

# National Human Rights Institutions in Europe and Dispute Resolution: A Mapping.

(April 2017)

Lorna McGregor, Rachel Murray, Shirley Shipman, Hélène Tyrrell



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It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. The Nuffield Foundation has funded this project, but the views expressed are those of the authors and not necessarily those of the Foundation. More information is available at [www.nuffieldfoundation.org](http://www.nuffieldfoundation.org)

## CONTENTS

LIST OF ACRONYMS .....	5
INTRODUCTION .....	6
I. METHODOLOGY .....	10
A. Desk-Based Research.....	11
B. Mapping NHRI Practice on Dispute Resolution .....	11
C. Stakeholder and Expert Interviews .....	14
II. THE ROLE AND MANDATE OF NHRIS.....	15
A. Forms of NHRIs .....	15
B. Functions of NHRIs .....	18
C. Dispute Resolution and Complaints Handling Roles of NHRIs .....	21
III. MAPPING THE DISPUTE RESOLUTION ROLE OF NHRIS WITHIN EUROPE.....	24
A. NHRIs with No Dispute Resolution Function.....	24
B. NHRIs with a Dispute Resolution Mandate.....	26
1. Types of Human Rights Complaints Dealt with by NHRIs.....	26
2. Investigations and Recommendations as a Form of Dispute Resolution.....	29
3. Quasi-Judicial Functions.....	32
4. NHRIs with Agreement-Based Dispute Resolution.....	34
IV. CONCLUSION AND RECOMMENDATIONS.....	41
V. TABLE OF THE DISPUTE RESOLUTION FUNCTIONS OF NHRIS IN EUROPE.....	43

## LIST OF ACRONYMS

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ADR	Alternative dispute resolution
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ENNHRI	European Network of National Human Rights Institutions
EU	European Union
FRA	European Union Agency for Fundamental Rights
GANHRI	Global Alliance of NHRIs (formerly the ICC)
ICC	International Coordinating Committee of NHRIs
IOI	International Ombudsman Institute
NEB	National equality body
NHRB	National human rights body
NHRI	National human rights institution
NHRS	National human rights structure
OHCHR	Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol to the UN Convention Against Torture, Cruel, Inhuman or Degrading Treatment or Punishment
SCA	Sub Committee on Accreditation of the International Coordinating Committee of NHRIs
UN	United Nations

# INTRODUCTION

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Alternative forms of dispute resolution (ADR), including agreement-based dispute resolution (such as settlement negotiation, mediation and conciliation) and adjudicative dispute resolution (such as arbitration) are regularly employed to resolve disputes alongside and instead of judicial processes, particularly in commercial and family disputes. Since 2000, the European Union has promoted the use of ADR as illustrated by its adoption of a series of resolutions on mediation<sup>1</sup>, the 2013 ADR Directive<sup>2</sup>, and the Online Dispute Resolution (ODR) Regulation for consumer disputes.<sup>3</sup> The investigatory function of ombudspersons can also be described as a form of dispute resolution where they issue binding decisions or non-binding recommendations that are complied with and thereby resolve the complaint. In recognition of the diversification of the form and nature of dispute resolution processes and the integration of ADR within the access to justice landscape, it is now more common to refer to ‘appropriate dispute resolution’, ‘proportionate dispute resolution’ or simply ‘dispute resolution’ rather than ADR.<sup>4</sup> For the purposes of this report, ‘dispute resolution’ encompasses all of these forms.

Within the literature and practice, there has been less discussion of the appropriateness of ADR for resolving disputes concerning human rights.<sup>5</sup> This is despite the fact that at the international level, the European Court of Human Rights (ECtHR) promotes friendly settlements between the applicant and respondent state.<sup>6</sup> The Council of Europe’s Commissioner for Human Rights<sup>7</sup>, the European Union’s Agency for Fundamental Rights (FRA) and the United Nations Office for the High Commissioner for Human Rights (OHCHR) have also noted that national human rights institutions (NHRIs) can play a role in dispute resolution (as well as complaints-handling more generally which may include advice, assistance and representation).<sup>8</sup>

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<sup>1</sup> Article 7(1) of the Racial Equality Directive, Council Directive 2000/43/EC of 29 June 2000; Directive 2009/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

<sup>2</sup> 2013/11/EU (21 May 2013).

<sup>3</sup> Regulation (EU) 524/2013.

<sup>4</sup> Blake, Browne & Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford University Press, 2012) at 5.

<sup>5</sup> The way in which international human rights law might apply to voluntary and mandatory uses of ADR is discussed more in Lorna McGregor, ‘Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR’ 26(3) *European Journal of International Law* 607 (2015) and EJIL Live! Interview available at: <http://www.ejil.org/episode.php?episode=21>

<sup>6</sup> See, H. Keller, M. Forowicz and L. Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice* (2010).

<sup>7</sup> See, ‘Justice in Austerity: Challenges and Opportunities for Access to Justice’ Fundamental Rights Conference 2012 (December 2012) programme and papers available at: <http://fra.europa.eu/en/event/2012/fundamental-rights-conference-2012-0?tab=programme> (see in particular the papers of Nils Muiznieks, Commissioner for Human Rights, Council of Europe and Ben Hagard and Head of Communication Unit, Office of the European Ombudsman).

<sup>8</sup> European Union Agency for Fundamental Rights, ‘National Human Rights Institutions in the EU Member States: Strengthening the Fundamental Rights Structure in the EU’ (2010) at 9 (noting that ‘[w]hen possible, NHRIs should have quasi-judicial competence to hear and consider complaints and petitions, including powers to establish facts, compel the production of evidence, and summon witnesses’.) See, for example, UN OHCHR, National Human Rights

Some NHRIs already offer forms of dispute resolution although this practice has not been mapped comprehensively in the literature. In policy and practice, very little has been discussed about the factors that need to be taken into account when deciding on whether an NHRI should have a dispute resolution role and the form it should take. Likewise, where NHRIs offer a form of dispute resolution, common guidelines are not available on how human rights complaints should be handled (although some NHRIs have internal guidelines on how to handle complaints). This report and wider project funded by the Nuffield Foundation contribute to filling a gap in the literature and practice in this area by examining the role NHRIs within Europe play in dispute resolution.<sup>9</sup>

NHRIs include a wide range of bodies with a mandate to promote and protect human rights such as human rights commissions, equality bodies and ombudspersons.<sup>10</sup> For the purposes of our project, NHRIs are those bodies which have had some engagement with the accreditation process of the UN Sub-Committee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) or the Global Alliance for National Human Rights Institutions (GANHRI) as it has been recently re-named.<sup>11</sup> The ICC/GANHRI usually only accredits one NHRI per jurisdiction (although there are exceptions to this general principle).<sup>12</sup>

However, there may be more national institutions with a human rights mandate than those that have been accredited by the ICC/GANHRI. Some of these institutions may have a narrower human rights mandate, for example, an equality body that focuses on equality and non-discrimination rather than all forms of human rights violations or an ombudsperson that handles human rights complaints but does not have a wider promotional mandate. For this reason, the FRA uses the term ‘national human rights bodies’ (NHRBs) to refer to a larger group of bodies with a human rights mandate, including multiple institutions within one state, even if

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Institutions: History, Principles, Roles and Responsibilities (United Nations OHCHR Professional Training Series No 4 2010) 93; Commonwealth Secretariat, ‘Comparative Study on Mandates of National Human Rights Institutions in the Commonwealth (Commonwealth Secretariat 2007), 24 – 27; Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights Nairobi, Kenya, 21-24 October 2008, *The Nairobi Declaration* (24 October 2008), available at: <http://www.ohchr.org/Documents/Countries/NairobiDeclarationEn.pdf> (last visited 3 January 2017).

<sup>9</sup> NHRIs within ‘Europe’ were taken from the membership of the European Network on National Human Rights Commissions and the International Coordinating Committee/Global Alliance for National Human Rights Institutions’ categorisation. *See further*, section on methodology below.

<sup>10</sup> We adopt the term ‘ombudsperson’ in this paper to reflect a gender-neutral formulation of the term. For further discussion on the use of the term *see* Varda Bondy and Margaret Doyle, ‘‘Manning’ the Ombuds Barricades’ *UKAJI Blog* available at: <https://ombudsresearch.org.uk/2015/06/09/manning-the-ombuds-barricades/>

<sup>11</sup> The ICC was renamed GANHRI at the 29<sup>th</sup> General Meeting of the ICC in March 2016: <http://nhri.ohchr.org/EN/ICC/GeneralMeeting/29/Pages/Default.aspx> (last visited 3 January 2017). As the ICC has only recently been renamed, we use the acronym ‘ICC/GANHRI’ in this report to avoid confusion.

<sup>12</sup> Exceptions to this include Bulgaria, Switzerland and the UK.

they have not applied to the ICC/GANHRI for accreditation.<sup>13</sup> The Council of Europe uses the term ‘national human rights structures’ (NHRS) for the same reason to cover ‘independent commissions, general or specialised ombudsmen, equality bodies, police complaints mechanisms and similar institutions’ and again, is not limited to one institution per jurisdiction.<sup>14</sup> In our study, we focused on NHRIs within Europe as this enabled us to capture a manageable sample of bodies at the national level with a dispute resolution mandate, including equality bodies and ombudspersons. However, our findings may be relevant to NHRBs and NHRS.

Where NHRIs handle complaints, this can take different (and multiple) forms. Some NHRIs provide advice, assistance and/or representation to individual complainants. Litigation is often undertaken on a selective basis (typically termed as strategic or public interest litigation) and aimed at bringing about a wider change in policy or practice. A similar objective is often achieved through the investigative or inquiry powers some NHRIs enjoy which may be triggered by an individual complaint or based on own-initiative powers. While these types of processes may result in a remedy for victims of human rights violations, in this project, we focus on the dispute resolution powers of NHRIs that are designed to provide access to justice for complainants. As noted above, ‘dispute resolution’ for this project encompasses agreement-based dispute resolution powers such as settlement negotiation, mediation or conciliation. It also includes adjudicative forms of ADR where the NHRI issues binding or non-binding recommendations on an individual complaint, for example where ombudspersons carry out investigations and issue recommendations or where an NHRI sits as a quasi-judicial tribunal. It does not include complaints-mechanisms such as where an NHRI acts as the National Preventive Mechanism to monitor places of detention under the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

This report is part of a wider project, funded by the Nuffield Foundation, examining the roles that National Human Rights Institutions (NHRIs) in Europe already play and should play in dispute resolution. The aims of this project were two-fold: first, to understand the role NHRIs in Europe have already played in dispute resolution; and second, to develop a framework for how they should play such a role in the future in line with international human rights law (IHRL). The project therefore focused on three key questions:

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<sup>13</sup> Fundamental Rights Agency website, ‘National human rights bodies’, <http://fra.europa.eu/en/cooperation/national-human-rights-bodies> (last visited 3 January 2017).

<sup>14</sup> Council of Europe website, ‘Co-operation with National Human Rights Structures’, <http://www.coe.int/en/web/commissioner/-/national-human-rights-structures-can-help-mitigate-the-effects-of-austerity-measur-1> (last visited 3 January 2017).

- 1) What is the current dispute resolution practice of NHRIs in Europe?
- 2) Should NHRIs play a role in dispute resolution?
- 3) Where they have a dispute resolution role, what should the standards of justice that attend to that process be?

This report focuses on mapping the current practice of NHRIs on dispute resolution. Part I explains the project methodology. Part II sets out the definition and different forms and functions of NHRIs. This provides the context for locating dispute resolution functions within the wider mandates of NHRIs. Part III maps the roles NHRIs in Europe play in dispute resolution, focusing in particular on agreement-based dispute resolution, investigations and the issuance of recommendations on individual complaints and quasi-judicial tribunals.

# I. METHODOLOGY

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This report and wider project is based on desk-research of the literature and policy documentation on forms of dispute resolution; reviews of the websites, annual reports and other material (where available) of NHRIs within Europe (as designated by the ICC/GANHRI Directory and the European Network on National Human Rights Institutions (ENNHRI)) and elsewhere where the practice on dispute resolution was instructive; interviews in person, by phone and email with the majority of NHRIs in Europe; and qualitative interviews with a range of stakeholders with expertise on NHRIs, access to justice, human rights and/or dispute resolution.

An Advisory Group composed of experts from NHRIs, EQUINET and experts on international human rights law and ADR advised the applicants on the design, scope and implementation of the project.<sup>15</sup>

An expert meeting was held at the University of Essex in September 2015 in order for the project to consult on key themes emerging in the research. Papers were also delivered on the project and preliminary findings at the following meetings:

- The Civil Mediation Council in London (June 2015)
- The Equality, Diversity and Human Rights Group of the Ombudsman Association (June 2015)
- Oxford Brookes University Faculty of Humanities and Social Sciences Research Conference (June 2015)
- A meeting of members of EQUINET in Brussels (September 2015)
- A seminar at Doughty Street Chambers London on Access to Justice and the Accountability of Businesses and States: Is ADR the Answer? (December 2015)
- A side event organised by ENNHRI and the International Ombudsman Institute on a Human Rights Based Approach to the Work of Ombudsmen: Strengthening the

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<sup>15</sup> Members of the Advisory Group were: Bruce Adamson (Scottish Human Rights Commission), Varda Bondy (United Kingdom Administrative Justice Institute), Neil Crowther (Independent Consultant, formerly Equality and Human Rights Commission), Professor David Feldman (University of Cambridge), Professor Françoise Hampson (University of Essex), Professor Christopher Hodges (University of Oxford), Tamás Kádár (EQUINET, the European Network of Equality Bodies), Commissioner Med Kagwa (Uganda Human Rights Commission), Professor Christopher McCrudden (Queens University, Belfast), the late Professor Sir Nigel Rodley (University of Essex), Dr Sarah Spencer (University of Oxford), Professor Maurice Sunkin (University of Essex) and Commissioner Joseph Whittal (Commission on Human Rights and Administrative Justice, Ghana).

Cooperation between Ombuds Institutions and NHRIs at the ICC/GANHRI Annual Conference (March 2016)

- Human Rights: A 21<sup>st</sup> Century Approach to the Work of Ombudsman Conference organised by the Northern Ireland Public Services Ombudsman and the Northern Ireland Human Rights Commission (May 2016)
- The World Conference of the International Ombudsman Institute in Bangkok (by video) (November 2016).

The project was also discussed within the EJIL Live! Interview on dispute resolution and human rights.<sup>16</sup>

## **A. Desk-Based Research**

Desk-based research included a detailed review of the general requirements of international human rights law on access to justice and the right to a remedy; the literature and judicial decisions on the compatibility of different forms of dispute resolution (including those employed by NHRIs) with international human rights law; a review of the literature, documentation by the UN and other international and regional organisations, NGOs, governments and NHRIs on NHRIs' functions and mandates (including on dispute resolution and complaints-handling more broadly).

As very little has been written that brings together the international human rights framework, dispute resolution theory and the dispute resolution (and complaints-handling more generally) role of NHRIs, the project relied heavily on qualitative empirical research through studies of individual NHRIs and interviews with a range of experts and stakeholders. This research has added depth and context to the project<sup>17</sup>, building on existing research and enabling links to be drawn between the different bodies of literature.

## **B. Mapping NHRI Practice on Dispute Resolution**

Six NHRIs were interviewed at their offices in Bulgaria, Croatia, Denmark, the Netherlands, Northern Ireland and Spain. These were envisaged as a series of single case-studies that would provide the opportunity to examine the dispute resolution role of NHRIs in greater depth than

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<sup>16</sup> available at: <http://www.ejil.org/episode.php?episode=21>

<sup>17</sup> Richard Carver, *Performance and Legitimacy: National Human Rights Institutions* (International Council on Human Rights Policy 2004), 6 (discussing the importance of empirical research in relation to NHRIs specifically).

the interviews with other NHRIs usually allowed (as there was usually only half an hour to one hour available). The NHRIs selected for case-studies were divided into three groups to reflect the main types of NHRIs found in Europe and the different roles they play in ADR. The first group encompassed NHRIs that have merged with equality bodies that had a pre-existing role in ADR. This group was selected to examine the role played by the equality body generally and whether its experience could be transferred to a broader NHRI mandate. These included the Bulgarian Commission for the Protection against Discrimination and the Netherlands Institute of Human Rights which has integrated the Equal Treatment Commission and continues to have a dispute resolution function only in relation to complaints of discrimination. The second group was composed of NHRIs that are also ombudspersons and have a wider complaints-handling function in their role as an ombudsperson. These were the Croatian Ombudswoman, the Spanish Defensor del Pueblo and one of the two NHRIs in Bulgaria which is also an ombudsperson. Northern Ireland and Denmark were chosen as jurisdictions in the third group where the NHRI is structured as a human rights commission. The Northern Ireland Human Rights Commission does not play a direct role in dispute resolution but undertakes strategic litigation and also runs a legal clinic. The Danish Institute of Human Rights is able to assist victims of discrimination in pursuing their complaints but was previously able to decide individual complaints of discrimination on grounds of race and ethnic origin through its Complaints Committee on Ethnic Equal Treatment. Interviews with relevant members of these institutions and other key stakeholders in the jurisdiction were undertaken in person.

Initially, the project had only intended to focus on these six case studies, particularly as it was a one-year grant and therefore limited in scope. However, in the course of the research, the team determined that the diversity in approaches to dispute resolution by NHRIs meant that the project would be enhanced by mapping the role of the 50 bodies designated as NHRIs in Europe by the ICC/GANHRI. Given the time and resource limitations of this project, this mapping is necessarily an overview and incomplete and further in depth studies of many NHRIs within Europe would be beneficial to learn more about the use of dispute resolution processes for human rights complaints since it is an under-studied area in policy and practice.

Three approaches were taken to this mapping exercise. First, the websites, annual reports and other available documentation of each NHRI were reviewed. This produced varying levels of detail on the dispute resolution roles of NHRIs as each NHRI takes a different approach to the depth of information it provides on its dispute resolution process. Some websites did not have an English translation available which also limited the amount of information possible to access within the scope of this project. Second, a questionnaire was circulated by the European

Network of NHRIs (ENNHRI) to all of its members. A small number of responses were elicited through this approach. One of the explanations for the lower number of returnees is that we included a note with the questionnaire to provide respondents with a choice of participating in an interview with us or returning the questionnaire and we made clear that we did not expect them to do both as we were conscious of the demands on their time. Most respondents chose to participate in an interview. Third, many NHRIs were interviewed in person or by Skype or telephone by one of the researchers on the project.

Some NHRBs and NHRS within Europe were also interviewed where recommended by an interviewee through a snowball technique although these interviews have been limited in number due to project capacity as set out in the introduction. Over 60 interviews were conducted with representatives from NHRIs, NHRBs and NHRS in Europe.

A review of the role of NHRIs in dispute resolution outside of Europe was also conducted, such as Australia, Canada, Ghana, Kenya, Peru and Uganda, and representatives of these bodies interviewed.

In examining the role that NHRIs play in dispute resolution, the project team was conscious of the need to pay close attention to the context in which the NHRI operates and how that shapes its role in dispute resolution.<sup>18</sup>

In-country consultant researchers were appointed to assist with each of the in-depth studies of NHRIs. The local researchers were selected on the basis of research experience on human rights in the country concerned and their demonstrated knowledge of the key actors that engage with the NHRI. Local researchers were also able to assist with the arrangement of interviews, provided support with any language and translation requirements, and assisted with the identification of local commentaries or analyses of the complaints-handling and access to justice functions of the NHRIs. In addition, interviewees were asked to situate their institutions within the local context. For example, some interview questions were aimed at situating the NHRI's dispute resolution role within the broader socio-political context. This included taking into account the relationship between the NHRI and the judicial system as well as with any other institutions able to hear human rights complaints, the availability of legal aid, and other bodies able to support and assist claimants. This context extended to acknowledgement of alternative

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<sup>18</sup> Linda Hantrais, *International Comparative Research: Theory, Methods and Practice* (Palgrave Macmillan 2008). Rachel Murray, 'National human rights institutions: criteria and factors for assessing their effectiveness' 25(2) *Netherlands Quarterly of Human Rights* 189 (2007) at 191. Julie A. Mertus, *Human Rights Matters: Local Politics and National Human Rights Institutions* (Stanford University Press 2009), 9.

complaints handling institutions, where the NHRI did not deal with individual complaints concerning human rights issues, or was not the main service provider. For example, the case studies in Denmark, the Netherlands and Northern Ireland incorporated an interview with ombudspersons as the main body responsible for handling complaints concerning human rights. In Croatia, we interviewed the ombudspersons for disability, children and gender equality which handle complaints relating to their specific expertise. These interviews provided a broader understanding of how such bodies are able to handle human rights complaints within the contexts in which they function.

## **C. Stakeholder and Expert Interviews**

In addition to the interviews conducted with NHRIs, NHRBs and NHRS, over 50 semi-structured interviews were carried out with key policymakers and experts on dispute resolution, human rights and NHRIs. Interviews were conducted in person in Brussels, Geneva, London, Strasbourg and Vienna and by telephone or Skype. The sample size for the interviews was determined by identifying individuals in key positions who would be well-placed to inform and contribute to the research from different perspectives while still allowing room for additional interviews in each category in anticipation that further interviewees would be recommended by the Advisory Group and/or other participants during the implementation of the project.

Interviewees were recruited through identification as authors or key stakeholders from the desk research and through a 'snowball' approach, following up the applicants' own contacts, through introduction by members of the Advisory Group and from leads in the early research phases (desk research and case studies).<sup>19</sup>

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<sup>19</sup> Mertus, *Human Rights Matters*, *id* at 12-13 (while snowball sampling has been criticized for the inherent selection bias, meaning that any given sample is less likely to represent a true cross section of a population, Mertus argues that this inherent bias causes little concern since the aim of the interviews is not to provide an accurate picture of a larger population).

## II. THE ROLE AND MANDATE OF NHRIS

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This part of the report sets out the forms and functions of NHRIs in the promotion and protection of human rights before locating their role in dispute resolution and complaints-handling more broadly within this mandate.

### A. Forms of NHRIs

The Principles relating to the Status of National Institutions, commonly referred to as the Paris Principles are the core set of standards on NHRIs. The Paris Principles do not provide a definition of an NHRI<sup>20</sup> but rather provide ‘minimum international standards for the establishment of National Human Rights Institutions’<sup>21</sup> and indicate the functions and composition of such a body. They characterise the basic *raison d’être* of an NHRI as ‘to promote and protect human rights’.<sup>22</sup> Without restating the principles in full, the basic requirements for an NHRI to comply with the Paris Principles are that:

- Institutions are founded in national law;<sup>23</sup>
- Are independent from government;<sup>24</sup>
- Have a broad mandate to promote and protect human rights;<sup>25</sup>
- Have a membership based on pluralism;<sup>26</sup>
- Appoint members via an independent appointment procedure;<sup>27</sup> and
- Have a responsibility to work with other actors in the field.<sup>28</sup>

The ICC was established in 1993 and as noted above, renamed GANHRI in 2016. Composed of NHRIs, it has developed a number of General Observations which elaborate on the content of

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<sup>20</sup> Linda Reif, ‘The Shifting Boundaries of NHRI Definition in the International System’ in Ryan Goodman, and Thomas Pegram, *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (CUP 2012), 54.

<sup>21</sup> International Coordinating Committee *General Observations* The General Observations reached by the Sub-Committee on Accreditation available at:

<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/SCAGeneralObservations.aspx> (last visited 3 January 2017); Gauthier de Beco and Rachel Murray, *A Commentary of the Paris Principles on National Human Rights Institutions* (CUP 2014), 4-5.

<sup>22</sup> ‘Principles Relating to the Status of National Institutions’ UNGA Res 48/134 (20 December 1993) A/RES/48/134 (1993), art 1.

<sup>23</sup> *Id* at para 2.

<sup>24</sup> *Id*. Composition and guarantees of independence and pluralism’ at para 2, ‘Competence and responsibilities’ at para 3(b).

<sup>25</sup> *Id* ‘Competence and responsibilities’ at para 1.

<sup>26</sup> *Id* ‘Composition and guarantees of independence and pluralism’ at para 1.

<sup>27</sup> *Id* ‘Composition and guarantees of independence and pluralism’ at para 3.

<sup>28</sup> *Id*. ‘Methods of operation’ at para 1(e)-(g).

the Paris Principles.<sup>29</sup> A Sub-Committee on Accreditation (SCA) assesses applications from NHRIs for accreditation on the basis of their compliance with the Paris Principles, granting them A, B or C status.<sup>30</sup>

The main purpose of the Paris Principles was to determine the relationship between NHRIs and the state rather than to define detailed criteria regarding their structures and operation.<sup>31</sup> The UN Office of the High Commissioner for Human Rights (OHCHR) has described NHRIs as ‘State bodies with a constitutional and/or legislative mandate to protect and promote human rights [which] are part of the State apparatus and are funded by the State.’<sup>32</sup> The General Observations of the SCA note the variety of models for NHRIs that include: ‘commissions; ombudsman institutes; hybrid institutions; consultative and advisory bodies; research institutes and centres; civil rights protectors; public defenders; and parliamentary advocates’.<sup>33</sup> Within Europe, which is the focus of this study, NHRIs tend to take the form of a traditional human rights commission, an ombudsperson, an equality body or a hybrid of one or more of these forms.<sup>34</sup>

Reif defines human rights commissions as bodies typically focused on the promotion of human rights through ‘providing advice and lobbying governments to ratify human rights treaties and lobby them domestically, engaging in human rights research and education, providing information to UN human rights treaty bodies, and encouraging the implementation of treaty body recommendations’.<sup>35</sup>

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<sup>29</sup> General Observations *supra* note 22.

<sup>30</sup> GANHRI, ‘ICC Sub-Committee on Accreditation’ webpage, available at: <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx> (last visited 3 January 2017).

<sup>31</sup> De Beco and Murray *supra* note 22 at 4-5; Gauthier de Beco, ‘National Human Rights Institutions in Europe’ 7(2) *Human Rights Law Review* 331 (2007) at 334-335.

<sup>32</sup> National Human Rights Institutions: History, Principles, Roles and Responsibilities (United Nations OHCHR Professional Training Series No 4 2010) 13.

<sup>33</sup> International Coordinating Committee *General Observations* 22.

<sup>34</sup> The UN General Assembly has provided that states establishing NHRIs have ‘the right . . . to choose the framework that is best suited to its particular needs at the national level’: Resolution 48/134, 20 December 1993, A/RES/48/134, at para 12; de Beco and Murray, *supra* note 22 at 5-6. See, for example, United Nations Office for the High Commissioner for Human Rights, *Survey on National Human Rights Institutions: Report on the findings and recommendations of a questionnaire addressed to NHRIs worldwide* (UNOCHR 2009), 4, 6, available at: <http://www.nhri.net/2009/Questionnaire%20-%20Complete%20Report%20FINAL-edited.pdf> (last accessed 6 February 2017). The report points out that NHRIs are relatively ‘recent phenomena, with the large majority being less than 20 years old’. The report also identifies regional trends in ‘NHRIs’ typology: mainly statute-based commissions in the Asia Pacific and Europe (although the ombudsperson model was common in Eastern Europe); mainly constitutionally-based commissions in Africa and mainly constitutionally-based ombudspersons in the Americas’. As a result, NHRIs have been developed with different purposes and mandates.

<sup>35</sup> Linda Reif, ‘The Shifting Boundaries of NHRI Definition in the International System’ in Ryan Goodman and Thomas Pegram (eds), *Human Rights, State Compliance, and Social Change* (Cambridge University Press 2012) 52 at 64. See also, Peter Rosenblum, ‘Tainted Origins and Outcomes’ in Goodman and Pegram at 303-304.

Our research includes ombudspersons within the definition of an NHRI, although there has been some reluctance among others to do so.<sup>36</sup> Ombudspersons differ from the commission model in that there is usually a single head or office holder acting as the decision-maker.<sup>37</sup> The classic form of an ombudsperson that primarily handles complaints of maladministration (the definition of which may include allegations of human rights violations) and does not engage in promotional activities will typically not be found to comply with the Paris Principles. However, the ICC/GANHRI recognises ombudspersons with a wider mandate to promote and protect human rights and has granted A status to a number of ombudspersons within Europe on this basis as set out below.

We also include equality bodies in our definition of NHRIs in so far as they have been accredited with A, B or C status by the ICC/GANHRI which will typically be where they are part of a hybrid body with a wider human rights mandate. The FRA has taken a wider, more inclusive approach of NHRBs but recognises that an NHRI (as determined by the ICC/GANHRI) has a wider mandate than an equality body. It therefore describes equality bodies as having ‘a focused and narrow mandate while an NHRI has a broader human rights mandate’.<sup>38</sup> Crowther and O’Cinneide point out that variation exists even between equality bodies: some tend to be ‘focused only on one aspect of non-discrimination (e.g. race, gender or disability) while others have a mandate that extends across multiple equality grounds, or combine a non-discrimination mandate with a wider human rights remit’.<sup>39</sup>

NHRIs in Europe can also take the form of hybrid bodies that combine one or more of the three models above (human rights commission, ombudsperson and equality bodies) such as an institution that is both a human rights commission and an equality body or an institution that is both a human rights commission and an ombudsperson. A number of hybrid bodies, which combine a broader human rights mandate with the work of the equality body, have been

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<sup>36</sup> Gauthier de Beco and Rachel Murray, *supra* note 22 at 33. See also Reif, *id.*

<sup>37</sup> Nick O’Brien, ‘Human rights: the ombudsman’s natural habitat’, UK Administrative Justice Institute Blog, 27 January 2015 <http://ukaji.org/2015/01/27/human-rights-the-ombudsmans-natural-habitat/> (last accessed 25 May 2015). O’Brien notes that ‘this is the case, for example, in much of eastern Europe and Latin America, but also closer to home in Spain and Portugal where the ombudsman was set up after periods of dictatorship. Interestingly in France the ombudsman or *mediateur* was amalgamated with other agencies such as the commissioner for children to become a new *defenseur de droits*, and in the Netherlands not so long ago the ombudsman put forward a strong, but ultimately unsuccessful case, to become the NHRI’. See further, Elina Steinerte and Rachel Murray, ‘Same but Different. National Human Rights Commissions and Ombudsman Institutions as national preventive mechanisms under the Optional Protocol to the UN Convention Against Torture’, *Essex Human Rights Law Review*, 54 (2009) at 64.

<sup>38</sup> EU Agency for Fundamental Rights, *National Human Rights Institutions in the EU Member States: Strengthening the Fundamental Rights Structure in the EU* (Publications Office of the European Union 2010), 11.

<sup>39</sup> Neil Crowther and Colm O’Cinneide, ‘Bridging The Divide? Integrating The Functions Of National Equality Bodies and National Human Rights Institutions in The European Union’ (UCL October 2013) at 5. The authors cite Moon, G. 2007. ‘Enforcement Bodies’, in Scheik, D., Waddington, L. and Bell, M. (eds.) *Cases, Materials and Text on National, Supranational and International Non Discrimination Law*. (Oxford: Hart Publishing 2007), pp. 871-954.

accredited with A-status.<sup>40</sup> As Reif notes, starting in Portugal and Spain in the 1970s, ombudspersons and human rights commissions merged to become ‘human rights ombudsmen’ with mandates to handle complaints as well as carry out wider promotional and protection functions on human rights.<sup>41</sup> For example, the Spanish Defensor del Pueblo investigates complaints of maladministration that may include complaints of a human rights character (although it does not have jurisdiction over complaints that require criminal action) but also carries out thematic advocacy and research on human rights issues such as its reports on trafficking in human beings.<sup>42</sup>

More recently, human rights commissions and equality bodies have merged. For example, the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) is a hybrid human rights commission and equality body established in 2012. It merged with the Equal Treatment Commission (*Commissie Gelijke Behandeling*) and therefore deals with matters of discrimination along with its role in relation to the promotion and protection of human rights.

These categorisations are rather blunt tools and it is not always possible to fit a particular institution into one or other definition. There may be overlaps between them and in part it may depend on how the institution views itself. However, the form the NHRI takes will influence, in part, the functions it has, particularly with regard to dispute resolution and complaints-handling more broadly.

## **B. Functions of NHRIs**

The Paris Principles encourage NHRIs to have as ‘broad a mandate’ as possible in the promotion and protection of human rights.<sup>43</sup> Although they do not distinguish between the promotion and protection of human rights when setting out the responsibilities and mandate of the NHRI, the SCA notes that 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.

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<sup>40</sup> *Id.*

<sup>41</sup> Reif, *supra* note 36 at 67.

<sup>42</sup> Defensor del Pueblo, Publications: <https://www.defensordelpueblo.es/en/publications/other-publications/> (last accessed 6 February 2017)

<sup>43</sup> International Coordinating Committee *General Observations supra* note 22, General Observation 1(2).

'Protection' functions may be understood as those that address and seek to prevent actual human rights violations. Such functions include monitoring, inquiring, investigating and reporting on human rights violations, and may include individual complaint handling.<sup>44</sup>

Furthermore:

A National Institution's mandate should be interpreted in a broad, liberal and purposive manner to promote a progressive definition of human rights which includes all rights set out in international, regional and domestic instruments, including economic, social and cultural rights. Specifically, the mandate should:

- extend to the acts and omissions of both the public and private sectors;
- vest the National Institution with the competence to freely address public opinion, raise public awareness on human rights issues and carry out education and training programs;
- provide the authority to address recommendations to public authorities, to analyse the human rights situation in the country, and to obtain statements or documents in order to assess situations raising human rights issues;
- authorize unannounced and free access to inspect and examine any public premises, documents, equipment and assets without prior written notice;
- authorize the full investigation into all alleged human rights violations, including the military, police and security officers.<sup>45</sup>

The 'methods of operation' set out in the Paris Principles that NHRIs should possess to achieve these tasks include the ability to:

- (a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;
- (b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
- (c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;
- (d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;
- (e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;

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<sup>44</sup> *Id.*

<sup>45</sup> General Observation 1.2.

(f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions);

(g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.<sup>46</sup>

To this the ICC/GANHRIs General Observations add the importance of ‘regular and constructive engagement with all relevant stakeholders’, through ‘working relationships, as appropriate, with other domestic institutions established for the promotion and protection of human rights, including sub-national statutory human rights institutions, thematic institutions, as well as civil society and non-governmental organizations’.<sup>47</sup> In addition, ‘[i]n fulfilling its protection mandate, a National Institution must not only monitor, investigate and report on the human rights situation in the country, it should also undertake rigorous and systematic follow up activities to promote and advocate for the implementation on its recommendations and findings, and the protection of those whose rights were found to have been violated’.<sup>48</sup>

More recently, some NHRIs have also been assigned the role of the national preventive mechanism pursuant to state ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)<sup>49</sup> and the independent mechanism under Article 33 of the UN Convention on the Rights of Persons with Disabilities.<sup>50</sup>

There are therefore a range of ways in which NHRIs may respond to alleged human rights violations and contribute to their prevention, the protection of victims, accountability and redress.

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<sup>46</sup> Paris Principles *supra* note 22.

<sup>47</sup> General Observation 1.5.

<sup>48</sup> General Observation 1.6.

<sup>49</sup> Such as in Ukraine, Croatia, and Poland

<sup>50</sup> On OPCAT and NPMs generally see e.g. Rachel Murray et al, *The Optional Protocol to the UN Convention Against Torture* (OUP 2011).

## C. Dispute Resolution and Complaints Handling Roles of NHRIs

The Paris Principles also envisage that NHRIs may have a complaints-handling function. They provide that, a 'national institution may be authorized to hear and consider complaints and petitions concerning individual situations' by, for example, 'amicable settlement through conciliation ... [or issuing] binding decisions ... informing the party who filed of his rights ... [and] remedies available to him ... Hearing any complaints or petitions or transmitting them to any other competent authority ... [or] Making recommendations to the competent authorities'. In its General Observations, the SCA similarly provides that a complaints-handling function might include:

The ability to receive complaints against both public and private bodies in its jurisdiction; The ability to receive complaints that are filed by persons on behalf of the alleged victim(s), where consent is given; The ability to commence a complaint on its own initiative; The ability to investigate complaints, including the power to compel the production of evidence and witnesses, and to visit places of deprivation of liberty; The ability to protect complainants from retaliation for having filed a complaint; The ability to protect witnesses from retaliation for having provided evidence in relation to a complaint; The ability to seek an amicable and confidential settlement of the complaint through an alternative dispute resolution process; The ability to settle complaints through a binding determination; The ability to refer its findings to courts of law or specialized tribunals for adjudication; The ability to refer complaints falling beyond its jurisdiction or in a concurrent jurisdiction to the appropriate decision-making body; The ability to seek enforcement through the court system of its decisions on the resolution of complaints; The ability to follow up and monitor the implementation of its decisions on the resolution of complaints; The ability to refer its findings to government in situations where a complaint provides evidence of a widespread or systematic violation of human rights.<sup>51</sup>

While the Paris Principles and the SCA do not require NHRIs to assume a complaints-handling function, the 2008 Nairobi Declaration,<sup>52</sup> adopted by the Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights recommends that NHRIs 'may handle complaints submitted to them by a complainant and by settling the case through conciliation and mediation, thereby relieving the existing case-load of courts'; 'ensuring

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<sup>51</sup> General Observation 1.10.

<sup>52</sup> Nairobi Declaration *supra* note 8.

victims of human rights violations receive compensation, including encouragement of the establishment of the fund for this purpose'; 'assisting victims seeking redress with information on the law and the legal system' as well as seeking 'informal legal redress mechanisms through conciliation or through binding decisions'.<sup>53</sup>

Complaints-handling as envisaged by the Paris Principles and the ICC/GANHRI is wider than the dispute resolution function that we focus on within this report; dispute resolution may be characterised as a sub-set of a wider definition of complaints-handling. In this respect, some NHRIs play no role in complaints-handling. Others have been vested with a complaints-handling role as part of the way in which they fulfil their mandate to protect human rights. For example, where an NHRI provides initial advice or assistance to complainants; represents or provides legal aid to individuals; issues decisions or recommendations on individual cases (whether binding or non-binding); or offers its services as a neutral arbiter of a dispute through informal settlement negotiations or more formal mediation or conciliation services. Cases may also come to its attention through the employment of own initiative powers or as part of wider thematic investigations or inquiries. Finally, NHRIs may identify individual cases through work on underreporting of certain types of human rights violations.

Equally, complaints-handling is not necessary in order to fulfil the mandate to protect human rights. NHRIs may also fulfil their protection functions in other ways that are not focused on assisting or providing an individual with access to a remedy but still contribute to addressing human rights violations.

Overall, therefore, NHRIs possess a variety of functions, some of which may include a complaints-handling mandate. Often an equality body or ombudsperson has a pre-existing complaints-handling function and this may have been, at its establishment, the intended focus of its activities. By contrast, traditional human rights commissions, research or advisory institutions may be less likely to have started with such a function or may have only acquired it through merging with the former type of body. The extent to which the complaints function is therefore seen as mainstreamed or integral to the work of a particular NHRI will depend in part on its institutional history and evolution. In addition, whether an NHRI is given a complaints-handling function is determined by the State and the criteria it took into account when it established the body.

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<sup>53</sup> Nairobi Declaration *supra* note 8; *see also*, 'Justice in Austerity: Challenges and Opportunities for Access to Justice' Fundamental Rights Conference 2012 *supra* note 8; EU Agency for Fundamental Rights, 'Bringing Rights to Life: The Fundamental Rights Landscape of the European Union' (2012) at 9.

Therefore, the extent to which an NHRI has a complaints-handling mandate will vary from institution to institution. It is likely that, for those that enjoy a complaints-handling mandate, this will exist alongside other functions as well. In the remainder of this report, we focus on mapping the dispute resolution functions of NHRIs within Europe. We do not examine any wider role NHRIs play in complaints-handling although we recognise the valuable role NHRIs play in this regard in furthering access to justice. Further documentation and analysis of these functions would be instructive for studies of NHRIs as well as on access to justice more generally. However, it was not possible within the scope of this project.

### III. MAPPING THE DISPUTE RESOLUTION ROLE OF NHRIS WITHIN EUROPE

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The project focused on the dispute resolution functions of NHRIs within Europe. As set out above the forms of dispute resolution relevant to NHRIs in Europe include agreement-based processes such as settlement negotiation, mediation and conciliation. They also include adjudicative forms of ADR where the NHRI issues binding or non-binding recommendations on an individual complaint, for example where ombudspersons carry out investigations and issue recommendations or where an NHRI sits as a quasi-judicial tribunal.

The NHRIs were identified using the Directory of Institutions within Europe provided by the ICC/GANHRI<sup>54</sup> and the member institutions listed on the European Network of NHRIs (ENNHRI) website.<sup>55</sup> The NHRIs included on these lists and their ICC/GANHRI accreditation status changed slightly over the course of the project, for example, where an NHRI was no longer accredited by the ICC/GANHRI. The ICC/GANHRI list includes 50 institutions,<sup>56</sup> nine of which do not have an accreditation status listed. ENNHRI has 40 members,<sup>57</sup> eight of which do not have ICC/GANHRI accreditation according to the ENNHRI website. There was some variance between the ICC/GANHRI and ENNHRI lists with regard to accreditation status.<sup>58</sup> A table is annexed to this report that provides a provisional map of the dispute resolution practice of NHRIs within Europe. In this part of the report we first discuss NHRIs that do not have a dispute resolution mandate. We then categorise the form(s) of dispute resolution that other NHRIs have which we note can be limited by subject-matter and take the form of agreement-based dispute resolution, the issuance of recommendations as the result of an investigation (such as how an ombudsperson operates), a quasi-judicial tribunal or a combination of these forms.

#### A. NHRIs with No Dispute Resolution Function

Within our research, we identified a number of NHRIs that do not have a dispute resolution function. Where this is the case, most NHRIs' websites do not explain why the NHRI does not have a dispute resolution mandate. As noted above, a dispute resolution function is not required

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<sup>54</sup> <http://nhri.ohchr.org/EN/Contact/NHRIs/Pages/Europe.aspx>

<sup>55</sup> <http://www.ennhri.org/List-of-members>

<sup>56</sup> As of 31 December 2016.

<sup>57</sup> As of 31 December 2016.

<sup>58</sup> The status listed here is drawn from the ICC/GANHRI website. Some of the details do not correspond to the status listed on the ENNHRI website.

by the Paris Principles, therefore an explanation by NHRIs on why they lack this function would not be expected.

The Scottish Human Rights Commission's website is an example of an NHRI that explains why it does not have a complaints-handling role, including dispute resolution, as this was explicitly considered on its establishment. It cites section 6(1) of the Scottish Commission for Human Rights Act which prohibits the Commission from providing 'assistance to or in respect of any person in connection with any legal claim or proceedings to which that person is or may become a party'. The Commission's website explains that 'when the Scottish Parliament set the Commission up, it decided that it would be better for our limited resources to be used for working on strategic legal and policy work, instead of providing an advice service. This means that we work on human rights issues that affect lots of people, rather than providing advice to a smaller number of individuals. We work closely with other organisations and services that do provide advice on human rights issues, so that we can refer people to them'.<sup>59</sup>

While the NHRIs listed here do not have a dispute resolution function, some handle individual complaints in other ways, for example, through provision of initial advice, strategic litigation, the submission of *amicus curiae* briefs/third party interventions or wider investigative or inquiry powers. For example, the Danish Institute for Human Rights is able to provide assistance to 'victims of discrimination in pursuing their complaints about discrimination'.<sup>60</sup> This may include helping an individual to sort through bundles of paper, writing up the case, and on occasion representing the person, in written proceedings, before the independent Board of Equal Treatment.<sup>61</sup> Where the issue is of strategic significance, the British Equality and Human Rights Commission is also able to provide legal assistance to individuals who have been subject to unlawful discrimination,<sup>62</sup> can intervene in cases brought by others,<sup>63</sup> and can initiate judicial review.<sup>64</sup> The Scottish Human Rights Commission is empowered to conduct inquiries into the policies or practices of Scottish public authorities<sup>65</sup>, to visit places of detention<sup>66</sup>, and to

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<sup>59</sup> Scottish Human Rights Commission, 'Help and Advice' <http://www.scottishhumanrights.com/help-advice/> (last accessed 10 February 2017).

<sup>60</sup> Act on the Danish Institute for Human Rights (Act No 552 June 2012) Chapter 1, Section 2, Sub-section 2.1

<sup>61</sup> Interview at the Danish Institute for Human Rights.

<sup>62</sup> S28 Equality Act 2006. Nuffield Foundation NHRI Project Interviewees 67 & 68. See also Equality and Human Rights Commission website: <https://www.equalityhumanrights.com/en/legal-responses/strategic-litigation> (last accessed 4 February 2017)

<sup>63</sup> S30 Equality Act 2006.

<sup>64</sup> S30 Equality Act 2006.

<sup>65</sup> S8(1) Scottish Commission for Human Rights Act 2006.

<sup>66</sup> S11(1) Scottish Commission for Human Rights Act 2006.

intervene in civil court cases where this is relevant to its general duty and concerns a matter of public interest<sup>67</sup>.

A number of NHRIs have systems in place to refer individual complaints to bodies with dispute resolution or complaint-handling powers. For example, when contacted with individual cases, the German Institute for Human Rights refers complainants ‘to specific help lines and special services’.<sup>68</sup> The Commission consultative des Droits de l’Homme du Grand-Duché de Luxembourg directs individuals to services such as the national Ombudsman, the Ombuds-Committee on the Rights of the Child, the Centre for Equal Treatment and the National Data Protection Commission depending on which body is most appropriate to the nature of the complaint.<sup>69</sup> The Danish Institute of Human Rights also receives complaints which fall outside of its specific mandate to offer assistance in relation to certain equal treatment issues. The advisors take time to listen to the complainant and then refer the complainant to a contact for instance a specific legal aid NGO or complaint mechanism, ‘to make sure – as best as possible – that the case is handled at the right place’.<sup>70</sup> Finally, some NHRIs contribute to strengthening the access to justice landscape through thematic and policy work.

## **B. NHRIs with a Dispute Resolution Mandate**

Where NHRIs in Europe enjoy a dispute resolution function, the types of powers with which they are mandated tend to divide into agreement-based dispute resolution; investigations followed by the issuance of non-binding recommendations that may be complied with, thus resolving the individual’s complaint (usually in the context of an ombudsperson); a quasi-judicial tribunal or a combination of dispute resolution powers.

### ***1. Types of Human Rights Complaints Dealt with by NHRIs***

The types of human rights complaints dealt with through the dispute resolution function of an NHRI is a relevant starting point in order to address the research question posed by this project on whether NHRIs should play a dispute resolution role in relation to human rights complaints. In this section, we map out the types of human rights complaints dealt with by NHRIs’ dispute resolution processes as a baseline to this question.

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<sup>67</sup> S14 (1)- 14(3) Scottish Commission for Human Rights Act 2006.

<sup>68</sup> <http://www.institut-fuer-menschenrechte.de/en/about-us/faqs/> accessed 20 April 2015.

<sup>69</sup> Interview, Commission consultative des Droits de l’Homme du Grand-Duché de Luxembourg.

<sup>70</sup> Interview with Danish Institution for Human Rights.

A first key point to note is that an NHRI may not have a dispute resolution role over all types of human rights complaints. This is particularly the case where it is also an equality body, as often the dispute resolution function only attaches to certain forms of complaints based on particular forms of discrimination. For example, the NHRI in the Netherlands, the College Voor de Rechten van de Mens, which was formerly the Equal Treatment Commission, hears and gives opinions on individual equal treatment complaints. Prior to its establishment in 2012, several NGOs proposed that the NHRI should also have a formal complaints procedure for human rights issues.<sup>71</sup> However, the Dutch government considered that there were already mechanisms in place to hear such complaints, including the courts and the Ombudsman.<sup>72</sup>

In certain instances, an NHRI was initially vested with a dispute resolution role in relation to particular issues, but this power was later removed. For example, the Danish NHRI, the Danish Institute for Human Rights (DIHR) is also a national equality body in relation to race, ethnic origin and gender and thus has a mandate to assist victims of discrimination on these grounds. In relation to race and ethnic origin, this mandate was originally held by the Complaints Committee for Ethnic Equal Treatment which was established under the DIHR. The Complaints Committee was closed when a separate Board – the Board of Equal Treatment – was established. This board handles discrimination cases on grounds of gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability, national origin, social origin and ethnic origin and its decisions are binding. DIHR still has a mandate to assist victims of discrimination, but is unable to resolve individual disputes.<sup>73</sup> Similarly, the British Equality and Human Rights Commission (EHRC), had the power to provide conciliation for non-workplace based disputes. This power was removed in 2012 as the Government considered that it offered ‘poor value for taxpayers’ money’ and did not fit with the ‘EHRC’s strategic role’.<sup>74</sup>

Where an NHRI has a wider subject-matter jurisdiction, which is typically the case where it is also an ombudsperson, the types of complaints it receives with a human rights dimension vary considerably. Often the complaints relate to economic, social and cultural rights such as complaints about health and housing. However, they can also relate to civil and political rights.

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<sup>71</sup> Interview with Yvonne Donders. See also Yvonne Donders “The Newly Established Netherlands Institute for Human Rights: Integrating Human Rights and Equal Treatment” (with Marjolijn Oldemonekhof) in: J. Wouters and K. Meeuwissen (eds.), *National Human Rights Institutions in Europe, Comparative, European and International Perspectives* (Antwerp Intersentia June 2013) pp. 91-112 at p. 89.

<sup>72</sup> Interview *id.*

<sup>73</sup> Interview with Danish Institute for Human Rights.

<sup>74</sup> ‘Building a Fairer Britain: Reform of the Equality and Human Rights Commission, Response to the Consultation’ (HM Government 2012) 6 & 16-18. Accessed at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85308/EHRC-consultation-response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85308/EHRC-consultation-response.pdf) (last accessed 4 February 2017)

The following provides illustration of the types of complaints received by NHRIs that are also ombudspersons without necessarily being representative.

In its 2014 report, the *People's Advocate of Albania* noted that it received 3969 complaints which mainly involved 'violation of the right to information, violation of human rights by the police, failure to respect the rights of prisoners, delays in administrative and court proceedings, violation of the right to property, violation of employment rights, failure to provide housing, eligibility problems with social security benefits and economic aid, problems in the free and effective exercise of the right to education and health care, the situation of minority rights, etc.'<sup>75</sup>

In its 2015 report, the Institution of Human Rights Ombudsman of Bosnia and Herzegovina noted that it 'registered 2966 citizens' complaints ... During the reporting period, 12876 citizens contacted the Ombudsman (direct contacts, telephone contacts, electronic mail and written complaints) ... The majority of complaints were related to violations of civil and political rights – 1790. These are followed by complaints related to: violation of economic, social and cultural rights – 698, all forms of discrimination – 159, rights of the child – 148, rights of prisoners and detainees – 108, rights of persons with disabilities – 53, and violation of the rights of religious and other minorities – 10.'<sup>76</sup>

The Provedor de Justicia in Portugal sets out the areas in which it receives complaints including on environment, urban planning and cultural rights; tax payers, consumers, and economic operators' rights; social rights; workers' rights; rights to justice and security; and rights, freedoms and guarantees; health, education and constitutionality valuations.<sup>77</sup>

According to the Report of the Croatian Ombudswoman for 2015, the offices<sup>78</sup> worked on 4655 cases. Of the 3531 cases opened in 2015, the highest number related to the areas of justice, civil

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<sup>75</sup>Republic of Albania People's Advocate, Annual Report on the Activities of the People's Advocate (1 January – 31 December 2014) at 7 (executive summary) available at: [http://www.avokatipopullit.gov.al/sites/default/files/ctools/PEOPLES%20ADVOCATE\\_2014.pdf](http://www.avokatipopullit.gov.al/sites/default/files/ctools/PEOPLES%20ADVOCATE_2014.pdf) (last accessed 4 February 2017)

<sup>76</sup> Institution of Human Rights Ombudsman of Bosnia and Herzegovina, 2015 Annual Report on the Results of the Activities of the Institution of the Human Rights Ombudsman of Bosnia and Herzegovina (March 2016) at 9 available at: [http://www.ombudsmen.gov.ba/documents/obmudsmen\\_doc2016041515322172eng.pdf](http://www.ombudsmen.gov.ba/documents/obmudsmen_doc2016041515322172eng.pdf)

<sup>77</sup> Portuguese Ombudsman National Human Rights Institution, Report to Parliament 2015 (2016) from 221 onwards available at: [http://www.provedor-jus.pt/site/public/archive/doc/Report\\_2015.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Report_2015.pdf) (last accessed 4 February 2017).

<sup>78</sup> The Croatian Ombudswoman (NHRI) has offices in Zagreb, Split, Osijek and Rijeka. Annual Report of the Ombudswoman of Croatia 2015, 8. Accessed at: <http://www.theioi.org/ioi-members/europe/croatia/croatian-people-s-ombudsman> (last seen on 4 February 2017)

service, employment and discrimination, as well as matters related to property relations and police conduct.<sup>79</sup>

In its 2015 annual report, the Human Rights Commissioner for Poland received 27,376 new applications. Of these the report sets out a number of issues which it considered of most importance, including the right to judicial protection and right to fair trial, the right to freedom of speech, the right to education, voting rights, protection of the rights of victims of crime, right to social security and the protection of rights of the family.<sup>80</sup>

These examples provide illustration of the wide range of ways in which NHRIs deal with human rights complaints through different dispute resolution processes.

## **2. *Investigations and Recommendations as a Form of Dispute Resolution***

As set out in the table in the annex to this report, many NHRIs within Europe are ombudspersons. Ombudspersons receive individual complaints. However, there is some debate and ambiguity over the purpose of complaints-handling from the perspective of the complainant. It is possible that NHRIs that are ombudspersons provide at least one and possibly two forms of dispute resolution. The first is that most ombudspersons are vested with the power to formally investigate a complaint and issue (typically) non-binding recommendations. These recommendations usually attract high levels of compliance. If they include recommendations about the individual's situation, they may resolve the individual's complaint in full or in part. This part of the ombudsperson's work is not always characterised as a form of dispute resolution, particularly in the public sector, however, in our view, if it resolves the individual's complaint it is possible to consider it within this definition. The second is where ombudspersons offer an agreement-based form of dispute resolution prior to, during or following a formal investigation and the issuance of recommendations that is aimed at resolving the individual's complaint. This is discussed in the next section.

Within our project, we therefore define the formal way in which ombudspersons investigate and issue recommendations on individual complaints as a potential form of dispute resolution.

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<sup>79</sup> Annual Report of the Ombudswoman of Croatia 2015, 8-9. Accessed at: <http://www.theioi.org/ioi-members/europe/croatia/croatian-people-s-ombudsman> (last seen on 4 February 2017)

<sup>80</sup> Summary of the Report on the Activity of the Ombudsman in Poland 2015, 3-4, and within the report. Accessed at: <https://www.rpo.gov.pl/sites/default/files/Summary%202015.pdf> (last seen on 4 February 2017). The Polish NHRI is also known as the Human Rights Commissioner for Poland, the Ombudsman, and the Human Rights Defender.

Illustrations of the nature of recommendations issued by ombudspersons (that are also NHRIs) that may resolve (fully or partially) an individual's complaint include:

*The People's Advocate in Albania* explained in its 2014 report that its 'main tool is the recommendation to remedy an infringement by the public administration body. For all cases of violated rights, were intervened and made the relevant recommendations, when these affect a group of individuals, and legislative recommendations'.<sup>81</sup> Article 63(3) of the Constitution entitles the Advocate to 'make recommendations and to propose measures when he finds violations of human rights and freedoms by the public administration.'<sup>82</sup> Article 21 of the Law on the People's Advocate sets out the 'actions and powers [of the People's Advocate] after conclusion of an investigation' as including to:

- 'a) Explain to the complainant that his rights have not been infringed upon;
  - b) Make recommendations on how to remedy the infringement to the Administrative organ that in his judgment has committed the violation. The submission of recommendation suspends the improper or illegal acts and proceedings until the examination of this recommendation is done and the response to the People's Advocate is given.
  - c) Make recommendations on how to remedy the infringement to the authority supervising the administrative organ that has committed the violation. Non examination of recommendation within 30 days leads to the suspension of the improper or illegal acts and proceedings;
  - d) Recommend to the public prosecutor to start the investigation if he finds that a criminal offence has been committed; or to re-start the dismissed or suspended investigation;
  - e) Upon finding serious violations, propose to the relevant authorities, including the Assembly, to dismiss officials under their jurisdiction;
  - f) In case of the infringement of right by organs of the judiciary, the People's Advocate, without interfering with judicial procedures shall notify the competent authorities of the violations;
  - g) Recommend to the injured persons to take their case to the court;
- These actions are not mutually exclusive.'<sup>83</sup>

Article 15 of the *Law of the Republic of Armenia on the Human Rights Defender* provides that,

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<sup>81</sup> Republic of Albania People's Advocate, 2014 Annual Report *supra* note 79 at 1.

<sup>82</sup> Constitution of the Republic of Albania, available at <http://www.osce.org/albania/41888?download=true>

<sup>83</sup> No.8454, dated 04.02.1999, supplemented by the law no. 8600, dated 10.04.2000, amended by the law no. 9398, dated 12.05.2005, added to and as amended by the law 155/2014, dated 27.11.2014, "ON THE PEOPLE'S ADVOCATE". Available at: <http://www.avokatipopullit.gov.al/en/ligji-p%C3%ABr-avokatin-e-popullit-0> (last accessed 14 February 2017)

‘1. Based on the findings of the considered complaint, the Defender shall take one of the following decisions:

- 1) to propose to the state or local self-governing body or the official, the decisions or actions (inaction) of whom have been qualified by the Defender as violating human rights and freedoms, to eliminate the committed violations, indicating the possible measures necessary and subject to implementation for the restitution of human and civil rights and freedoms;
- 2) on the absence of violations of human rights and freedoms, if during the examination of the complaint no violation of human rights and fundamental freedoms by the state and local selfgoverning bodies or officials has been revealed;
- 3) pursuant to the defined procedure if there were discovered the bases concerning not considering the complaint, or concerning the cease of considering.
- 4) to bring an action before the court on invalidating in full or partially the normative legal acts of the state and local self-governing bodies or officials that violate human rights and fundamental freedoms and contradict the law and other statutes, if the state and local self governing bodies or officials, who committed the named violation, do not invalidate in full or partially their corresponding legal act within the prescribed period;
- 5) to recommend that the authorized state agencies execute disciplinary or administrative penalties or file criminal charges against the official whose decisions or actions (inaction) violated human rights and fundamental freedoms and (or) violated the requirements of this Law.<sup>84</sup>

Article 13.2.1 of the Constitutional Law enables the *Ombudsman in Azerbaijan* to ‘demand from the governmental or municipal body, whose decision or act (omission) violated the human rights and freedoms, to remedy those violations’. Furthermore, the Ombudsman can suggest the initiation of additional cassation complaints as well as of criminal and disciplinary proceedings to the relevant bodies.<sup>85</sup> Some measures available to the Ombudsman can have effects beyond individual complaints. The Ombudsman is, for example, entitled to submit motions to parliament ‘with regard to the adoption or review of laws with a view to ensuring human rights and freedoms’.<sup>86</sup>

Article 19 of the *Ombudsman Act in Bulgaria* allows the Ombudsman (one of the two designated NHRIs in Bulgaria) to make individual as well as more general recommendations. The

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<sup>84</sup> available at <http://www.ombuds.am/en/legislation/the-law-on-the-ombudsman.html> (last accessed 16 February 2017).

<sup>85</sup> Constitutional Law, Art. 13.3.2-13.3.4

<sup>86</sup> Constitutional Law, Art. 1.4

Ombudsman can ‘make proposals and recommendations for reinstatement of the violated rights and freedoms to the respective authorities, the administrations thereof, and persons under Item 1’<sup>87</sup> and can ‘make proposals and recommendations for elimination of the reasons and conditions which create prerequisites for violation of rights and freedoms’<sup>88</sup>.

These examples illustrate the range of ways in which NHRIs can issue recommendations that affect an individual’s complaint. Within the course of the project, it was sometimes difficult to gain appreciation of the extent to which recommendations issued by ombudspersons, if complied with, would resolve the complaint. Some NHRIs publish illustrative recommendations on their website or in their annual reports, however, the recommendations are often quite short and usually do not include the original complaint. Therefore, they are often not sufficient to assess the extent to which the recommendation would resolve the complaint. This is an area in which further empirical research would be particularly useful. In our view, this would require substantial periods of time researching within an ombudsperson’s office, while recommendations are drafted in cases involving human rights, in order to understand more about how they are dealt with, as well as the development of a research methodology and assessment framework to assess the adequacy of recommendations as a means to resolve the complaint. While, for some complaints this would not necessarily be needed as they would be relatively straightforward, in other cases it may be useful. For example, some recommendations might, if complied with, partially resolve the complaint, for example by ensuring that ill-treatment in a care home stopped. However, the person may still have a compensation claim which might not be recommended by the ombudsperson but could be taken up separately. The prosecuting authorities may also be under an obligation to carry out a criminal investigation where the treatment appears to amount to torture or other cruel, inhuman or degrading treatment or punishment.

### **3. *Quasi-Judicial Functions***

Another way in which NHRIs may play a role in dispute resolution is where they have been vested with a quasi-judicial function. For example, EQUINET describes the Commission for the Protection against Discrimination, one of the two NHRIs in Bulgaria as a ‘predominantly quasi-

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<sup>87</sup> Ombudsman Act, Art 19(4)

<sup>88</sup> Ombudsman Act, Art 19(6)

judicial body'.<sup>89</sup> Article 47 of the Protection against Discrimination Act provides that the CPD shall:

1. ascertain violations of this or other Acts regulating equal treatment, the perpetrator of the violation and the aggrieved person;
2. decree prevention and termination of the violation and restoration of the original situation;
3. impose the sanctions envisaged and implement administrative enforcement measures;
4. issue mandatory directions for compliance with this or other Acts regulating equal treatment;
5. appeal against administrative acts decreed in contravention of this or other Acts regulating equal treatment, bring action in court and join as a concerned party in proceedings instituted under this or other Acts regulating equal treatment;
6. make proposals and recommendations to the state and municipal authorities to discontinue discrimination practices and revoke their acts issued in violation of this or other Acts regulating equal treatment;
7. maintain a public register of its decisions and mandatory directions which have entered into force;
8. issue opinions on the conformity of draft statutory act with the legislation on prevention of discrimination, as well as recommendations for adoption, revocation, amendment and supplementing of statutory acts;
9. provide independent assistance to victims of discrimination filing complaints against discrimination;
10. conduct independent research into discrimination;
11. publish independent reports and make recommendations on all matters relating to discrimination;
12. perform other competencies laid down in its Rules of Organisation and Procedure.<sup>90</sup>

In carrying out these functions, Article 48 of the law provides that:

- (1) The Commission shall consider and take decisions on the case files submitted to it in panels determined by the Chairperson of the Commission.
- (2) The Chairperson of the Commission shall appoint standing panels specialising in matters of discrimination:
  1. on ethnic and racial grounds;
  2. on the grounds of gender;

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<sup>89</sup> Equinet, *Commission for Protection against Discrimination – Bulgaria: Brief Profile*, [http://www.equineteurope.org/IMG/pdf/PROFILE\\_CPD\\_BG.pdf](http://www.equineteurope.org/IMG/pdf/PROFILE_CPD_BG.pdf) (last accessed 29 September 2014).

<sup>90</sup> Article 47.

3. on other grounds referred at in Article 4 (1).

(3) Cases of multiple discrimination shall be considered by an enlarged five-member panel.'

The decisions issued by the panels can be appealed to a supreme administrative court.<sup>91</sup> The Commission is entitled to impose fines pursuant to Article 84(2) of the Protection against Discrimination Act as set out in Articles 78 to 82 of the Discrimination Act. While the Commission is not authorized to rule on compensation, Article 74(1) of the Protection against Discrimination Act provides that '[i]n cases under Section I, any person who has suffered damage from a violation of rights under this or other Acts regulating equal treatment may claim compensation under the general procedure against the persons and/or the authorities that inflicted the damage.'

Similarly, in the Netherlands, the College Voor de Rechten Van de Mens (the NHRI) acts in a form of quasi-judicial capacity. After a complaint has been accepted as within the authority of the institution, a letter is sent 'to the accused, asking for a general reaction [to] the complaint'. Where it is obvious that there has, or has not been, discrimination, the NHRI will provide a written opinion. In other cases, the institution will hold a 'session'. The parties are invited to attend a session, which is held in a room at the NHRI, and are given the opportunity to explain what has happened. Project interviewees explained that 'sometimes it's more like a conversation between the two parties'. The hearings/sessions are conducted by one or three of the NHRI's commissioners. Following the session, the commissioner(s) write the opinion which is checked by other colleagues. The opinion, which gives recommendations for change, is not legally enforceable but there is around an 80% compliance rate.<sup>92</sup>

#### **4. *NHRIs with Agreement-Based Dispute Resolution***

Within our research, we identified a number of NHRIs that may employ a form of agreement-based dispute resolution within their work (defined above as settlement negotiations, mediation and conciliation that may take place separately or before, concurrently or after formal investigations by an ombudsperson or quasi-judicial body, for example). This was the most difficult aspect of the dispute resolution function of an NHRI to categorise. Part of this difficulty was because NHRIs (in common with other bodies) use a range of terms to refer to forms of agreement-based dispute resolution without necessarily referring to the same process.

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<sup>91</sup> See Articles 68 and 69.

<sup>92</sup> Interview with the Netherlands NHRI, the College Voor de Rechten Van de Mens.

The examples here may also be under-representative as some NHRIs use language such as ‘settled a complaint’ or refer to ‘mediating disputes’ without providing further details on what the process entails. Without further interviews which were beyond the scope of this project, it was therefore difficult to determine whether the language referred to a negotiation process or was a way of describing the overall effect of the process. This was particularly challenging with ombudspersons as ombudspersons typically carry out formal investigations and issue decisions or recommendations on individual complaints. They may also employ agreement-based dispute resolution such as settlement negotiations or mediation before, during or after an investigation. Some ombudspersons’ reports referred to settling complaints or playing a mediating role between complainants and the state. This could be interpreted either to mean that they employed a formal settlement or mediation process or that they understood the investigative function of the ombudsperson to have the effect of settling or resolving the dispute between the complainant and the state.

Examples of NHRIs employing a form of agreement-based dispute resolution include:

***(a) A Form of Agreement-Based Dispute Resolution Employed by Ombudspersons and Quasi-Judicial Bodies***

As noted above, some ombudspersons employ a form of agreement-based dispute resolution when handling complaints. Examples include:

In Bosnia and Herzegovina, Article 7(d) of the Law on Human Rights Ombudsman<sup>93</sup> provides that the Ombudsman (the NHRI) has competence to ‘[p]ropose initiation of process of mediation in compliance with provisions of the Law on Mediation’. Article 32 of the Rules of Procedure states that ‘[d]uring the proceedings, the Ombudsman BiH shall seek to mediate between the parties trying to reach an amicable solution of the case. In any stage of the procedure, the Ombudsman shall make its best efforts to close the case efficiently and in satisfactorily. To this end the Ombudsman BiH shall seek to mediate between the parties aimed at finding agreement between them with regard to issue subject to complaint.’<sup>94</sup> In relation to discrimination cases, the BiH Law on the Prohibition of Discrimination entitles the Ombudsman to ‘propose initiation of process of mediation in compliance with provisions of the Law on Mediation’.<sup>95</sup>

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<sup>93</sup> <http://www.ombudsmen.gov.ba/Default.aspx?id=14&lang=EN> (adopted in 2000 and amended in 2004 and 2006).

<sup>94</sup> Rules of Procedure of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina, available at: [http://www.ombudsmen.gov.ba/documents/obudsmen\\_doc2013041003424659eng.pdf](http://www.ombudsmen.gov.ba/documents/obudsmen_doc2013041003424659eng.pdf) (last accessed 14 February 2017).

<sup>95</sup> Article 7(d)

When used, the process involves the Ombudsman (or a representative) mediating or negotiating between two parties: the public institution on one side and citizen on the other. In this case the Ombudsman holds a meeting to try to reach an agreement without the issue going to court. The two parties come in person to the meeting. The parties sometimes come with legal representation. The aim is to resolve the issue out of court. The mediator is the Ombudsman's representative (not the actual Ombudsman).<sup>96</sup>

In Croatia, the Ombudswoman is empowered to initiate investigations of individual or recurrent violations of constitutional and statutory rights and freedoms.<sup>97</sup> With the consent of the parties, it may also conduct a mediation process with the possibility to reach a settlement agreement.<sup>98</sup> The process has not yet been used. There has been discussion of how to implement this and some staff members have been trained but it is now thought that hiring outside experts would be better. However, the Ombudswoman office does make use of relatively informal procedures to obtain information and sometimes to reach a resolution. For example, the Ombudswoman's office may contact five or six public sector bodies for information on a particular complaint and the claimant may visit the office on several occasions to discuss the case or to give further information. In relation to persons deprived of their liberty, a complaint may be resolved during an institutional visit, through talking to the management. The Croatian Ombudswoman's alternate reports as an NHRI may include relevant matters from four special ombudswomen's offices: for disability, gender equality and for children.<sup>99</sup> The Disability Ombudswoman's office does not take a formal mediation role. However, once it has collected information and heard arguments from both parties, it 'actively takes the side of the party whose rights have been violated ... and informs the other party "this practice is discrimination" ... and tries to be constructive, proposing solutions ...'. At the same time they would 'involve the other party and see what their problems are. That's why we call this a kind of mediation because we listen to the other side and see what their issues are'.<sup>100</sup>

In Cyprus, the Office for the Commissioner for Administration and Human Rights explains that 'in cases (either complaints or own-initiative investigations) where violation of the law or human rights is observed, the investigation process can lead to the submission of a Report to the implicated authority, with specific conclusions, suggestions and recommendations that aim at

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<sup>96</sup> Interview with Institute of Human Rights Ombudsman of Bosnia and Herzegovina (4 September 2015).

<sup>97</sup> Article 20 Ombudsman Act 2012. Downloadable at <http://www.legislationline.org/documents/id/17882> (last seen on 10 February 2017)

<sup>98</sup> Article 12(2)(5) Anti-Discrimination Act 2008. Accessed at: [http://www.minoritycentre.org/sites/default/files/antidiscrimination\\_law\\_croatia.pdf](http://www.minoritycentre.org/sites/default/files/antidiscrimination_law_croatia.pdf) (last seen on 10 February 2017)

<sup>99</sup> Interviewee with office of the Ombudswoman.

<sup>100</sup> Interview with the offices of the Disability Ombudswoman, 17 April 2015

resolving an issue and avoiding the generation or repetition of similar issues in the future. Not rarely, after the submission of a Report or an Opinion Paper, the Commissioner is called by the Parliament, to express her view on the issue, if this is related to the adoption, implantation or monitoring of a legislation'.<sup>101</sup> Alternatively, the Commissioner may make use of his/her mediating role, and in cooperation with the relevant authority, succeed in resolving the issue without submitting a Report.<sup>102</sup> In an interview for this project, the Office explained that the mediation process involves consultations, either through correspondence or personal communication, with the purpose either of the satisfaction of the complaint (e.g. annulment of a deportation order, issuance of residence permit) or the adoption of general measures for the overall improvement of the policy or the practice followed by the authorities'.<sup>103</sup>

In Slovenia, the Rules of Procedure state that: '[w]hen possible, the Ombudsman shall strive, throughout the entire course of proceedings, to establish the mediating approach and settle the case by mutual agreement on a friendly settlement. When the friendly settlement is reached the proceedings started upon the petition shall be terminated. The achieved friendly settlement of the case shall not mean that the Ombudsman does not come to his own findings and make proposals or recommend a remedy in accordance with the law.'<sup>104</sup> In an interview with the NHRI, the interviewee noted that the mediation process involves both parties being invited to a meeting. While every staff member at the Ombudsman Office is trained as a mediator, mediation is usually conducted by the Ombudsman or his/her deputies. Since mediation cases are relatively rare and only about 5% of all cases are mentioned in the annual reports of the Ombudsman, mediation cases are usually not published'.<sup>105</sup>

In Bulgaria, Article 19 of the Ombudsman Act entitles the Bulgarian Ombudsman (one of the NHRIs) to 'make examinations on the complaints and alerts received'<sup>106</sup> and to 'mediate between the administrative authorities and the persons concerned for overcoming the violations committed and reconcile their positions'<sup>107</sup>.

Similar to the practice of some ombudspersons, quasi-judicial bodies may also use agreement-based dispute resolution as a tool for resolving. For example, in Bulgaria, Article 62 of the Law

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<sup>101</sup> Interview with Office of the Commissioner for Administration and Human Rights.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Rules of Procedure, art 26.

<sup>105</sup> Interview with Republic of Slovenia Human Rights Ombudsman, Thursday 02 July 2015.

<sup>106</sup> Ombudsman Act, Art 19(2).

<sup>107</sup> Ombudsman Act, Art 19(5).

on Protection Against Discrimination provides the other NHRI, the Commission for Protection against Discrimination, with the following powers:

- (1) At the first session the rapporteur shall invite the parties to achieve a settlement. In case of agreement, expressed by the parties, the speaker shall call settlement proceedings session.
- (2) In case of achieving an agreement between the parties on the basis of equal treatment during the settlement proceedings, the Commission shall approve it by a decision and shall terminate further proceedings.
- (3) If the agreement is achieved only for part of the dispute, the proceedings shall continue for the unsettled part.
- (4) The settlement approved by the Commission shall be enforced and the Commission exercise control over the compliance with the settlement.<sup>108</sup>

If no agreement is reached, the complaint is handled by the relevant panel of the Commission, which then issues a legally binding decision.<sup>109</sup>

In the Netherlands, the College Voor de Rechten Van de Mens (the NHRI), gives written opinions on equal treatment complaints as discussed above in the section on quasi-judicial bodies. While conducting hearings/sessions, on a few occasions, the Commissioner(s) ‘get the feeling that there is still room for mediation’. The parties are asked to leave the room to discuss whether they would like to go to mediation. If the parties agree, the NHRI arranges for a professional mediator to meet with the parties. Where the mediation is unsuccessful, the parties return to the NHRI for a session and an opinion. The interviewees stated that the mediations seldom have ‘any positive result’ explaining that ‘more times ... the parties come to a settlement on their own accord because ... there has been a complaint filed with [the NHRI] .. [the respondent] doesn’t want a session here, they’re afraid about naming and shaming ...’.<sup>110</sup> Therefore while it does not provide the mediation service itself, it can support parties in accessing this route.

***(b) The Use of Agreement-Based Dispute Resolution when the Institution Acts as an Equality Body***

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<sup>108</sup> Protection against Discrimination Act (translation obtained from: <http://www.accessfacility.org/sites/default/files/Law%20on%20the%20protection%20against%20discrimination.pdf> (last visited 20 February 2017)).

<sup>109</sup> Access website <<http://accessfacility.org/commission-protection-against-discrimination-bulgaria>> accessed 24 February 2015. [CPD website is at: <http://www.kzd-nondiscrimination.com/layout/>]

<sup>110</sup> Interview with the Netherlands NHRI, the College Voor de Rechten Van de Mens.

As noted above, where the NHRI also acts as an equality body, it may have a mandate to conduct agreement-based dispute resolution but only in relation to complaints of certain forms of discrimination or inequality. Examples include:

In Georgia, Article 6(e) of the Organic Law provides that the Public Defender can ‘invite a victim of discrimination and an alleged discriminating person, and try to settle the case by mutual agreement of the parties’.<sup>111</sup> Article 8(3) further stipulates that ‘if the Public Defender of Georgia considers it to be necessary, it may schedule an oral hearing and invite both parties to settle the case by mutual agreement. If the case is settled by mutual agreement, the Public Defender of Georgia shall monitor the fulfilment of the obligations determined by the settlement agreement.’<sup>112</sup> The Ombudsman’s mandate does not envisage mediation in cases that do not concern equality.<sup>113</sup> Within the Public Defender, the Department of Equality is the only department that uses mediation, reconciliation and negotiation when dealing with complaints. However, since the Department and the agreement-based powers are relatively new, the department has not yet received many complaints.

Another way in which an NHRI might engage with agreement-based dispute resolution as noted in the example of the Netherlands above, is by providing support to the complainant in accessing agreement-based dispute resolution. For example, Unia (the Interfederal Centre for Equality Opportunities) in Belgium, an equality body and member of EQUINET but not an NHRI ‘prefer(s) conciliation, negotiated solutions and alternative measures’ to litigation.<sup>114</sup> Its 2012 annual report explains that its:

...preference for extra-judicial solutions is not restricted to the handling of cases of discrimination. Indeed, in some (minor) cases concerning hate speech and hate crimes, alternative measures, such as mediation in the criminal court records, are also of such a nature as to offer a more suitable response than a ‘mere’ sanction (especially when the offenders are young and are ‘searching for an identity’). What is more, this approach also increases the possibilities of effective redress for the victims.<sup>115</sup>

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<sup>111</sup> Law of Georgia on the Elimination of All Forms of Discrimination, available at <http://www.ombudsman.ge/uploads/other/1/1662.pdf> (last accessed 10 February 2017)

<sup>112</sup> Law of Georgia on the Elimination of All Forms of Discrimination, available at <http://www.ombudsman.ge/uploads/other/1/1662.pdf>; see also, <http://www.ombudsman.ge/en/diskriminaciis-preveneciis-meganizmi/xshirad-dasmuli-kitxvebi> - (last accessed 10 February 2017)

<sup>113</sup> Interview with Mr Niko Tatulashvili, Head of the International Relations and Communications Department, Public Defender’s Office, 13 August 2015.

<sup>114</sup> <[http://www.diversitybelgium.be/sites/default/files/documents/article/the\\_centre\\_in\\_2012.pdf](http://www.diversitybelgium.be/sites/default/files/documents/article/the_centre_in_2012.pdf)> accessed 16 April 2015, 6. <http://unia.be/en>

<sup>115</sup> <[http://www.diversitybelgium.be/sites/default/files/documents/article/the\\_centre\\_in\\_2012.pdf](http://www.diversitybelgium.be/sites/default/files/documents/article/the_centre_in_2012.pdf)> accessed 16 April 2015, 19.

In a questionnaire completed for this project, Unia noted that it does not 'feel 'neutral' ... This is why [we] prefer to speak of negotiation rather than mediation or conciliation. Mediation – help people to find their own solution but don't jump into contact. Difference between negotiation and conciliation, if negotiation in position to negotiate something for the victim. Conciliation more neutral – more distance in the case'<sup>116</sup>. It continued that, it:

plays an important role in the handling of individual complaints: before initiating a procedure in civil cases, the Centre will always try to reach a friendly settlement through negotiation or mediation. The following elements will usually be found in such a settlement: recognition of the discrimination by the perpetrator and engagement not to discriminate again, reparation for the victim and sometimes commitment to implement some structural changes.

The Centre also promotes and supports alternative dispute resolutions in criminal cases. The Centre may suggest such option to the public prosecutor. If the public prosecutors decides to initiate a criminal mediation, the Centre might help to define an adequate proposal and support its implementation. The training department of the Centre is usually highly involved, as well as the dossier manager.<sup>117</sup>

Almost half of the staff of the Centre works on individual complaints and might potentially support or conduct a friendly settlement. When a solution is reached outside a court, it's published on our website as "good practice" (<http://www.diversite.be/solutions-n%C3%A9goci%C3%A9es>). People working on individual cases may also write advices and recommendations that would be published and promoted.<sup>118</sup>

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<sup>116</sup> Interview with Unia.

<sup>117</sup> Response to Questionnaire issued by this project.

<sup>118</sup> Response to Questionnaire issued by this project.

## IV. CONCLUSION AND RECOMMENDATIONS

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As noted at the outset, this report and the wider project have sought to provide a preliminary overview of the practice of NHRIs on dispute resolution in Europe. In this regard, we offer some baseline recommendations that arise from this initial mapping. These are primarily aimed at understanding, showcasing and engaging with the work of NHRIs in an emerging field of practice for human rights.

Where NHRIs provide a form of dispute resolution, in our view, a best practice would be to include a clear section on the NHRI's website explaining in clear and plain language what the nature of the dispute resolution process is, the types of disputes it covers, what the possible outcomes can entail, how the process relates to the ability to pursue a claim elsewhere and how to engage the process. This is particularly important in relation to ombudspersons where it is not always clear the extent to which the complaints-handling functions they enjoy are intended to resolve an individual's complaint. We are also of the view that further empirical research would be particularly useful into the extent to which the recommendations of ombudspersons and quasi-judicial bodies are capable of resolving an individual's complaint of a human rights violation, in full or in part.

NHRIs are multi-faceted bodies undertaking a range of functions, of which one may be some form of dispute resolution. Exactly what form of dispute resolution role an NHRI may play, if at all, will therefore vary from institution to institution. For those that do undertake this role, in whatever form, they will need to balance this against the diverse aspects of their wider mandate. Questions around whether NHRIs are best suited to examining individual complaints depend in part on giving power and voice to the parties to any dispute and whether sufficient standards are in place to address any imbalances in the relationships between them. The applicability of standards of justice may go some way to assisting here but our findings suggest there are gaps and an inconsistency in approach and call for more work to be done in this area. Placing these discussions in the context of broader debates around access to justice is equally important. Although this forms part of our research, it is clear that further examination and studies on the role that NHRIs can play in this landscape is crucial.

The researchers very much welcome any comments, further examples of best practice or suggestions on the content or next steps on this project, particularly in relation to how to further promote the development of bespoke standards of justice for NHRIs with a dispute

resolution function and for disputes with a human rights dimension. The contact details for the team are: Lorna McGregor ([lmcgreg@essex.ac.uk](mailto:lmcgreg@essex.ac.uk)); Shirley Shipman ([sshipman@brookes.ac.uk](mailto:sshipman@brookes.ac.uk)) and Rachel Murray ([Rachel.Murray@bristol.ac.uk](mailto:Rachel.Murray@bristol.ac.uk))

## V. TABLE OF THE DISPUTE RESOLUTION FUNCTIONS OF NHRIS IN EUROPE

<b><u>NHRI</u></b>	<b>ICC ACCREDITATI ON<sup>i</sup></b>	<b>ENNHRI MEMBER</b>	<b>NO DISPUTE RESOLUTION</b>	<b>AGREEMENT-BASED DISPUTE RESOLUTION</b>	<b>INVESTIGATION RECOMMENDATIONS &amp;</b>	<b>QUASI-JUDICIAL TRIBUNAL</b>
Albania <sup>ii</sup>	A	✓	-		✓ (Ombudsperson)	X
Armenia <sup>iii</sup>	A	✓	-		✓ (ombudsperson)	X
Austria <sup>iv</sup>	B	✓	-	X	✓	X
Azerbaijan <sup>v</sup>	A	✓	-		✓ (ombudsperson)	X
Belgium <sup>vi</sup>	-	✓	-	✓ (negotiation)	X	X
Bosnia and Herzegovina <sup>vii</sup>	A	✓	-	✓ (mediation)	✓ ombudsperson	X
Bulgaria	Bi <sup>viii</sup> &Bii <sup>ix</sup>	✓ (Bi)	-	✓ Bi & Bii	✓ (Bi) (ombudsperson)	✓ (Bii)
Croatia <sup>x</sup>	A	✓	-	✓ (mediation)	✓ (ombudsperson)	X
Cyprus <sup>xi</sup>	B	✓		✓ (mediation)	✓	X
Denmark <sup>xii</sup>	A	✓	-	X	X	X

<b>NHRI</b>	<b>ICC ACCREDITATI ON</b>	<b>ENNHRI MEMBER</b>	<b>NO DISPUTE RESOLUTION</b>	<b>AGREEMENT-BASED DISPUTE RESOLUTION</b>	<b>INVESTIGATIONS AND RECOMMENDATIONS</b>	<b>QUASI-JUDICIAL TRIBUNAL</b>
Finland <sup>xiii</sup>	A	✓	-	X	✓	X
France <sup>xiv</sup>	A	✓	✓	X	X	X
Georgia <sup>xv</sup>	A	✓	-	✓ (mediation)	✓ (ombudsperson)	X
Germany <sup>xvi</sup>	A	✓	✓	X	X	X
Great Britain <sup>xvii</sup>	A	✓	✓	X	X	X
Greece <sup>xviii</sup>	A	✓	✓	X	X	X
Hungary <sup>xix</sup>	A	✓	-		✓	X
Ireland <sup>xx</sup>	A	✓	✓	X	X	X
Kazakhstan <sup>xxi</sup>	B	-	-		✓	X
Kosovo <sup>xxii</sup>	-	✓	-	✓	✓	X
Kyrgyzstan <sup>xxiii</sup>	B			X	✓	X

NHRI	ICC/GANHRI ACCREDITATI ON	ENNHRI MEMBER	NO DISPUTE RESOLUTION	AGREEMENT-BASED RESOLUTION	DISPUTE	INVESTIGATIONS AND RECOMMENDATIONS	QUASI-JUDICIAL BODY
Latvia <sup>xxiv</sup>	A	✓	-			✓	X
Lithuania <sup>xxv</sup>	-	✓	-	✓ (mediation)		✓ (ombudsperson)	X
Luxembourg <sup>xxvi</sup>	A	✓	✓	X		X	X
Macedonia <sup>xxvii</sup>	B	✓		X		✓	X
Moldova <sup>xxviii</sup>	B	✓		✓ (‘amiable’ solutions)		✓	X
Montenegro <sup>xxix</sup>	B		-			✓	
Netherlands <sup>xxx</sup>	A	✓	-	X (but can refer to mediation)		✓	✓
Northern Ireland <sup>xxxi</sup>	A	✓	✓	X		X	X
Norway <sup>xxxii</sup>	B	✓	✓	X		X	X
Poland <sup>xxxiii</sup>	A	✓		X		✓ (ombudsperson)	X
Portugal <sup>xxxiv</sup>	A	✓				✓	

NHRI	ENNHRI MEMBER	ENNHRI MEMBER	NO DISPUTE RESOLUTION	AGREEMENT-BASED RESOLUTION	DISPUTE	INVESTIGATIONS AND RECOMMENDATION S	QUASI-JUDICIAL BODY
Romania <sup>xxxv</sup>	C	✓					
Russia <sup>xxxvi</sup>	A	-	-			✓	X
Scotland <sup>xxxvii</sup>	A	✓	✓	X		X	X
Serbia <sup>xxxviii</sup>	A	✓		-		✓	X
Slovakia <sup>xxxix</sup>	B	✓		✓ (as an equality body can assist with settlement or refer to mediation or conciliation)		✓	X
Slovenia <sup>xl</sup>	B	✓		✓		✓	X
Spain <sup>xli</sup>	A	✓		X		✓	X
Sweden <sup>xlii</sup>	B	✓		X		✓	X
Switzerland	C & C	-					X
Tajikistan <sup>xliii</sup>	B	-					
Turkey <sup>xliv</sup>	-	✓					

NHRI	ICC/GANHRI ACCREDITATI ON	ENNHRI MEMBER	NO DISPUTE RESOLUTION	AGREEMENT-BASED RESOLUTION	DISPUTE	INVESTIGATIONS AND RECOMMENDATIONS	QUASI-JUDICIAL BODY
Ukraine <sup>xlv</sup>	A	✓					X

The status listed here is drawn from the ICC/GANHRI website. Some of the details do not correspond to the status listed on the ENNHRI website.

ii Office of the People's Advocate, website: <http://www.avokatipopullit.gov.al/en> (last visited 3 January 2017).

iii Human Rights Defender of the Republic of Armenia, website: <http://www.pashtpan.am/> (last visited 3 January 2017).

iv Austrian Ombudsman Board, website: <http://volksanwaltschaft.gv.at/en/about-us> (last visited 2 January 2017)

v The Office of the Commissioner for Human Rights, website: <http://ombudsman.gov.az/az/> (last visited 3 January 2017).

vi Unia (the Interfederal Centre for Equal Opportunities), website: <http://unia.be/en> and the Federal Migration Centre, website: <http://www.myria.be/en/about-myria> (last visited 3 January 2017).

vii The Institution of Human Rights Ombudsman, website: <http://www.ombudsmen.gov.ba/Default.aspx?id=0&lang=EN> (last visited 3 January 2017).

viii The Ombudsman of the Republic of Bulgaria, website: <http://www.ombudsman.bg/> (last visited 3 January 2017).

ix Commission for Protection against Discrimination, website: <http://www.kzd-nondiscrimination.com/layout/index.php/za-nas> (last visited 2 February 2017)

x Office of the Ombudswoman of Croatia, website: <http://ombudsman.hr/hr/> (last visited 3 January 2017).

xi The Office for the Commissioner for Administration and Human Rights, website: [http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/index\\_gr/index\\_gr?OpenDocument&lang=el](http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/index_gr/index_gr?OpenDocument&lang=el) (last visited 2 February 2017)

xii Danish Institute for Human Rights, website: <http://www.humanrights.dk/about-us/national-human-rights-institutions> (last visited 2 February 2017)

xiii Human Rights Centre: <http://www.ihmisoikeuskeskus.fi/in-english/> and Parliamentary Ombudsman: [http://www.oikeusasiamies.fi/Resource.phx/ea/index.htm?locale=fi\\_FI](http://www.oikeusasiamies.fi/Resource.phx/ea/index.htm?locale=fi_FI) (last visited 30 December 2016).

xiv Commission Nationale Consultative des Droits de l'Homme, website: <http://www.cncdh.fr> (last visited 3 January 2017).

xv Office of the Public Defender, website: <http://www.ombudsman.ge/en/> (last visited 3 January 2017).

xvi German Institute for Human Rights, website: <http://www.institut-fuer-menschenrechte.de/startseite/> (last visited, 3 January 2017).

xvii Equality and Human Rights Commission, website: [www.equalityhumanrights.com](http://www.equalityhumanrights.com) (last visited 3 January 2017).

xviii Greek National Commission for Human Rights, website: <http://www.nchr.gr/> (last visited 3 January 2017).

xix Office of the Commissioner for Fundamental Rights, website: <http://www.ajbh.hu/> (last visited 3 January 2017).

xx Irish Equality and Human Rights Commission, website: <https://www.ihrec.ie/> (last visited 30 December 2016).

xxi Commissioner for Human Rights, website: <http://www.ombudsman.kz/> (last visited 3 January 2017).

xxii Ombudsperson Institution of Kosovo, website: <http://www.ombudspersonkosovo.org/> (last visited 3 January 2017).

xxiii Ombudsman of the Kyrgyz Republic, <http://www.ombudsman.kg/> (last visited 2 February 2017)

xxiv Ombudsman's Office of the Republic of Latvia, website: <http://www.tiesibsargs.lv/> (last visited 3 January 2017).

xxv The Seimas Ombudsman's Office of the Republic of Lithuania, website: <http://www.lrski.lt/en/> (last visited 3 January 2017).

xxvi Commission consultative des Droits de l'Homme du Grand-Duché de Luxembourg, website: <https://ccdh.public.lu/fr/index.html> (3 January 2017).

xxvii Ombudsman Institution of the Republic of Macedonia, website: <http://ombudsman.mk/en> (last visited 31 January 2017)

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- xxviii The Protector of Human Rights and Freedoms, website: <http://ombudsman.md/> (last visited 31 January 2017)
- xxix Office of the Ombudsman on Montenegro, <http://www.ombudsman.co.me/index.php?&display=1> (last visited 31 January 2017).
- xxx Netherlands Institute for Human Rights: <http://www.humanrightsinstitute.nl/> (last visited 31 January 2017).
- xxxi Northern Ireland Human Rights Commission, <http://www.nihrc.org/> (last visited 31 January 2017).
- xxxii The Norwegian Human Rights Institution: [http://www.nhri.no/?lang=no\\_NO](http://www.nhri.no/?lang=no_NO) (last visited 18 February 2017).
- xxxiii Commissioner for Human Rights, <https://www.rpo.gov.pl/en> (last visited 31 January 2017)
- xxxiv Provedor de Justica, <http://www.provedor-jus.pt/> (last visited 31 January 2017)
- xxxv Romanian Institute for Human Rights, website: <http://www.avp.ro/>
- xxxvi High Commissioner for Human Rights in the Russian Federation, website: <http://eng.ombudsmanrf.org/> (last visited 2 February 2017)
- xxxvii Scottish Human Rights Commission, website: [www.scottishhumanrights.com](http://www.scottishhumanrights.com) (last visited 31 January 2017).
- xxxviii Protector of Citizens, Ombudsman of Serbia, website: <http://www.ombudsman.org.rs/> (last visited 31 January 2017).
- xxxix Slovak National Centre for Human Rights, website: <http://www.snslp.sk/> (last visited January 2017).
- xl Republic of Slovenia, Human Rights Ombudsman, website: <http://www.varuh-rs.si/> (last visited January 2017)
- xli Defensor del Pueblo, <https://www.defensordelpueblo.es/en/> (last visited January 2017)
- xlii Equality Ombudsman, website: <http://www.do.se/other-languages/english-engelska/> (last visited 31 January 2017)
- xliii Ombudsman of the Republic of Tajikistan
- xliv National Human Rights Institution of Turkey, website: <http://www.tihk.gov.tr/en/> (last visited 2 February 2017)
- xlv Ukrainian Parliament Commissioner for Human Rights, <http://www.ombudsman.gov.ua/> (last visited 31 January 2017).



