenkins	18-Apr-16	16-Apr-21	Limited selection process	APSC Merit and Transparency Guidelines provide for a limited selection process in certain circumstances, such as where there is an urgent requirement to fill the position.	45 candidates were considered	Not advertised. A list of candidates was developed by AGD, the Department of the Prime Minister and Cabinet (Office for Women), including suggestions from former Sex Discrimination Commissioner, Elizabeth Broderick AP, the AHRC and ministers, as well as some individuals nominating themselves for the role.	
Age Discrimination Commissioner	The Hon Dr Kay Patterson AO	29-Jul-16	28-Jul-21	Full selection process	N/A	57	APSJobs, AGD website, AGD social media, AHRC social media, The Australian, the Australian Financial Review, Sydney Morning Herald, The Age, Courier Mail, West Australian and Herald Sun, Seek	
Disability Discrimination Commissioner	Mr Alastair McEwin	29-Jul-16	28-Jul-21	Full selection process	N/A	40	APSJobs, AGD website, AGD social media, AHRC social media, The Australian, the Australian Financial Review, Sydney Morning Herald, The Age, Courier Mail, West Australian and Herald Sun, Seek	
Human Rights Commissioner	Mr Edward Santow	29-Jul-16	28-Jul-21	Full selection process	N/A	60	APSJobs, AGD website, AGD social media, AHRC social media, The Australian, the Australian Financial Review, Sydney Morning Herald, The Age, Courier Mail, West Australian and Herald Sun, Seek	
Aboriginal and Torres Strait Islander Social Justice Commissioner	Ms June Oscar AO	03-Apr-17	02-Apr-22	Full selection process	N/A	22	APSJobs, AGD website, AGD social media, AHRC social media, The Australian, Koori Mail	
President	Emeritus Professor Rosalind Croucher AM	30-Jul-17	29-Jul-24	Full selection process	N/A	27	APSJobs, AGD website, AGD social media, AHRC social media, The Australian, the Australian Financial Review	
National Children's Commissioner	Ms Megan Mitchell	25-Mar-18	24-Mar-20	N/A - reappointed	APSC Merit and Transparency Guidelines do not require any selection process to be undertaken where the incumbent is to be reappointed.	N/A	N/A	Section 46MD of the AHRC Act provides that the period of appointment must not exceed seven years. Ms Mitchell's initial term was five years and her reappointed term two years, bringing her total term to seven years.
Race Discrimination Commissioner	Mr Chin Tan	08-Oct-18	07-Oct-23	Full selection process	N/A	53	APSJobs, AGD website, AGD social media, AHRC social media, The Australian, Koori Mail, Seek website	

Disability Discrimination Commissioner	Dr Ben Gauntlett	07-May-19	06-May-24	Direct appointment	APSC Merit and Transparency Guidelines provide for a direct appointment to be made in certain circumstances, such as where there is an urgent requirement to fill the position.	N/A	N/A	The vacancy was created by Mr Alastair McEwin's appointment as Commissioner for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. Given the importance of the position of Disability Discrimination Commissioner, particularly in light of the establishment of the Royal Commission, it was desirable for the position to be filled immediately upon Mr McEwin's resignation.
National Children's Commissioner	Ms Anne Hollonds	02-Nov-20	01-Nov-25	Full selection process	N/A	33	APSJobs, AGD website, AGD social media, AHRC social media, The Weekend Australian, Koori Mail, the Australian Financial Review, Sydney Morning Herald, The Age, Brisbane Times, West Australian	
Sex Discrimination Commissioner	Ms Kate Jenkins	18-Apr-21	16-Apr-23	N/A - reappointed	APSC Merit and Transparency Guidelines do not require any selection process to be undertaken where the incumbent is to be reappointed.	N/A	N/A	Section 97 of the Sex Discrimination Act provides that the Commissioner holds office for such period, not exceeding seven years, as is specified in the instrument for the person's appointment, but is eligible for reappointment. Ms Jenkin's initial term was five years and her reappointed term two years, bringing her total term to seven years.

Age Discrimination Commissioner	The Hon Dr Kay Patterson AO	29-Jul-21	28-Jul-23	N/A - reappointed	APSC Merit and Transparency Guidelines do not require any selection process to be undertaken where the incumbent is to be reappointed.	N/A	N/A	Section 53B of the Age Discrimination Act provides that the Commissioner holds office for the period specified in the instrument of appointment and that this period must not exceed seven years. Dr Patterson's initial term was five years and her reappointed term two years, bringing her total term to seven years.
Human Rights Commissioner	Ms Lorraine Finlay	22-Nov-21	21-Nov-26	Direct appointment	APSC Merit and Transparency Guidelines provide for a direct appointment to be made in certain circumstances, such as when an eminent person is available, rendering the selection process unnecessary.	N/A	N/A	



**Senator the Hon Michaelia Cash**  
Attorney-General  
Minister for Industrial Relations  
Deputy Leader of the Government in the Senate

Emeritus Professor Rosalind Croucher AM  
President  
Australian Human Rights Commission  
GPO Box 5218  
SYDNEY NSW 2001

By email: [president.ahrc@humanrights.gov.au](mailto:president.ahrc@humanrights.gov.au)

Dear President Croucher

I write in relation to the upcoming re-accreditation review of the Australian Human Rights Commission (the Commission) as a national human rights institution (NHRI) by the Global Alliance of National Human Rights Institutions (GANHRI) Sub-Committee on Accreditation. I thank the Commission for its recent advice on issues that may be raised during the upcoming re-accreditation review, including the process for appointment of Commissioners.

As you are aware, the Australian Government takes the process of appointing Commissioners seriously and the current appointments process is consistent with the Australian Public Service Commission's Merit and Transparency Guidelines, which provide detailed criteria for merit-based selection. The Guidelines only allow for direct appointments of candidates in certain circumstances, such as where there is an urgent requirement to fill the position or when an eminent person is available, rendering the selection process unnecessary. I note that there have been two direct appointments made since the Commission's last re-accreditation review in 2016 (Dr Ben Gauntlett as Disability Discrimination Commissioner in 2019 and Ms Lorraine Finlay as Human Rights Commissioner in 2021).

While I am satisfied that these appointments have been made in accordance with the Merit and Transparency Guidelines, in light of the concerns raised by GANHRI, I have asked my department for advice on this matter. In the meantime, I advise that future appointments of Commissioners will be openly advertised, including for the proposed Religious Discrimination Commissioner.

I trust this information is of assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michaelia Cash'.

Senator the Hon Michaelia Cash

11/03/2022

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**From:** Leanne Smith  
**Sent:** Tuesday, 22 February 2022 1:19 PM  
**To:** [REDACTED]  
**Cc:** Rosalind Croucher; Darren Dick; [REDACTED]  
**Subject:** AHRC - GANHRI re-accreditation [SEC=OFFICIAL]  
**Attachments:** 220222\_Memo\_AHRC\_GANHRI reaccrreditation.docx

Dear [REDACTED]

As foreshadowed in recent discussions and emails, please find attached a Memo from the Commission to AGO concerning the upcoming GANHRI re-accreditation process for the AHRC.

I would be very glad to discuss with you when you have a moment. I note that our reaccreditation interview has now been scheduled for 15 March.

I have raised the same points, separately, in my introductory calls with both AGD and DFAT.

Best Wishes,

Leanne

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**Leanne Smith**

Chief Executive

**Australian Human Rights Commission**

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**Human rights: everyone, everywhere, everyday**

We acknowledge the traditional custodians of this land, the Gadigal peoples of the Eora Nation, and pay our respects to their Elders, past, present and future.

The Australian Human Rights Commission remains committed to safeguarding the human rights of everyone in our community. We have closed our offices and our staff are working remotely until further notice. For more information on our work during the COVID-19 pandemic, please [visit our website](#).

# What's age got to do with it? Ageism across the Australian lifespan

Read the report 



OFFICIAL

**MEMO**

To: [REDACTED]  
Adviser (IR and Legal)  
Office of the Attorney General

From: Leanne Smith  
Chief Executive  
AHRC

CC:

Date: 22/2/2022

**Re: AHRC — International Accreditation review as an ‘A Status’ National  
Human Rights Institution**

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**Background**

1. In March 2020, the Australian Human Rights Commission will be considered for accreditation as a national human rights institution (NHRI) by the Sub-Committee on Accreditation (SCA) of the Global Alliance of National Human Rights Institutions (GANHRI). The Commission submitted its written application for the review in the first week of October 2021.
2. The UN General Assembly and the Human Rights Council encourage NHRIs to seek accreditation status through the GANHRI. UN human rights mechanisms including the Universal Periodic Review, Treaty Bodies and the Special Procedures increasingly refer to the Paris Principles and the GANHRI accreditation process, to encourage the establishment and strengthening of fully Paris Principles-compliant NHRIs worldwide.
3. Accreditation occurs on a five yearly cycle, with NHRIs graded as either ‘A’ or ‘B’ status institutions. ‘A status’ institutions are those that fully comply with the Paris Principles (United Nations General Assembly Principles relating to the Status of National Institutions, UN General Assembly Resolution 48/134, 20 December 1993). ‘B status’ institutions are those that do not fully comply with the Paris

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Principles.

4. Advocating for all nations to establish and maintain A status NHRIs has been a key pillar of the Australian Government's foreign policy for many decades. It was one of the five pillars of the Australian Government's voluntary commitments when seeking membership of the UN Human Rights Council and is a key signifier of Australia's commitment to human rights, democracy and the rule of law internationally.
5. As part of our accreditation review, the Commission is encouraged to identify actions that have been taken to address the recommendations made by the SCA in its previous accreditation review in 2016. These recommendations, which were provided to the former Attorney-General, are set out in the attachment to this note.
6. In 2022, one key matter that could affect our 'A status' accreditation concerns the current process of appointment of Commissioners.

### ***Appointment of Commissioners***

7. A key aspect of the GANHRI accreditation process focuses on the process of selection and appointment of members of the Commission. The SCA has adopted the following General Observation on selection and appointment:

***Selection and appointment of the governing body:***

*The Sub-Committee notes the critical importance of the selection and appointment process of the governing body in ensuring the pluralism and independence of the National Institution. In particular, the Sub-Committee emphasises the following factors:*

1. *A transparent process*
  2. *Broad consultation throughout the selection and appointment process*
  3. *Advertising vacancies broadly*
  4. *Maximising the number of potential candidates from a wide range of societal groups*
  5. *Selecting members to serve in their own individual capacity rather than on behalf of the organization they represent.*
8. When the Commission underwent its review in 2016, the appointment of the Human Rights Commissioner, without public advertising or a merit-based selection process, was identified as a major concern. The appointment process was the subject of a recommendation by the SCA to be remedied in the

subsequent 5-year period, ending in 2022 — by the time of the current re-accreditation process.

9. Since then, two further Commissioners have been appointed through processes that did not meet the GANHRI requirements for independent NHRIs — the Disability Discrimination Commissioner in 2019 and Human Rights Commissioner in 2021.
10. The Attorney-General's Department, working with the Attorney-General's Office, has assisted in providing background information about the appointments processes for all Commissioner appointments, including the President, since 2016. This information was included in the accreditation application that was submitted to the SCA in October.
11. The Commission is required to appear before the SCA on 15 March.
12. The issue of appointment processes is one that receives significant attention in the review process by the SCA. The Commission was put on notice on 8 February that we will be asked about the appointments of the Disability Discrimination Commissioner and Human Rights Commissioner.
13. Precedent from other NHRI reviews suggests that there is a substantial likelihood that the Commission will face challenges to retain its 'A status' without addressing, in some form, the recommendation made by the SCA in 2016. This may result in:
  1. downgrading of the Commission to 'B status' — for the first time since the Paris Principles were established in 1993 ; or
  2. deferral of accreditation for 12 months to enable the government to make necessary changes.
14. A downgrade to B status would mean that the AHRC does not have participation rights in UN fora, including human rights treaty committees and the UN Human Rights Council. This would be a significant focal point for international attention in all UN treaty body reviews, the UPR and in the UN Human Rights Council.
15. In addition to the issue of ensuring the Commission's independence through the appointments processes, there is also the issue of the legitimacy of the appointment for the incumbent and their ability to credibly fulfill their role. An open, merit-based appointment process provides the candidate selected for appointment with legitimacy and enables them to undertake their role without having to answer criticism for their own appointment.

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***For consideration — strengthening protocols for appointment processes***

16. In order to address similar concerns of the SCA in their most recent review, the New Zealand Government recently introduced a formalised selection process for commissioner appointments to the New Zealand Human Rights Commission, as set out here:  
<https://www.justice.govt.nz/assets/Documents/Publications/Guidance-for-the-appointment-of-Human-Rights-Commissioners.pdf>
17. There are broad similarities between the NZ approach and the existing Australian Government's Merit and Transparency Policy. In New Zealand decisions about selection still rest with the relevant Minister. However, the key differences are that:
  - the NZ Guidelines are specifically for appointments to the Human Rights Commission
  - the NZ Guidelines expressly reference the Paris Principles and require the Minister to have regard to them in selecting a candidate for appointment
  - for new appointments there is a requirement for advertising and for the constitution of a panel to consider applications.
18. While the SCA recommends legislative entrenchment of selection processes – something that the AHRC has advocated for consistently over the past decade – we note that the process now adopted in New Zealand does not involve legislative reform, but instead sits at the policy level. This has been sufficient for the SCA to renew New Zealand's A status accreditation.

***Reputational risks for the Australian Government if the Commission were to be downgraded***

19. The [Department of Foreign Affairs and Trade](#) has provided its perspective on the importance of the AHRC retaining A status, in the context of a recent review of the Commission and risks to our international standing, particularly in our own region, as follows:
  - [The AHRC's international activities \(including engagement in the UN reporting process\) provide critical support to our efforts to advance human rights globally, a top foreign policy priority, and curtailing these activities would risk undermining our efforts in this area. The Australian Government's working with and accommodation of a truly independent NHRI is the most powerful example we can provide to other countries to advance global human rights. The following points outline our concerns:](#)

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- Supporting strong national human rights institutions (NHRIs) is a priority of Australia's international human rights policy. We consistently advocate for the need to strengthen the capacity of NHRIs, in our region and globally, as key mechanisms for advancing the promotion and protection of human rights. We lead the biennial resolution on the role of NHRIs at the UN Human Rights Council (most recently at HRC45 in September 2020) and work closely with Germany, which leads of a complementary resolution in alternate years in the Third Committee of the UN General Assembly. The AHRC provides critical input and guidance on the development of these resolutions. Weakening the role of our own NHRI would risk accusations of hypocrisy from other countries and civil society and undermine the credibility of Australia's international leadership on these issues.
- The AHRC is recognised internationally as an 'A status' NHRI operating in full compliance with the UN Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights (the Paris Principles). As outlined in the in Australia's resolution, NHRIs foster the development and maintenance of inclusive societies through the performance of their core functions as set out in the Paris Principles and in line with their independent mandates. To be accorded 'A status' under the Paris Principles, an NHRI must be independent, possess a broad human rights mandate and adequate funding, and implement an inclusive and transparent selection and appointment process. A core function of an A Status NHRI is to support the link between countries' obligations under international human rights law, including ratified treaties, and the lived experiences of individuals on the ground — reducing this role (engagement on international human rights issues, IHRL treaty body reporting etc.) may result in the AHRC being demoted in status under the Paris Principles.
- The AHRC plays a critical role as a participant in our international Human Rights Dialogues with other countries, and as the provider of expert technical assistance to countries with whom we have these dialogues. Human Rights Dialogues are a vital tool for Australia in building trust and confidence in bilateral engagement on human rights issues. Representatives of the AHRC have participated as members of the Australian delegations in Human Rights Dialogues with Vietnam, Laos, Iran and China. The participation of AHRC's representatives enables the direct sharing with partner countries of information, on both Australia's own experience of dealing with human rights challenges and the importance and role of independent national human rights institutions in addressing those challenges. It demonstrates how NHRIs and governments can work together. AHRC's provision of technical capacity building on the ground in partner countries in connection with these Dialogues is a critical contribution to the promotion and protection of human rights in the partner countries and reinforces the value of the Dialogue

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process. Deprioritising the international work of the AHRC would undermine its ability to participate in Dialogues and provide technical assistance, risking undermining the effectiveness of Dialogues as a human rights capacity building tool.

- AHRC's provision of parallel reports to the Australian Government's reports for its Universal Periodic Review and treaty body appearances is best practice and provides an important demonstration to other countries of the role and function of an NHRI. The HRC resolution which sets out the principles for the UPR (A/HRC/16/21 of 2011) states that the UPR 'should ensure the participation of all relevant stakeholders, including non-governmental organizations and national human rights institutions'. Preventing the AHRC from providing these reports would risk criticism from other countries and civil society that the Australian Government was avoiding scrutiny, undermine our efforts to encourage other countries to engage in the UPR process in a constructive and transparent manner as we currently do, and undermine our action on international human rights issues more broadly.

***Recommendations***

1. The Commission encourages the Government to consider adopting a formal policy on Commissioner appointment processes similar to the New Zealand approach, with an initial focus on advertising the vacancies.
  - a. This would be an important first step in affirming the independence of the Commission, its domestic and international legitimacy and Australia's international reputation in bilateral and multilateral fora
2. As an immediate step, the Commission encourages the Government to commit to undertake a merit-based selection process for the next commissioner appointment, the Religious Discrimination Commissioner (pending passage of the relevant bill).
  - a. This would provide concrete evidence to the SCA of the Government's commitment to strengthening the appointment process and to maintain the A status of the Commission.

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ATTACHMENT: SCA recommendations (2016) Topic	Issue	Recommendation
<b>1. Selection and appointment</b>	<p>APSC merit guidelines exist, but not always followed – either by AG not following recommendation of panel or not conducting process at all.</p> <p>The SCA is of the view that it is critically important to ensure the formalization of a clear, transparent and participatory selection and appointment process for an NHRI's decision-making body, and the application of the established process in all cases.</p> <p>The SCA notes that AHRC has proposed amendments to formalize the above selection process in its enabling law, and that it continues to advocate for such amendments.</p>	<p>The SCA encourages the AHRC to continue to advocate for a selection process that specifies explicit requirements to: a)Publicize vacancies broadly; b)Maximize the number of potential candidates from a wide range of societal groups and educational qualifications; 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 individual capacity rather than on behalf of the organization they represent.</p> <p>The SCA refers to Paris Principle B.1 and to its General Observation 1.8 on 'Selection and appointment of the decision-making body of NHRIs'.</p>
<b>2. Process for dismissal of commissioners</b>	<p>The SCA is of the view that, in order to address the requirement for a stable mandate, which is important in reinforcing independence, 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. This process should apply uniformly to all nominating entities. The grounds for dismissal must</p>	<p>The SCA accordingly urges the AHRC to advocate for an independent and objective dismissal process regarding the grounds already recognised in the AHRC Act. The SCA refers to Paris Principle B.3 and to its General Observation 2.1 on 'Guarantee of tenure for members of the NHRI decision-making body'.</p>

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	<p>be clearly defined and appropriately confined to those actions that impact adversely on the capacity of the member to fulfil his or her mandate.</p> <p>The SCA expresses concern about cuts to the AHRC budget since 2014-15. The SCA again notes, with concern, the impact of the application of annual efficiency dividends which erode the AHRCs base level of funding and therefore its capacity to fulfil its legislative mandate. The SCA is also concerned about the conferral of work and the appointment of additional commissioners without an additional budget allocation.</p>	
<b>3.Adequate funding and financial autonomy</b>	<p>The SCA reiterates that, to function effectively, an NHRI must be provided with an appropriate level of funding in order to guarantee its ability to freely determine its priorities and activities. Further the NHRI ought to be provided with adequate funding for its operations and ensures that the Commission retains adequate discretionary funding to independently set its own program of work. In particular, adequate funding should, to a reasonable degree, ensure the gradual and progressive realization of improvement in the NHRI's operations and the fulfilment of its mandate.</p>	<p>The SCA encourages the AHRC to continue to advocate for an appropriate level of funding to carry out its mandate including, where appropriate, the establishment of regional offices.</p> <p>The SCA refers to Paris Principle B.2 and to its General Observations 1.10 on 'Adequate funding' and 2.8 on 'Administrative regulation'.</p>
<b>4.Limitation on mandate</b>	<p>The current definition of human rights in the Act does not explicitly refer to either the Convention against Torture or the International Covenant on</p>	<p>The SCA urges the AHRC to continue advocating for amendment of the definition of 'human rights' within the AHRC Act to include the seven core human rights</p>

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	<p>Economic, Social and Cultural rights. The SCA acknowledges that the AHRC interprets its mandate to encompass all human rights. The Paris Principles require that an NHRI must be legislatively mandated for both the promotion and protection of all human rights.</p>	<p>treaties ratified by Australia (matching the definition used by the Parliamentary Joint Committee on Human Rights).</p>
<p><b>5.Tenure</b></p>	<p>The SCA notes the provisions of sections 37 of the AHRC Act, 97 of the Sex Discrimination Act, 114 of the Disability Discrimination Act, 30 of the Racial Discrimination Act and 53 B of the Age Discrimination Act, which each provide that members can be appointed for a term not exceeding seven years and that they are eligible for re-appointment, with no limit on the number of times re-appointment can occur.</p>	<p>As a proven practice, the SCA encourages that a term of between three (3) and seven (7) years with the option to renew once be provided for in an NHRI's enabling law. The SCA refers to Paris Principle B.3 and to its General Observation 2.1 'Guarantee of tenure for members of the National Human Rights Institution decision-making body'.</p>

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**From:** [REDACTED]  
**Sent:** Tuesday, 22 February 2022 2:51 PM  
**To:** [REDACTED]@un.org  
**Cc:** [REDACTED]; Leanne Smith; Rosalind Croucher; Darren Dick; [REDACTED]@un.org; [REDACTED]@un.org; [REDACTED]@un.org; [REDACTED]@un.org  
**Subject:** RE: Publicly available information for the reaccreditation of the Australian NHRI - SCA March 2022 [SEC=OFFICIAL]  
**Attachments:** 2022.02.22 - Australian Human Rights Commission\_response to article.pdf; Supporting Document 24. Memo to Attorney-General.pdf

Good afternoon

Please find attached the Australian Human Rights Commission's response to the article provided on 8 February 2022, along with one supporting document.

I would be grateful if you could please acknowledge receipt of the two documents.

I also kindly request that the Commission's Chief Executive, Leanne Smith, be copied into correspondence moving forward.

Should you need anything further, please do not hesitate to contact me.

Kind regards,

[REDACTED]

[REDACTED]

Senior Executive Support Officer | Commission Secretariat

### Australian Human Rights Commission

GPO Box 5218, Sydney NSW 2001

T +61 [REDACTED]

E [REDACTED]@humanrights.gov.au W [humanrights.gov.au](http://humanrights.gov.au)

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**From:** [REDACTED]@un.org>  
**Sent:** Tuesday, February 8, 2022 9:59 PM  
**To:** Rosalind Croucher <[rosalind.croucher@humanrights.gov.au](mailto:rosalind.croucher@humanrights.gov.au)>; Darren Dick <[darren.dick@humanrights.gov.au](mailto:darren.dick@humanrights.gov.au)>; Julie O'Brien <[julie.obrien@humanrights.gov.au](mailto:julie.obrien@humanrights.gov.au)>  
**Cc:** [REDACTED]@un.org>; [REDACTED]@un.org>; [REDACTED]@un.org>; [REDACTED]@un.org>; [REDACTED]@asiapacificforum.net>  
**Subject:** Publicly available information for the reaccreditation of the Australian NHRI - SCA March 2022

You don't often get email from [fellow.belen@un.org](mailto:fellow.belen@un.org). [Learn why this is important](#)

Dear NHRI,

This is to share with you the attached publicly available article which will form part of the sources of information to assess your NHRI during the March 2022 session of the SCA.

The SCA Secretariat kindly requests a response to the information in the attached article on or before **22 February 2022 (18:00 CET)**.

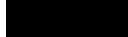
Please acknowledge receipt of this email and its attachment. Thank you very much.

Kind regards,



**National Institutions Fellow**

National Institutions and Regional Mechanisms Section (NIRMS)  
Field Operations and Technical Cooperation Division (FOTCD)  
Office of the United Nations High Commissioner for Human Rights (OHCHR)

E-mail: @un.org

Web: [w](#)

**To:** National Institutions and Regional Mechanisms Section (NIRMS)  
Field Operations and Technical Cooperation Division (FOTCD)  
Office of the United Nations High Commissioner for Human Rights (OHCHR)

**From:** Australian Human Rights Commission

**Date:** 22/2/2022

**Re:** Response to The Conversation article: "Australia's 'A' rating on human rights is under threat with a handpicked, politically engineered commissioner"

## Evidence from Statement of Compliance

The Australian Human Rights Commission submitted its Statement of Compliance on 6 October 2021. In the Statement, the Commission outlined that the process for selection and appointment is conducted in accordance with the merit-based assessment policy and guidelines set out by the Australian Public Service Commission (APSC guidelines) for the selection of statutory office holders.<sup>1</sup> All portfolios of Government are required to conduct appointment processes in accordance with these guidelines – including the Attorney-General's Department that conducts the process for appointment of commissioners to the AHRC.

Appointment processes for most commissioner positions and the role of President have been filled following extensive national advertising and merit-based selection processes, in accordance with the APSC guidelines.

The APSC guidelines provide that there may be circumstances where the Attorney-General may consider a full selection process is not required, including where there is an urgent requirement to fill a position, as was the case of the Disability Discrimination Commissioner in 2019, or the availability of an eminent person 'where there would be little value in conducting a selection process', as the Attorney-General advised was the case of the Human Rights Commissioner in 2021.<sup>2</sup> In these circumstances, the Attorney-General must request the Prime Minister's approval to fill a position without a full selection process. The Commission has been advised by the Attorney-General's Department that the government complied with the APSC guidelines for these processes.

The Commission has regularly advocated for all appointment processes to be publicly advertised and merit based. This advocacy has taken the form of:

- letters from the President to the Attorney-General and Minister for Foreign Affairs
- briefings of the Attorney-General and the Attorney's office
- briefings of the Attorney-General's Department and the Department of Foreign Affairs

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<sup>1</sup> Australian Public Service Commission, *Government's Merit and Transparency Policy* (11 December 2020) <<https://www.apsc.gov.au/working-aps/governments-merit-and-transparency-policy>>.

<sup>2</sup> Australian Public Service Commission, *Government's Merit and Transparency Policy* (11 December 2020) [2.6.6].

- statements in parliamentary processes such as public hearings of the Senate Estimates Committee
- recommendations to the Government in publicly released discussion papers and reports to strengthen the governing legislation in accordance with the Paris Principles.<sup>3</sup>

For further information, refer to **Section 3.2** of the Statement of Compliance, and the following supporting documents, that were submitted on 6 October 2021:

- Supporting Document '[12. Attorney-General's Department List of Appointments 2016-2021](#)'
- Supporting Document '[13. Letter from Attorney-General to chair of selection panel](#)'
- Supporting Document '[14. Letter from Attorney-General to President](#)'
- Supporting Document '[15. Letter from President to Attorney-General](#)'
- Supporting Document '[16. Letter from President to Minister for Foreign Affairs](#)'
- Supporting Document '[17. Letter from Attorney-General to President](#)'

## Explanation from Government at senate estimates

In Australia's Westminster Parliamentary System of Government, the Senate Estimates hearings are a key accountability measure in which departments and agencies are held accountable to the Australian parliament, through the Senate.

At the senate estimates hearing on 26 October 2021, the Attorney-General was asked about the most recent appointment and selection process for a commissioner, namely the Human Rights Commissioner. The Attorney-General stated that the Commissioner:

was appointed in accordance with the policies and guidelines set out in the government's merit and transparency policy, which states: 'Special circumstances where a Minister may consider a full selection process is inappropriate may include ... the availability of an eminent person, where there would be little value in conducting a selection process.' ... Ms Finlay was considered an eminent person, eminently qualified for the appointment given her qualifications, knowledge and experience.

A full transcript of the hearing is available at:

<[https://www.aph.gov.au/Parliamentary\\_Business/Hansard/Hansard\\_Display?bid=committees/estimate/25205/&sid=0002](https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=committees/estimate/25205/&sid=0002)>.

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<sup>3</sup> Australian Human Rights Commission, *Discussion paper: Priorities for federal discrimination law reform* (2019) <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-priorities-federal-discrimination-law>>; Australian Human Rights Commission, *Free and Equal* <<https://humanrights.gov.au/free-and-equal>>.

## Additional information since statement of compliance

The Commission has continued to undertake briefings and advocacy with the Government about the processes for the appointment of commissioners in the time period since our application for re-accreditation was submitted. This engagement has confirmed that the Government considers that it has made appointments in a manner that is consistent with the government-wide appointment process for statutory officers.

The Commission has advocated for all appointments to be undertaken utilising the full selection criteria set out in the government's policy, so that it does not rely on special circumstances for any future appointment process. Our most recent advocacy is set out below.

### Advocacy to government (verbal):

Additional examples of verbal advocacy on selection processes undertaken by the Commission about this issue, since the submission of the Statement of Compliance, include:

- On 2 February 2022, the Chief Executive and the President met with the Secretary of the Attorney-General's Department, and spoke in that meeting regarding the accreditation process and matters related to the appointment and selection process.
- On 15 February 2022, the Chief Executive met with the First Assistant Secretary, Multilateral Policy Division of the Australian Department of Foreign Affairs and Trade regarding the accreditation process and matters related to the appointment and selection process.
- On 16 February 2022, the Chief Executive and the President met with the First Assistant Secretary and the Assistant Secretary to the Integrity and Security Division of the Attorney-General's Department regarding the accreditation process and matters related to the appointment and selection process.

### Advocacy to government (written):

Additional examples of written advocacy on selection processes undertaken by the Commission about this issue, since the submission of the Statement of Compliance, include:

- On 9 February 2022, the Chief Executive sent a draft briefing note to the office of the Attorney-General for their comment prior to sending to the Attorney-General.
- On 22 February 2022, the Chief Executive sent a memo to the Attorney-General seeking commitments regarding the appointment and selection process as per below. An extract of the memo is attached as [Supporting Document 24. Memo to Attorney-General.](#)

The memo includes two recommendations to strengthen protocols for the appointment process:

1. The Commission encourages the Government to consider adopting a formal policy on Commissioner appointment processes similar to the New Zealand approach, including by advertising all vacancies.
2. As an immediate step, the Commission encourages the Government to commit to undertake a merit-based selection process for the next commissioner appointment, the Religious Discrimination Commissioner (pending passage of the relevant bill).

### Advocacy to government (public reports):

In December 2021, the Commission released the final report on discrimination law reform titled *Free & Equal: A reform agenda for federal discrimination laws*.<sup>4</sup> The Position Paper includes recommendations to strengthen the governing legislation of the Commission in accordance with the Paris Principles. It includes several recommendations to Government to amend the *Australian Human Rights Commission Act 1986* (Cth) as a matter of priority, including:

- Specifying that all Commissioner appointments can only be made following a clear, transparent, merit-based and participatory selection and appointment process.
- Including a reference to the Paris Principles in the objects clause of the legislation acknowledging that the AHRC is intended to be a Paris Principles compliant national human rights institution.
- Including a definition of human rights in the AHRC Act that references all of Australia's international human rights obligations.<sup>5</sup>

### Key work undertaken by the Human Rights Commissioner since appointment:

The new Human Rights Commissioner commenced her term on 22 November. Since that time, the Commissioner has advocated publicly on complex human rights issues, calling the government to account for its performance on these issues in clear demonstration of her independence.

Examples of the work completed by the Human Rights Commissioner since commencement on 22 November 2021:

- On 8 December 2021, the Human Rights Commissioner hosted a national Workshop with stakeholders from state and territory human rights institutions, academia, international organisations and civil society. The Workshop involved discussion of the challenges and opportunities to human rights presented by the COVID-19 pandemic.
- The Commissioner has published opinion pieces in newspapers nationally, criticising the government's performance on the handling of the COVID-19 pandemic, immigration detention and OPCAT implementation as follows:

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<sup>4</sup> Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws* (December 2021) < <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>.

<sup>5</sup> Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws* (December 2021) < <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>> p.306.



- Lorraine Finlay, 'Time for review on COVID-19 border and quarantine restrictions', *The West Australian* (online) 18 December 2021 <<https://thewest.com.au/opinion/covid-restrictions-must-be-measured-and-give-regard-to-the-impact-on-our-lives--c-4985908>>.
- Lorraine Finlay, 'Novak Djokovic drew global attention to Australia's immigration detention regime. Now we need proper scrutiny of all places of detention', *ABC News* (online) 20 January 2022 <<https://www.abc.net.au/news/2022-01-20/djokovic-australia-immigration-detention-hotel-scrutiny-opcat/100767220>>.
- Melissa Coad, 'Time's up for Australia to implement OPCAT, commissioner says', *The Mandarin* (online) 25 January 2022 <<https://www.themandarin.com.au/179473-times-up-for-australia-to-implement-opcat-commissioner-says0/>>.
- On 15 February 2022, the Commissioner appeared at the Senate Budget Estimates process (in Parliament) and spoke to the importance of the implementation of OPCAT in Australia, and urged the federal and state and territory governments to work together to embed the measures of the protocol.
- The Commissioner made submissions to two parliamentary inquiries into the government's proposed Religious Discrimination Bill,<sup>6</sup> and also appeared before the Parliamentary Joint Committee on Human Rights on Friday 14 January 2022, and the Senate Legal and Constitutional Affairs Legislation Committee on Friday 21 January 2022. In these appearances and submissions, the Commissioner expressed significant concern about the scope of the proposed bill and made recommendations to improve the bill. This bill is a priority law reform of the Prime Minister that has attracted significant political attention.

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<sup>6</sup> Submission 97 to the Parliamentary Joint Committee on Human Rights <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/ReligiousDiscrimination/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/ReligiousDiscrimination/Submissions)>; and Submission 32 to the Senate Legal and Constitutional Affairs Legislation Committee <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Religiousdiscrimination/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Religiousdiscrimination/Submissions)>.

## 5. SELECTION AND APPOINTMENT PROCESS

### Issue of Concern 2: Appointments without merit-based selection

- The Attorney-General may unilaterally propose a candidate that did not go through the merit-based selection process by the APSC as in the case of the appointments of the Disability Discrimination Commissioner in 2019 and the Human Rights Commissioner in 2021.
- [An article published on 9 September 2021 on the website theconversation.com](#) pointed out that the “handpicked appointment of a new human rights commissioner... threatens to undermine the independence and legitimacy of the [AHRC]” as it was not the “result of an open and competitive process.”

#### Response:

- We understand that the SCA previously made a recommendation regarding the appointment and selection process, and we agree that there is a concern for the potential perception that can accompany a direct appointment, as the Conversation article illustrates.
- We as an institution provide the support to the incumbent to ensure that they can exercise their role independently, as we will demonstrate in a moment.
- We have directed our advocacy to change this as a matter of policy and practice. I am delighted to say that our advocacy to government has recently resulted in some success, with a written commitment from the Attorney-General that appointments moving forward will be openly advertised. We will continue to advocate for that commitment to result in legislative change.
- I will first provide some background and context.
- The Government has asserted that it has complied with, and did apply the merit-based selection process in the Australian Public Service Commission’s *Government’s Merit and Transparency Policy* (dated December 2020), which applies across all government agencies for all Commissioner appointments, which allows for exceptional circumstances.
- This usually means that they conduct a merit-based, publicly advertised appointment process.
- In the case of the Disability Commissioner in 2019, the Government had conducted a broad consultation process about statutory appointments to the Royal Commission into Disability, and then appointed the then Disability Discrimination Commissioner to this Royal Commission. The newly appointed Disability Discrimination Commissioner was not separately advertised, but was considered as part of this broader selection process. The exceptional circumstance for not conducting a separate process was to ensure that the Commission was able to fully participate, as an NHRI, in the periodic review of Australia by the Committee on the Rights of Persons with Disabilities which was scheduled within months of the appointment.
- Regarding the Human Rights Commissioner appointment in 2021, at the senate estimates hearing on 26 October 2021, the Attorney-General stated that the Commissioner:
 

was appointed in accordance with the policies and guidelines set out in the government’s merit and transparency policy, which states: ‘Special circumstances where a Minister may consider a full selection process is inappropriate may include ... the availability of an eminent person, where there would be little value in conducting a selection process.’ ... Ms Finlay was considered an eminent

person, eminently qualified for the appointment given her qualifications, knowledge and experience.

- The Commission has continued to advocate for all appointments to be undertaken utilising the full selection criteria set out in the government's policy, so that it does not rely on special circumstances for any future appointment process.
- Since the submission of the Commission's Statement of Compliance in October 2021, this advocacy has included:
  - 2 February 2022 - Chief Executive and President met with the Secretary of the Attorney-General's Department. The Secretary is the head of the Department.
  - 15 February 2022 - Chief Executive met with First Assistant Secretary, Multilateral Policy Division of the Australian Department of Foreign Affairs and Trade
  - 16 February 2022 - Chief Executive and President met with the First Assistant Secretary and the Assistant Secretary to the Integrity and Security Division of the Attorney-General's Department
  - 9 February 2022 - Chief Executive sent a draft briefing note to the office of the Attorney-General for their comment prior to sending to the Attorney-General
  - 22 February 2022 - Chief Executive sent memo to the Attorney-General seeking commitments regarding the appointment and selection process, including two recommendations:
    - 1. The Commission encourages the Government to consider adopting a formal policy on Commissioner appointment processes similar to the New Zealand approach, including by advertising all vacancies.
    - 2. As an immediate step, the Commission encourages the Government to commit to undertake a merit-based selection process for the next commissioner appointment, the Religious Discrimination Commissioner (pending passage of the relevant bill).
  - December 2021 - the Commission released the final report on discrimination law reform titled *Free & Equal: A reform agenda for federal discrimination laws*.<sup>2</sup> The Position Paper includes recommendations to strengthen the governing legislation of the Commission in accordance with the Paris Principles, including a recommendation to Government to amend the *Australian Human Rights Commission Act 1986* (Cth) to specify that all Commissioner appointments can only be made following a clear, transparent, merit-based and participatory selection and appointment process.<sup>3</sup>
- Since commencing on 22 November, the Human Rights Commissioner has advocated publicly on complex human rights issues, calling the government to account for its performance on these issues in clear demonstration of her independence. Examples include:

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<sup>2</sup> Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws* (December 2021) < <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>.

<sup>3</sup> Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws* (December 2021) < <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>> p.306.

- 8 December 2021 - HRC hosted national Workshop with state and territory human rights institutions, academia, international organisations and civil society, to discuss challenges and opportunities to human rights presented by the COVID-19 pandemic.
- The HRC's opinion pieces have been published in newspapers nationally, criticising the government's performance on the handling of the COVID-19 pandemic, immigration detention and OPCAT implementation,<sup>4</sup> as well as an article on the human rights implications of the Ukraine conflict.
- 15 February 2022 - at the Senate Budget Estimates process (in Parliament), the HRC spoke to the importance of the implementation of OPCAT in Australia, and urged the federal and state and territory governments to work together to embed the measures of the protocol.
- The HRC made submissions to two parliamentary inquiries into the government's proposed Religious Discrimination Bill,<sup>5</sup> and appeared before two committees to provide evidence.<sup>6</sup> The Commissioner expressed significant concern about the scope of the proposed bill and made recommendations to improve the bill. This bill is a priority law reform of the Prime Minister that has attracted significant political attention.
- As the materials we have provided demonstrate, we have advocated for the Government to not rely on the exemption process and to clarify that they will always ensure positions are publicly advertised. We have made significant progress in dealing with this issue.
- On 11 March, the Commission received a letter with a written commitment from the Attorney-General that they will ensure advertised processes into the future.
- The letter states: *"While I am satisfied that these appointments have been made in accordance with the Merit and Transparency Guidelines, in light of the concerns raised by GANHRI, I have asked my department for advice on this matter. In the meantime, I advise that future appointments of Commissioners will be openly advertised, including for the proposed Religious*

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<sup>4</sup>Lorraine Finlay, 'Time for review on COVID-19 border and quarantine restrictions', *The West Australian* (online) 18 December 2021 <<https://thewest.com.au/opinion/covid-restrictions-must-be-measured-and-give-regard-to-the-impact-on-our-lives--c-4985908>>.

Lorraine Finlay, 'Novak Djokovic drew global attention to Australia's immigration detention regime. Now we need proper scrutiny of all places of detention', *ABC News* (online) 20 January 2022 <<https://www.abc.net.au/news/2022-01-20/djokovic-australia-immigration-detention-hotel-scrutiny-opcat/100767220>>.

Melissa Coade, 'Time's up for Australia to implement OPCAT, commissioner says', *The Mandarin* (online) 25 January 2022 <<https://www.themandarin.com.au/179473-times-up-for-australia-to-implement-opcat-commissioner-says0/>>.

<sup>5</sup> Submission 97 to the Parliamentary Joint Committee on Human Rights <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/ReligiousDiscrimination/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/ReligiousDiscrimination/Submissions)>; and Submission 32 to the Senate Legal and Constitutional Affairs Legislation Committee <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Religiousdiscrimination/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Religiousdiscrimination/Submissions)>.

<sup>6</sup> Parliamentary Joint Committee on Human Rights on Friday 14 January 2022, and the Senate Legal and Constitutional Affairs Legislation Committee on Friday 21 January 2022.

*Discrimination Commissioner.*" We will provide a copy of this letter to the Committee at the end of the session.

- We are hopeful that we will be able to secure amendments to our legislation to embed this understanding.
- **A recommendation from the Committee to this effect will be most helpful to the Commission in continuing its advocacy with government: That the Australian Government ensure that all appointment processes are based on a publicly advertised, merit-based selection process and that this is reflected in legislation as well as operational policies.**

### Issue of Concern 3: Consultation/participation in selection process

- The Act is silent on measures to promote broad consultation and/or participation in the selection and appointment process.

#### Response:

- The process is guided by the Australian Public Service Commission's *Government's Merit and Transparency Policy* (APSC Policy)
- The assessment panel for AHRC Commissioner appointments consists of a representative of the Australian Public Service Commissioner, the Commission's President, and one or more additional panel members as needed to maintain or establish gender balance or provide specialist expertise.
- The President has on a number of occasions sat on the selection panel.

### Potential Question 4: Future advocacy on appointment process

- What are the Commission's plans for future advocacy for improved selection and appointment process?

#### Response:

- The Commissioner will continue to advocate for the *Australian Human Rights Commission Act 1986* (Cth) to be amended to specify that all Commissioner appointments can only be made following a clear, transparent, merit-based and participatory selection and appointment process.
- The Attorney-General's Office has indicated an openness to consider legislative change.
- **A helpful advocacy tool for this endeavour would be a recommendation from the Committee that the Australian Government ensure that all appointment processes are based on a publicly advertised, merit based selection process and that this is reflected in legislation as well as operational policies.**

### Issue of Concern 5: Appointment criteria for President

- The Act is silent on the relevant criteria for appointment as President.

# Accreditation as an ‘A status’ NHRI

## What is it?

The UN General Assembly and the Human Rights Council encourage countries to establish and maintain ‘A status’ NHRIs as a commitment to advancing human rights and meeting their obligations under the UN Charter and human rights treaties.

NHRIs must be accredited through a process run by the Sub-Committee on Accreditation of the Global Alliance of NHRIs (SCA), which is supported in running the accreditation process by the Office of the High Commissioner for Human Rights.

The accreditation process establishes whether NHRIs meet minimum standards relating to transparency, rigour and independence as set out in the Paris Principles. The SCA also develops [General Observations](#) which interpret the Paris Principles and set out detailed requirements to be met.

NHRIs are reviewed every 5 years. The outcome of a review is a set of recommendations to improve compliance with the Paris Principles, and a rating of A or B status.

**A status** accreditation grants participation in the work and decision-making of the GANHRI, as well as regional NHRI bodies (APF and Cth Forum) as well as in the work of the UN Human Rights Council, UN human rights treaty bodies and other UN mechanisms (such as indigenous specific mechanisms).

**B status** means that an institution does not fully meet the Paris Principles and they do not enjoy participation status in NHRI bodies or UN processes.

## Why does it matter?

Four key reasons:

1. ‘A status’ is reputational for the Commission – it signals to all that the relevant institution is robust, free from political bias and interference. ‘B status’ institutions are seen as lacking credibility and their outputs as potentially being compromised.
2. ‘A status’ institutions form an important plank in the foreign policy of many countries, including Australia. Failure to maintain ‘A status’ would be a significant diplomatic problem for Australia’s positioning in the UNGA and HRC, and undermine the credibility of their advocacy.
3. ‘A status’ enables an NHRI to participate in key UN processes such as UPR, treaty bodies, Human Rights Council and other associated mechanisms. This is a key accountability mechanism for Australian governments in meeting human rights obligations.
4. There are technical issues for the APF if Australia did not maintain an ‘A status’ institution as their incorporation is in Australia under the Corporations Law, requires the Australian institution to have a director of the APF – this is not achievable if the Commission were ‘B status’ as such institutions cannot serve as members of the APF.

## What did they say last time (2016)?

The Commission has always been accredited as A status, and enjoys a reputation as a leading NHRI internationally. In 2016, A status was conferred on the Commission, with 3 areas of concern for the Commission to address and 2 further issues of concern for noting. These are summarised below, with the full accreditation report **appended** to this document.

Topic	Issue	Recommendation
<p><b>1. Selection and appointment</b></p>	<p>APSC merit guidelines exist, but not always followed – either by AG not following recommendation of panel or not conducting process at all.</p> <p>The SCA is of the view that it is critically important to ensure the formalization of a clear, transparent and participatory selection and appointment process for an NHRI’s decision-making body, and the application of the established process in all cases.</p> <p>The SCA notes that AHRC has proposed amendments to formalize the above selection process in its enabling law, and that it continues to advocate for such amendments.</p>	<p>The SCA encourages the AHRC to continue to advocate for a selection process that specifies explicit requirements to:</p> <ul style="list-style-type: none"> <li>a)Publicize vacancies broadly;</li> <li>b)Maximize the number of potential candidates from a wide range of societal groups and educational qualifications;</li> <li>c)Promote broad consultation and /or participation in the application, screening, selection and appointment process;</li> <li>d)Assess applicants on the basis of pre-determined, objective and publicly-available criteria;</li> <li>and e)Select members to serve in their individual capacity rather than on behalf of the organization they represent.</li> </ul> <p>The SCA refers to Paris Principle B.1 and to its General Observation 1.8 on ‘Selection and appointment of the decision-making body of NHRIs’.</p>
<p><b>2. Process for dismissal of commissioners</b></p>	<p>The SCA is of the view that, in order to address the requirement for a stable mandate, which is important in reinforcing independence, 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. This process should apply uniformly to all nominating entities. The grounds for dismissal must be clearly defined and appropriately confined to those actions that impact adversely on the capacity of the member to fulfil his or her mandate.</p>	<p>The SCA accordingly urges the AHRC to advocate for an independent and objective dismissal process regarding the grounds already recognised in the AHRC Act. The SCA refers to Paris Principle B.3 and to its General Observation 2.1 on ‘Guarantee of tenure for members of the NHRI decision-making body’.</p>

<p><b>3.Adequate funding and financial autonomy</b></p>	<p>The SCA expresses concern about cuts to the AHRC budget since 2014-15. The SCA again notes, with concern, the impact of the application of annual efficiency dividends which erode the AHRCs base level of funding and therefore its capacity to fulfil its legislative mandate. The SCA is also concerned about the conferral of work and the appointment of additional commissioners without an additional budget allocation.</p> <p>The SCA reiterates that, to function effectively, an NHRI must be provided with an appropriate level of funding in order to guarantee its ability to freely determine its priorities and activities. Further the NHRI ought to be provided with adequate funding for its operations and ensures that the Commission retains adequate discretionary funding to independently set its own program of work. In particular, adequate funding should, to a reasonable degree, ensure the gradual and progressive realization of improvement in the NHRI's operations and the fulfilment of its mandate.</p>	<p>The SCA encourages the AHRC to continue to advocate for an appropriate level of funding to carry out its mandate including, where appropriate, the establishment of regional offices.</p> <p>The SCA refers to Paris Principle B.2 and to its General Observations 1.10 on 'Adequate funding' and 2.8 on 'Administrative regulation'.</p>
<p><b>4.Limitation on mandate</b></p>	<p>The current definition of human rights in the Act does not explicitly refer to either the Convention against Torture or the International Covenant on Economic, Social and Cultural rights. The SCA acknowledges that the AHRC interprets its mandate to encompass all human rights. The Paris Principles require that an NHRI must be legislatively mandated for both the promotion and protection of all human rights.</p>	<p>The SCA urges the AHRC to continue advocating for amendment of the definition of 'human rights' within the AHRC Act to include the seven core human rights treaties ratified by Australia (matching the definition used by the Parliamentary Joint Committee on Human Rights).</p>
<p><b>5.Tenure</b></p>	<p>The SCA notes the provisions of sections 37 of the AHRC Act, 97 of the Sex Discrimination Act, 114 of the Disability Discrimination Act, 30 of the Racial Discrimination Act and 53 B of the Age Discrimination Act, which each provide that members can be appointed for a term not exceeding seven years and that they are eligible</p>	<p>As a proven practice, the SCA encourages that a term of between three (3) and seven (7) years with the option to renew once be provided for in an NHRI's enabling law. The SCA refers to Paris Principle B.3 and to its General Observation 2.1 'Guarantee of tenure for members</p>

	for re-appointment, with no limit on the number of times re-appointment can occur.	of the National Human Rights Institution decision-making body'.
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## What are the challenges this time around?

In this accreditation round, the key issues for the Commission remain the same as 2016 but with two qualitative differences:

- The 'non-compliant' appointment of a Commissioner in 2013 was able to be described as an aberration, and the only time this had occurred in the Commission's history. There have been two further appointments in the past five years that have been 'non-compliant', and the recommendation of the SCA to amend legislation to ensure this does not repeat was not implemented.
- The budgetary challenges being faced by the Commission are of a significantly different order to those that were considered at the most recent accreditation. To the extent that the budgetary challenges are the result of systemic underfunding of the Commission, they are Paris Principles issues. Explaining this will be challenging, given that the lack of financial controls and internal management has contributed to the current financial challenges (which is not a Paris Principles compliance issue).

The SCA tends to be careful to not punish NHRIs for inaction of their governments. Issues of concern from the last accreditation such as procedures for dismissal and tenure, and breadth of coverage, would not usually be issues that would lead to a downgrading of an institution.

Resourcing issues would only lead to downgrading if the variance in funding since the previous accreditation was manifestly different or deliberately targeted to limit the effectiveness of the institution. The process will however result in some pressure on the government to ensure that the Commission has adequate resources. (Also, SCA recommendations sometimes also appear in other human rights processes such as concluding observations of treaty bodies and UPR. It is likely that a strongly worded concern about resourcing would become a matter of scrutiny for the government in all treaty based processes for the foreseeable future).

Accordingly, the key issue that will determine A or B status will be merit based selection processes of commissioners. A number of institutions have been downgraded due to this issue.

## Potential impact of non-merit based selection processes

There is a significant prospect that the Commission will be considered for downgrade to B status due to ongoing and longstanding concerns about appointment processes of commissioners.

Factors that will likely be weighed up and which may influence the SCA in favour of downgrading the Commission include:

- The longstanding nature of this concern – with no action to remedy it in legislation over successive accreditation periods
- The fact that it is not a theoretical concern, but that there are now 3 non-compliant appointments in the past 8 years

Factors that will likely be considered and influence the SCA to not downgrade the Commission include:

- How robust the Commission has been in advocating for change to the legislation, and in expressing concerns about non-compliant processes. The public nature of how the Commission has expressed its views on these matters will also be significant.
- Any explanation that can be provided by the government as to what processes were used (eg is it compliant with the APSC merit appointment guidelines?)
- Evidence that appointments have not contributed to the politicisation of the Commission – eg by referencing advocacy work of commissioners.

## What happens if the SCA recommends downgrading to B status?

If the SCA considers that this issue renders the Commission not compliant with the Paris Principles, it usually defers a decision about A status for a period of 18-24 months to enable the Commission to address the concerns. In this instance, this would provide a window of time for reforms to be implemented to ensure the Commission is Paris Principles compliant.

If at the end of that time period the Commission is still assessed as not compliant, then it would be formally downgraded to B status. This downgrade would take effect after 12 months.

**In other words, there will likely be a window of 18-24 months, and a further window of 12 months, in which to address the issues of concern.**

While the SCA recommends key matters that must be addressed for merit based selection processes, it does not specify that they must be in legislation. The SCA General Observations note that they can also be implemented through regulation, although this would have to be considered 'binding' in effect.

## Key issues

The political reality is that the Commission has long recommended addressing the shortcomings in the legislation that potentially have Paris Principles compliance implications, and neither side of politics has taken action to address this (although some concerns would have been addressed in the consolidation of discrimination laws process).

The forthcoming accreditation process, therefore, provides an opportunity for the Commission to finally get action on key issues of concern.

It is likely that retaining an A status institution would be a matter of significant concern to DFAT and also AGD (who also understand the political problem B status would create in treaty reporting processes).

There are a range of actions that the Commission could consider over the next 6 months, before the Committee is formally considered for re-accreditation in late March 2022. These actions include:

- Clearly expressing concern about the non-compliance issues: publicly, in Commission reports and submissions, media, Senate Estimates, and with Ministers and departments
- Advocating for legislative or other appropriate reform to ensure future appointment processes are compliant: for example, by attaching amendments to the AHRC Act on this to other amendment bills (whether specific to the Commission or portfolio miscellaneous bills)
- Requesting the SCA to defer accreditation by 24 months on the basis of the known non-compliance and using this time to advocate for necessary legislative (or other) reform. This could be done on the basis of the merit appointments issue and possibly also the resourcing issue, to place some external scrutiny on the government for how it responds to that issue in the next 18-24 months

### Timeline for accreditation

6 October	Written application is submitted to SCA
End October	Commission will be provided with any NGO submissions outlining non-compliance issues, FYI
End Feb 2022	OHCHR will provide the Commission with a high level summary of our application for comment – this is then submitted to SCA and is a major basis for the consideration of accreditation
Late March 2022, date tbc	Commission appears before SCA for interview to determine accreditation status. This is by phone or video-conference (FYI: NHRIs are not permitted to be in person for this review, so as to ensure that smaller, less well-resourced NHRIs are not disadvantaged from lacking resourcing to be in person in Geneva)
End of SCA session (March/April 2022)	Draft report is provided to AHRC for consideration. There is a formal appeals process if the NHRI considers the accreditation decision is wrong. After a set time, the report and its recommendations for accreditation are confirmed.
March 2024 (TBC)	If B status concerns, likely deferment date for reconsideration of AHRC accreditation
March 2025 (TBC)	If B status concerns and remain unaddressed, additional period before B status takes effect

## Attachment: AHRC – SCA Accreditation review 2016

Extracted from GANHRI, Report and recommendations of the Sub-Committee on Accreditation (SCA) , Geneva, 14-18 November 2016, pp9-12.

### **2.2 Australia: Australian Human Rights Commission (AHRC)**

**Recommendation: The SCA recommends that the AHRC be re-accredited with A status.**

**The SCA notes with concern:**

#### **1. Selection and appointment**

The Australian Human Rights Commission Act and a number of Anti-Discrimination Acts provide that the Governor-General appoints members of the Commission on the recommendation of the Attorney General.

The SCA notes that some merit criteria are provided in the relevant enabling laws, and that the process for the assessment of candidates is specified in the "Merit and Transparency Guidelines" of the Australian Public Service Commission (APSC). The Guidelines include requirements to: advertise vacancies; provide detailed selection criteria; and assess candidates by a panel that includes the independent representative of the APSC whose role is to ensure the process is in accordance with the Guidelines. On the completion of the assessment process, the panel determines a pool of suitable candidates and provides a report to the Commissioner of the APSC for endorsement and transmission to the Attorney General. The Attorney-General then writes to the Prime Minister seeking approval for the candidate to be appointed as an AHRC Commissioner by the Governor-General.

However, the SCA notes that: if the Attorney-General is not satisfied with the proposed candidates, he or she may unilaterally propose an alternate appointee; and that, in one instance in 2013, the Attorney-General proposed the appointment of a Commissioner without following the merit-based selection process outlined above. Such appointment has the potential to bring into question the legitimacy of the appointees and the independence of the NHRI.

The SCA is of the view that it is critically important to ensure the formalization of a clear, transparent and participatory selection and appointment process for an NHRI's decision-making body, and the application of the established process in all cases. The SCA notes that AHRC has proposed amendments to formalize the above selection process in its enabling law, and that it continues to advocate for such amendments.

The SCA encourages the AHRC to continue to advocate for a selection process that specifies explicit requirements to: a) Publicize vacancies broadly; b) Maximize the number of potential candidates from a wide range of societal groups and educational qualifications; 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 individual capacity rather than on behalf of the organization they represent. The SCA refers to Paris Principle B.1 and to its General Observation 1.8 on 'Selection and appointment of the decision-making body of NHRIs'.

## **2. Dismissal process**

In accordance with section 41 of the AHRC Act, section 102 of the Sex Discrimination Act, section 119 of the Disability Discrimination Act, section 34 of the Racial Discrimination Act and section 53 G of the Age Discrimination Act, the Governor-General may remove the Commissioner on the advice of the Executive Council, for the following reasons: (i) physical or mental incapacity; (ii) misbehaviour; (iii) absence from duty; and (iv) bankruptcy under their respective applicable above cited laws.

The precise process for dismissal is not further described in the Act.

The SCA is of the view that, in order to address the requirement for a stable mandate, which is important in reinforcing independence, 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. This process should apply uniformly to all nominating entities. The grounds for dismissal must be clearly defined and appropriately confined to those actions that impact adversely on the capacity of the member to fulfil his or her mandate.

Where appropriate, the legislation should specify that the application of a particular ground must be supported by the decision of an appropriate body with independent jurisdiction. The dismissal must be made in strict conformity with all the substantive and procedural requirements as prescribed by law. It should not be allowed based solely on the discretion of the appointing authorities. These requirements ensure the security of tenure of the members of the governing body and are essential to ensure the independence of, and public confidence in, the senior leadership of an NHRI.

The SCA accordingly urges the AHRC to advocate for an independent and objective dismissal process regarding the grounds already recognised in the AHRC Act. The SCA refers to Paris Principle B.3 and to its General Observation 2.1 on 'Guarantee of tenure for members of the NHRI decision-making body'.

## **3. Adequate funding and financial autonomy**

The SCA expresses concern about cuts to the AHRC budget since 2014-15. The SCA again notes, with concern, the impact of the application of annual efficiency dividends which erode the AHRCs base level of funding and therefore its capacity to fulfil its legislative mandate. The SCA is also concerned about the conferral of work and the appointment of additional commissioners without an additional budget allocation.

The SCA reiterates that, to function effectively, an NHRI must be provided with an appropriate level of funding in order to guarantee its ability to freely determine its

priorities and activities. Further the NHRI ought to be provided with adequate funding for its operations and ensures that the Commission retains adequate discretionary funding to independently set its own program of work. In particular, adequate funding should, to a reasonable degree, ensure the gradual and progressive realization of improvement in the NHRI's operations and the fulfilment of its mandate.

Provision of adequate funding by the State should, at a minimum, include the following:

- a) The allocation of funds for premises which are accessible to the wide community, including for persons, including for persons with disabilities. In certain circumstances, in order to promote independence and accessibility, this may require that offices are not co-located with government agencies. Where possible, accessibility should be further enhanced by establishing a permanent regional presence;
- b) Salaries and benefits awarded to staff comparable to those of civil servants performing similar tasks in other independent institutions of the State;
- c) Remuneration of members of the decision-making body (where appropriate);
- d) The establishment of a well-functioning communications system including telephone and internet; and
- e) The allocation of a sufficient amount of resources for mandated activities.

Where the NHRI has been designated with additional responsibilities by the State, additional financial resources should be provided to enable it to assume the responsibilities of discharging these functions. The SCA encourages the AHRC to continue to advocate for an appropriate level of funding to carry out its mandate including, where appropriate, the establishment of regional offices.

The SCA refers to Paris Principle B.2 and to its General Observations 1.10 on 'Adequate funding' and 2.8 on 'Administrative regulation'.

#### **The SCA further notes:**

#### **4. Limitation on mandate**

The current definition of human rights in the Act does not explicitly refer to either the Convention against Torture or the International Covenant on Economic, Social and Cultural rights. The SCA acknowledges that the AHRC interprets its mandate to encompass all human rights. The Paris Principles require that an NHRI must be legislatively mandated for both the promotion and protection of all human rights.

The SCA urges the AHRC to continue advocating for amendment of the definition of 'human rights' within the AHRC Act to include the seven core human rights treaties ratified by Australia (matching the definition used by the Parliamentary Joint Committee on Human Rights).

The SCA refers to Paris Principles A.1, A.2 and A.3 and to its General Observation 1.2 and 2.7 on 'Human rights mandate.'

#### **5. Tenure**

The SCA notes the provisions of sections 37 of the AHRC Act, 97 of the Sex Discrimination Act, 114 of the Disability Discrimination Act, 30 of the Racial Discrimination Act and 53 B of the Age Discrimination Act, which each provide that members can be appointed for a term not exceeding seven years and that they are eligible for re-appointment, with no limit on the number of times re-appointment can occur.

As a proven practice, the SCA encourages that a term of between three (3) and seven (7) years with the option to renew once be provided for in an NHRI's enabling law. The SCA refers to Paris Principle B.3 and to its General Observation 2.1 'Guarantee of tenure for members of the National Human Rights Institution decision-making body'.

**From:** [REDACTED]  
**To:** [REDACTED] (OHCHR-Fellow)  
**Cc:** [REDACTED] Rosalind Croucher; Darren Dick; Leanne Smith; [REDACTED]  
**Subject:** RE: Forthcoming Session of SCA 14 - 25 March - NHRI Australia [SEC=OFFICIAL]  
**Date:** Wednesday, 23 February 2022 4:00:00 PM  
**Attachments:** [Australia Summary with Australian Human Rights Commission response.docx](#)  
[Supporting document 25. Public Governance, Performance and Accountability Act 2013.pdf](#)

Good afternoon

Please find attached the Australian Human Rights Commission's response to the summary with all amendments in track changes.

I have also attached one additional supporting document.

I would be grateful if you could please acknowledge receipt of the two documents.

Should you need anything further, please do not hesitate to contact me.

Kind regards,

[REDACTED]  
 Senior Executive Support Officer | Commission Secretariat  
 Interim Executive and Research Assistant to the National Children's Commissioner  
**Australian Human Rights Commission**  
 GPO Box 5218, Sydney NSW 2001

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**From:** [REDACTED] (OHCHR-Fellow) <[REDACTED]@un.org>  
**Sent:** Wednesday, February 16, 2022 10:16 PM  
**To:** Rosalind Croucher <[rosalind.croucher@humanrights.gov.au](mailto:rosalind.croucher@humanrights.gov.au)>; Darren Dick <[darren.dick@humanrights.gov.au](mailto:darren.dick@humanrights.gov.au)>; Julie O'Brien <[julie.obrien@humanrights.gov.au](mailto:julie.obrien@humanrights.gov.au)>  
**Cc:** [REDACTED]  
 [REDACTED]  
 [REDACTED]

**Subject:** Forthcoming Session of SCA 14 - 25 March - NHRI Australia

Dear NHRI,

On behalf of the GANHRI Subcommittee on Accreditation (SCA), I would like to thank you for your participation in the accreditation process.

In this context, the Secretariat has prepared a summary for the review of your institution on the basis of the information you provided. I would be grateful if you could kindly check the attached summary for **ONLY** possible factual mistakes and revert by close of business on **23 February 2022** (Geneva time) to: [REDACTED]@un.org, [REDACTED]@un.org, [REDACTED]@un.org, [REDACTED]@un.org, and [REDACTED]@un.org. Please note that changes in the document should be in **track changes**. If no response is received by this deadline, it will be presumed that you do not have any comments.

Please be informed that the review of your institution by the SCA is scheduled for **Tuesday 15 March 2022, 08:00 – 09:30** (Geneva time). Kindly also provide in the same email message the **name, email and phone number (landline and mobile)** of the person of your institution whom the SCA may contact for additional information.

Please also note that the main language of the SCA is English. Accordingly, the NHRIs needing informal translation should kindly provide their own translators.

Finally, kindly acknowledge receipt of this mail.

Thank you and best regards,

[REDACTED]

**National Institution Fellow**

National Institutions and Regional Mechanisms Section (NIRMS)

Field Operations and Technical Cooperation Division (FOTCD)

Office of the United Nations High Commissioner for Human Rights (OHCHR)

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**SUMMARY**  
**RE-ACCREDITATION OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION**  
**BY THE GANHRI SUB-COMMITTEE ON ACCREDITATION**

- March 2022 -

**BACKGROUND**

The Australian Human Rights Commission (AHRC) has been accredited 'A' status by the Global Alliance of National Human Rights Institutions (GANHRI) Sub-Committee on Accreditation (SCA) since 1999.

During its last reaccreditation in November 2016, the SCA encouraged the AHRC to: (i) continue to advocate for a clear, transparent, and participatory selection and appointment process in its enabling law; (ii) advocate for an independent and objective dismissal process regarding the grounds provided under its enabling law; (iii) continue to advocate for an appropriate level of funding to carry out its mandate including, where appropriate, the establishment of regional offices; (iv) continue to advocate for amendment of the definition of human rights in its enabling law to include the seven core human rights treaties ratified by Australia; and (v) advocate for amendment in its enabling law to provide for a term of office for members between three to seven years with the option to renew once.

In accordance with Article 15 of the GANHRI Statute, the AHRC has submitted its application for re-accreditation.

**DOCUMENTATION PROVIDED IN SUPPORT OF THE APPLICATION**

To allow GANHRI to make a determination as to the continuing compliance of the AHRC with the Paris Principles, the following documents were submitted for the March 2022 session:

- Statement of Compliance with the Paris Principles (6 October 2021)
- Supporting Documents Part 1 – Legislation
  - Australian Human Rights Commission Act 1986
  - Sex Discrimination Act 1984
  - Racial Discrimination Act 1975
  - Disability Discrimination Act 1992
  - Age Discrimination Act 2004
  - Native Title Act 1993
  - Fair Work Act 2009
  - Declaration by the Attorney General – Convention on the Rights of the Child as an international instrument under the Australian Human Rights Commission Act 1986
  - Declaration by the Attorney General – Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief as an international instrument under the Australian Human Rights Commission Act 1986
  - Declaration by the Attorney General – Convention on the Rights of Persons with Disabilities as an international instrument under the Australian Human Rights Commission Act 1986
- Supporting Documents Part 2 – Annual Report 2019-2020
- Supporting Documents Part 3 – Other Documents
  - Attorney-General's Department List of Appointments 2016-2021
  - Letter from Attorney-General to chair of selection panel, 4 April 2016

- Letter from Attorney-General to Commission President, 23 August 2016
- Letter from Commission President to Attorney-General, 8 February 2017
- Letter from Commission President to Minister for Foreign Affairs, 8 February 2017
- Letter from Attorney-General to Commission President, 3 April 2019
- Organizational Chart
- Structure of the Commission by sections and teams
- Portfolio Budget Statement 2021-2022
- Diversity Strategy and Diversity Committee terms of reference
- Corporate plan 2021-2022
- Attorney-General's Department – Comment on 2016 GANHRI recommendations
- Response to The Conversation article: "Australia's 'A' rating on human rights is under threat with a handpicked, politically engineered commissioner" (submitted 22 February 2022)
  - Supporting document 24. Memo to Attorney-General (submitted 22 February 2022)
  - Supporting document 25. Public Governance, Performance and Accountability Act 2013 (submitted 23.02.2022)

## CHARACTER OF THE NHRI

### **1. Establishment**

The AHRC was established by the Australian Human Rights Commission Act 1986 (the Act), which sets out its powers and functions. It is not entrenched in the Australian Constitution.

The AHRC has also functions conferred on it by federal discrimination laws (i.e., Sex Discrimination Act 1984, Racial Discrimination Act 1975, Disability Discrimination Act 1992, and Age Discrimination Act 2004) and Commonwealth enactments (i.e., Native Title Act 1993 and Fair Work Act 1996).

The AHRC enjoys full geographic jurisdiction coverage.

### **2. Independence**

The AHRC is a corporate Commonwealth entity under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), meaning it is a body corporate that has a separate legal personality from the Commonwealth of Australia. Section 7(2) of the Act confirms this position, stating expressly that the AHRC is a body corporate.

By comparison, the PGPA Act also establishes non-corporate Commonwealth entities, which do not have a separate legal identity to the Commonwealth of Australia, and are thus part of the Commonwealth itself. Non-corporate Commonwealth entities, primarily government departments such as the Department of Finance and the Department of Health, do not function as independent entities in the same manner as corporate Commonwealth entities such as the AHRC.

The Act does not explicitly provide for independence of the AHRC. However, according to the Statement of Compliance (SoC), the AHRC As a corporate Commonwealth entity, the AHRC may exercise its statutory functions ~~are exercised independently~~ of government, ~~without and there is no~~ oversight or approval required from the government ~~for regarding~~ the manner in which the AHRC undertakes its work, or the administrative or operational decisions it makes. This independence in how it exercises its functions and makes its decisions is explained on the AHRC's website, as well as on the website of the Australian Attorney General, where it explains the purpose and functions of the AHRC. The Statement of Compliance (SoC) explains that the AHRC does, in fact, function and exercise its powers as an independent body.

[Section 10 of the Act sets out the Commission's duties, including to perform its functions with regard to the indivisibility and universality of rights, while section 11 of the Act sets out the Commission's functions. They are exercised independent of government, and there is no oversight or approval required. When exercising functions under section 11 of the Act to make an examination or hold an inquiry, section 14 of the Act states that the Commission should do so \*in such manner as it thinks fit\*.](#)

Section 29(1) of the Public Governance, Performance, and Accountability Act (PGPA Act) requires officials of the AHRC to disclose material personal interest that relates to AHRC affairs. Under section 41(2)(e) of the Act, failure, without reasonable excuse, of a member of AHRC to comply with this requirement is a ground for termination of their appointment.

### **Immunity**

Section 48 of the Act provides that the AHRC, its members, and any person acting for or on behalf of AHRC or its members are not liable to an action or other proceeding for damages for an act or omission, done in good faith, in exercise of AHRC powers or functions.

**IoC:** The Act [itself](#) does not explicitly provide for the independence of the AHRC, [however the AHRC's independence is established by the fact that it is a corporate Commonwealth entity under the PGPA Act. The Act does expressly identify that the AHRC is a body corporate.](#)

## **3. Composition, appointment process, tenure**

### **3.1 Composition**

According to section 8 of the Act, the AHRC consists of a President and seven Commissioners, namely Human Rights Commissioner, Race Discrimination Commissioner, Aboriginal and Torres Strait Islander Social Justice Commissioner, Sex Discrimination Commissioner, Age Discrimination Commissioner, Disability Discrimination Commissioner, and National Children's Commissioner.

[Per the SoC, As of September–November 2021](#), the AHRC members included [five–six](#) women, one Indigenous Australian who has extensive experience in indigenous affairs, one with lived experience of disability, and one from a culturally diverse background. The SoC also states that Commissioners have been selected from different backgrounds, including academics, former parliamentarians, Chief Executive Officers of non-government organizations and research institutes, and former commissioners of state-level human rights commissions.

### **3.2 Selection and appointment**

The President and Commissioners are appointed by the Governor-General, [in accordance with procedures for all statutory appointments and judicial officers](#). This ~~is~~ provided in sections 8A (President), 8B (Human Rights Commissioner), 46B (Aboriginal and Torres Strait Islander Social Justice Commissioner), 46MC (National Children's Commissioner) of the Act, section 96 of the Sex Discrimination Act (Sex Discrimination Commissioner), section 29 of the Racial Discrimination Act (Race Discrimination Commissioner), section 113 of Disability Discrimination Act (Disability Discrimination Commissioner) and section 53A of the Age Discrimination Act (Age Discrimination Commissioner). No one may be appointed Commissioner unless the Minister (Attorney-General) is satisfied that the candidate has the appropriate qualifications, knowledge or experience.

[The Governor-General is Australia's Head of State as the Queen's representative, a position that is largely ceremonial. However, the Governor-General also undertakes constitutional duties, and is responsible for confirming all statutory appointments to the AHRC under the Act. The Governor-](#)

General usually does so on the advice of the Executive Council, a body established under the Australian Constitution.

Per the SoC, the selection process for these appointments is overseen by the Attorney-General. The process is guided by the Australian Public Service Commission's *Government's Merit and Transparency Policy* (APSC Guidelines), which applies to all statutory appointments, and the appointment of all government agency heads. ~~Per the SoC, the selection process is administered by the Australian Public Service Commission (APSC) using a merit based assessment policy and guidelines, which apply across all government appointment processes.~~ The APSC guidelines cover: the advertisement of vacancies; the assessment of applicants by ~~the an~~ assessment panel consisting of the Secretary of the Attorney-General's Department (AGD) and the APSC and against a core set of selection criteria which is supplemented by additional criteria agreed by the Minister (Attorney-General) and the AGD Secretary; and endorsement of shortlisted candidates by the AGD Secretary to the Attorney-General. The assessment panel for AHRC Commissioner appointments consists of the Secretary of the Attorney-General's Department, a representative of the Australian Public Service Commissioner, the Commission's President, and one or more additional panel members as needed to maintain or establish gender balance or provide specialist expertise.

The Attorney-General makes the final recommendation of appointment to the Prime Minister and Cabinet and then seeks the Governor-General's approval as required by laws. Where the Attorney-General considers that a full selection process is ~~inappropriate~~ not required, the Attorney-General must request the Prime Minister's approval to fill a position without a full selection process.

**IoC:** The Attorney-General may unilaterally propose a candidate that did not go through the merit-based selection process by the APSC as in the case of the appointments of the Disability Discrimination Commissioner in 2019 and the Human Rights Commissioner in 2021.

The Commission notes that the Government has asserted that it did apply the merit-based selection process as laid out by the APSC which allows for exceptional circumstances. In the case of the Disability Commissioner, the Government had conducted a broad consultation process about statutory appointments to the Royal Commission into Disability, and then appointed the then Disability Discrimination Commissioner to this Royal Commission. The newly appointed Disability Discrimination Commissioner was not separately advertised, but was considered as part of this broader selection process. The exceptional circumstance for not conducting a separate process was to ensure that the Commission was able to fully participate, as an NHRI, in the periodic review of Australia by the Committee on the Rights of Persons with Disabilities which was scheduled within months of the appointment.

**IoC:** The Act is silent on measures to promote broad consultation and/or participation in the selection and appointment process.

**IoC:** An article published on 9 September 2021 on the website [theconversation.com](https://theconversation.com) pointed out that the "handpicked appointment of a new human rights commissioner... threatens to undermine the independence and legitimacy of the [AHRC]" as it was not the "result of an open and competitive process."

Please refer to the Australian Human Rights Commission's submission to the GANHRI Secretariat on 22 February 2022, titled "Response to The Conversation article: "Australia's 'A' rating on human rights is under threat with a handpicked, politically engineered commissioner" for a detailed response to this Issue of Concern.

**loC:** The Act is silent on the relevant criteria for appointment as President. [However, the appointment is regulated by the Australian Public Service Commission's Government's Merit and Transparency Policy.](#)

[Please see section 2.6.1 Selection criteria, under "Agency head selection criteria". This section lists the core criteria for agency head positions as, inter alia:](#)

- [Demonstrates high level leadership and vision](#)
- [Manages large and/or complex operations](#)
- [Works with others to meet objectives](#)
- [High level of judgement](#)
- [Demonstrates a high standard of professional and personal integrity and capacity to promote these in an organisation.](#)

### 3.3 Tenure

According to section 37 of the Act, members hold office for such period, not exceeding seven years, as is specified in the appointment instrument, but are eligible for re-appointment. Per the SoC, usually, initial appointments are for a five-year term.

Except for the Human Rights Commissioner, [the National Children's Commissioner](#) and Age Discrimination Commissioner who must be full-time, members may be full or part-time as agreed on appointment.

Members are remunerated as Statutory Office Holders under a formal determination by the independent Remuneration Tribunal. Salaries and allowances are reviewed by the Remuneration Tribunal on an annual basis.

~~According to s~~Section ~~31-41~~ of the Act, [enables](#) the Governor-General ~~may to~~ terminate the appointment of a member for reasons such as incapacity, misbehavior, absence from duty or bankruptcy, and disability that renders the member incapable of performing the inherent requirements of the office.

**loC:** There is no limitation on the number of times members may be re-appointed.

**loC:** While the grounds for [the appointing authority, i.e. the Governor-General, terminating a statutory office holder's appointment dismissal](#) are provided in the Act, the process of ~~dismissal-termination~~ is not further described [within the Act. The Governor-General's power to terminate an appointed office holder under section 41 of the Act has never been exercised.](#)

**loC:** The President and Commissioners may be removed from office by the appointing authority, i.e., the Governor-General, and not by an independent body or authority. [The Governor-General usually acts on the advice of the Executive Council, a body established under the Australian Constitution.](#)

## 4. Organizational infrastructure

### 4.1 Infrastructure

Per the SoC and organizational chart, the President and Commissioners are supported by a Senior Executive Group comprising: Chief Executive, Senior Executive for Investigation and Conciliation Services, Senior Policy Executive for Human Rights and Strategy, Senior Policy Executive for

Partnerships and International Engagement, General Counsel, Director for Public Engagement, Chief Financial Officer, Chief Information Officer, and Director for Human Resources.

## 4.2 Staffing

AHRC staff are recruited in accordance with section 22 of the Public Service Act 1999 and section 43 of the Act, through a standard Australian Public Service merit-based selection process. Per the SoC, the AHRC recruits independently its staff, subsequent to the advertisement of vacancies. In addition to Australian Public Service regulations, appointments must also comply with the AHRC Staff Selection Guidelines.

Per the SoC, [the AHRC has currently at 6 October 2021, the AHRC had](#) a total of 181 staff members, with 2 positions filled by secondees from government agencies. There are no secondees in the senior positions of AHRC.

Per the SoC, the AHRC has a Workplace Diversity Program, which provides proactive strategies for building a diverse workforce. As reported in its 2016-2020 Workforce Profile Statistics, the AHRC exceeded most Australian Public Service targets for the employment of women (79.6% of AHRC staff are women in 2021), Aboriginal and Torres Strait Islander people (3.3% of staff in 2021), persons with disabilities (5% of staff in 2021), and people of culturally and linguistically diverse backgrounds (31.5% of staff in 2021).

## 4.3 Premises (accessibility)

AHRC is located in an office space in the central business district of Australia's largest city, Sydney. Per the SoC, the office space complies with accessibility standards and is easily accessible to the public via public transportation. [Since the COVID pandemic, staff have largely worked from home, with some staff and Commissioners located in other states.](#)

AHRC does not have regional or local offices. However, per the SoC, it maintains an extensive website and communicates with the public through electronic means. It has a National Information Service that can be contacted for free by phone, email, fax, or through online inquiry. Teleconferencing and videoconferencing, with reasonable adjustments for persons with disability and people of non-English speaking background, are utilized for conciliation and investigative work. The AHRC also provides sign language interpreters and captioning services for certain events.

## 4.4 Budget

Section 44A(1) of the Act provides that there is payable to AHRC such money as is appropriated by the Parliament for the purposes of AHRC.

Per the SoC, the AHRC budget includes funds annually appropriated through the federal government budget along with externally sourced funding (or funds earned through fee for service arrangements and the provision of services with other government agencies). The AHRC falls within the Attorney-General's portfolio for government financial and administrative purposes. Discussion about the levels and use of funding may be held between AHRC senior officials and the Attorney-General's Department. The AHRC President can liaise directly with the Attorney-General in relation to these matters.

Per the SoC, the AHRC President is responsible for approving the AHRC budget allocations and the AHRC has full control over the management and expenditure of its allocated budget.

The SoC indicates that the AHRC received a budget of \$19.026 million for the 2021-22 financial year. [This appropriation included specific funding for a major project, the review of Commonwealth Parliamentary workplaces. Funding generally available to the Commission outside this project was approximately \\$16.5million.](#)

The AHRC does not receive donor funds. It does perform fee for service activities and enter into partnership with third party entities. This funding currently comprises approximately 23% of the total budget of AHRC. [The AHRC's independence in exercising its statutory functions are reinforced in contractual terms for all partnership arrangements, or any agreement to perform a fee for service activity.](#)

**IoC:** The Act is silent on how the budget is developed.

[In accordance with the Paris Principles requirements for a separate budget allocation, the Commission is provided a budget each year through the federal budget process. The Commission's budget is developed in accordance with processes that apply across the whole of government, and the PGPA Act sets out requirements regarding how it must be managed. This includes:](#)

- [The Commission may submit proposals for funding to the government annually](#)
- [The Commission's budget is subject to analysis and review through the Senate of federal Parliament, through the Senate Estimates process](#)
- [The Commission is required to prepare a Portfolio Budget Statement, setting out its agreed budget and outcomes, and is required to report on these annually through an Annual Report and Annual Performance Statement](#)
- [The Commission's finances must be audited annually.](#)

[This process provides independently verified and independently provided reporting on the Commission's budget.](#)

**IoC:** Section 44A(2) of the Act provides that “[t]he Finance Minister may give directions about the amounts in which, and the times at which, money payable [to the AHRC as appropriated by the Parliament] is to be paid to the [AHRC]”. This may be interpreted as allowing the Finance Minister to withhold the regular release of funding to the AHRC, which may adversely impact the performance of its functions.

**IoC:** Per the SoC, the AHRC has expressed concern about the sustainability of its funding base over many years. In 2021, the AHRC has identified that it is now facing significant financial challenges that affect its financial viability and that at this stage, it is not clear whether the AHRC can perform its statutory [duties-functions](#) within the allocated funding, as it is insufficient to retain the necessary staff to undertake its functions. [The Commission will provide a specific update on budget issues immediately prior to the accreditation session, as there are developments from negotiations with Government in addressing this. To date, the Government has provided an additional \\$16 million to the Commission for 2021-22 with consideration of further funding into the next financial year still underway.](#)

## **5. Working methods**

Section 46AA of the Act requires the AHRC to take into consideration the corporate plan prepared by the AHRC President under section 35 of the PGPA Act. The AHRC Corporate Plan for the period 2021-22 to 2024-25 sets out four organizational goals with eight outcomes and provides the workplans by the President and each Commissioner.

## 5.1 Regular meetings

Per the SoC, the President, Commissioners and Chief Executive meet formally every 3 months. The President and Commissioners also have informal meetings every fortnight and other formal meetings as required. AHRC staff meet regularly in small management groups and policy teams. Meetings involving all staff and Commissioners are convened, when necessary, four to five times a year.

## 5.2 Working groups

Per the SoC, the AHRC has: a Diversity Committee; a Work, Health and Safety Committee; a Pandemic Planning Team for organizational issues associated with working through the COVID-19 pandemic; a cross-functional Steering Group to consider the AHRC procurement in relation to modern slavery risks; a Budget Steering Committee; and a Projects Review Committee.

As deemed necessary, informal working groups of staff are established to support key projects.

## GENERAL MANDATE

### 6. General competence and responsibilities

#### 6.1 Mandate to promote and protect human rights

Section 3(1) of the Act defines human rights as rights and freedoms recognized or declared in the ICCPR, Declaration of the Rights of the Child, Declaration on the Rights of Mentally Retarded Persons, and Declaration on the Rights of Disabled Persons, or any relevant international instrument. Pursuant to section 47 of the Act, the relevant international instruments are CRC, CRPD, Convention Concerning Discrimination in Respect of Employment and Occupation, and Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The AHRC mandate to protect and promote rights under CERD and CEDAW are provided under the Racial Discrimination Act and the Sex Discrimination Act.

Per the SoC, the AHRC continues to advocate for the inclusion of CAT and ICESCR in the definition of human rights in the Act while also regularly working towards the protection and promotion of human rights covered in both instruments.

Section 11(3) of the Act provides that the AHRC cannot inquire into an act or practice of an intelligence agency. Complaints in this regard shall be referred to the Inspector-General of Intelligence and Security.

**IoC:** The definition of human rights in the Act does not explicitly refer to CAT and ICESCR.

**IoC:** Per Section 11(3) of the Act, the AHRC does not have power to inquire into any act or practice by an intelligence agency that may be inconsistent with or contrary to any human right. [The Commission does, however, regularly engage in proposed legislative reforms relating to national security and other activities of intelligence agencies.](#)

#### 6.2 Advisory Functions

##### 6.2.1 Functions regarding national legislation

Sections 11(1)(e, j, and k) and 31(a, e, and f) of the Act vest the AHRC with the function to examine, on its own motion or when requested by the Attorney-General, any enactment or proposed enactment