

4 Key Criteria for NHRIs

Having set out the normative framework for the establishment and operational methodology of NHRIs, this section of the paper turns to consider the key criteria for the effective functioning of an NHRI.

4.1 Independence

Independence from government is a core theme of the Paris Principles and is firmly endorsed by the Commonwealth Secretariat Best Practice Guidelines. Independence is commonly guaranteed in some manner in the enabling legislation of the majority of NHRIs considered in this report. The preferable method of establishing an NHRI is through incorporation in the State Constitution. However, only 11 of the 28 States examined have entrenched the legal guarantees of independence in their Constitutions.¹¹⁵ It is not possible to evaluate with certainty the true extent of the operational independence of the NHRIs analysed here. The majority of the enabling legislation for the NHRIs explicitly recognises their independence from government. Where features of a particular NHRI appear to threaten its independence, these are highlighted. However, it is salutary to identify a number of common factors that may threaten the independence of NHRIs. These include:

- Funding arrangements or budgetary procedures determined by government;
- Method of appointment or termination of commissioners and power of presidential patronage;
- Salaries of commissioners paid by government;
- Links to government departments or ministries, particularly in operational matters;¹¹⁶
- Referral mechanisms for NHRIs, which also have the potential to undermine independence; and
- Funding arrangements made with donor agencies that may push forward a particular agenda or priority.

It is recognised that it is not possible to completely separate NHRIs from the executive. However, strong and effective procedural safeguards, which govern the relationship

¹¹⁵ On available information, these include Fiji, Zambia, Ghana, Malawi, South Africa, Tanzania, Papua New Guinea, Balize, Antigua and Barbuda, Trinidad and Tobago and Namibia.

¹¹⁶ Brian Burdekin, NHRIs in the Asia Pacific.

between the NHRI and the executive and protect the operational independence of the NHRI, are critical and must be argued for energetically.

4.2 Mandates, Functions and Powers

Protection and promotion of human rights

The Paris Principles require that NHRIs have a broad mandate *to protect and promote* human rights. All NHRIs possess this mandate, as do about 50 per cent of Ombudsman Offices examined (Papua New Guinea, Namibia and Jamaica). Notably, some NHRIs focus on protection rather than the promotion (for example, Ghana), while for others the opposite is true (for example, Nigeria and Denmark). Others conceptualise the issue as one of 'prevention' and 'cure' (for example, Northern Ireland and Canada), prioritising activities which aim to curb undue numbers of complaints arising through systemic abuse (Canada).

(A) PROMOTION OF HUMAN RIGHTS

- **Providing advice** to government, parliament and other relevant entities on any issues relating to legislative or administrative practices, or proposed legislation, policies or programmes within their jurisdiction.
- **Establishing advisory committees** from civil society to assist the institution in the performance of its functions.
- **Educating the public concerning human rights**, including preparing and disseminating information both through formal educational institutions and more widely through general public schemes; for example, workshops, training programmes and the provision of resources and fact-finding sheets.
- **Preparing and delivering information and educational materials and programmes to particular 'target groups'** – for example, police, prison officials, military, judiciary etc. Exploiting international, regional and sub-regional opportunities for training.
- **Monitoring** government officials, agencies and actors in the private sector in terms of their compliance with international human rights treaty observations.
- **Promoting ratification of human rights treaties and their incorporation into domestic law.** Advising on the development of new international human rights instruments (see work of Northern Ireland Human Rights Commission).
- **Reporting function:** Contributing to government reports to international treaty bodies and following up and disseminating reports by the treaty bodies.
- **Media Engagement:** Engaging with the press and issuing public statements to raise awareness of human rights and publicising issues of concern.
- **Co-operating with the UN, relevant international agencies/NGOs and NHRIs.**

(B) PROTECTION OF HUMAN RIGHTS

- **Inspecting custodial facilities and places of detention.** Ensuring the relevant powers are in place to visit detention facilities unannounced and unhindered.
- **Receiving, investigating and resolving complaints.**

- **Conducting national or local public enquiries into systemic violations of human rights.** This might include the power to review important laws that display qualities of discrimination.
- **Powers ancillary to investigation of complaints or inquiries:** Compelling the attendance of witnesses and disclosure of documents when necessary to conduct effective enquiries or investigations and taking evidence on oath or affirmation. NHRIs possess coercive powers here and criminal and punitive sanctions (for example, payment of fines or imprisonment) may be attached where witnesses fail to attend or mislead the commission. Fines and imprisonment must be proportionate and not oppressive.
- **Participation in legal proceedings:** a NHRI may be granted representative standing or may appear in its own right as a party (see Northern Ireland). Alternatively, NHRIs may participate as third party intervenors or in an *amicus curiae* capacity. Some NHRIs have strong enforcement powers as to the resolution of complaints and can make applications for high court orders for relief. Some NHRIs are able to enforce interim measures in this way but others are able to secure these in a non-judicial capacity too (see India).

Clearly defined mandate

It is preferable that, like guarantees of independence, NHRI mandates are constitutionally entrenched. This safeguards the mandate from restriction by future executive leaders.

It is critical that commissioners and staff understand the full parameters and limitations of the mandates of the NHRI as set out in the enabling legislation or charter. Many of the legislative provisions examined in this study are drafted in broad terms but lack precision.

It is also vital that commissioners understand the scope and meaning of human rights and are able to draw on international human rights instruments.

Functions and powers

The enabling legislation must set out the functions and powers clearly and precisely so that commissioners can carry out the mandate of the commission effectively. This also contributes to the accountability and transparency of the institution.

4.3 Membership and Composition

In line with the full range of normative standards under which the NHRIs operate, selection, appointment and removal procedures should be set out clearly in legislation. This was the case with all NHRIs studied. The duration of appointment of commissioners and opportunities for re-appointment were also specified. The principles of plurality and representative membership should also be considered.

National Human Rights Action Plans

The 1993 World Conference, which was so instrumental to the growth of NHRIs, emphasised the merits of National Human Rights Action Plans (NHRAPs). The Conference recommended that all countries adopt an NHRAP to provide an overarching strategy for the protection and promotion of human rights. However, the 1993 World Conference recommendation has not been universally implemented. Less than 20 NHRIs have developed NHRAPs to date.¹¹⁷ Indeed, only a small number of the NHRIs examined in

¹¹⁷ *Ibid.*

this study appear to have adopted NHRAPs: Australia, New Zealand, Malawi and South Africa, although others may have formulated overarching strategies without clearly publicising these as NHRAPs.

As part of its remit to develop and publishing best practice on the promotion and protection of human rights in the Commonwealth, the Commonwealth Secretariat's Human Rights Unit will shortly host a meeting of experts in London. The expert panel will formulate a model framework for countries pursuing a comprehensive national plan to advance human rights, based on both international human rights standards and national priorities. The experts will be drawn from all regions of the Commonwealth, and will represent government, academia, national human rights institutions, regional organisations and civil society.