

# Not independent enough?

---

Input on the Human Rights and Equality Commission  
Bill



January, 2016

**A B O U T P H R O M**

The **Platform of Human Rights Organisations in Malta (PHROM)** is Malta's network of NGOs working on human rights issues. It provides Member Organisations with a strong and united voice on areas of common concern, having a more effective impact on policy- and decision-making.

PHROM also provides capacity building on the advocacy tools and skills needed to undertake target-oriented human rights activities. PHROM is a member of the Anna Lindh Foundation and of the Fundamental Rights Platform of the EU Fundamental Rights Agency.

To date, PHROM's Member Organisations are:

aditus foundation	Gozo Youth Council	Richmond Foundation
African Media Association Malta	Inspire Foundation	SOS Malta
Amputees4Amputees	Integra Foundation	Troupe 18:45
Breaking Limits	Jesuit Refugee Service (Malta)	UpBeat Music House
Deaf People Association	Kunsill Studenti Universitarji	Victim Support Malta
Din l-Art Helwa	Libya Foundation for Rehabilitation	We Are
Drachma LGBTI	Malta Humanist Association	Why Not?
Foundation for Shelter & Support to Migrants	MGRM	Women's Rights Foundation
Fondazzjoni Mid-Dlam għad-Dawl	Migrant Women Association Malta	YMCA Homeless
Gender Liberation	Organisation for Friendship in Diversity	
Gozo NGO Association	PRISMS	

For more information on PHROM:

**Visit:** [www.humanrightsplatform.org.mt](http://www.humanrightsplatform.org.mt)

**Contact us:** +356 2010 6295  
[info@humanrightsplatform.org.mt](mailto:info@humanrightsplatform.org.mt)

**This document is drafted by the PHROM Secretariat and the views expressed herein do not necessarily represent the views of all PHROM's Member Organisations.**

## I N T R O D U C T I O N

Following our submissions to the Ministry of Social Dialogue, Consumer Affairs and Civil Liberties (MSDC) in February 2015 entitled ‘*Strengthening Human Rights through Dialogue*’<sup>1</sup>, the Platform of Human Rights Organisations in Malta (PHROM) welcomes the opportunity to provide comments on a Bill published on 10 December 2015<sup>2</sup>. PHROM’s Head of Secretariat, as well as representatives of various Member Organisations, attended the Bill’s launch and participated in the discussion that followed.

The Bill’s stated aims are:

*“to provide for the establishment of a Human Rights and Equality Commission responsible for the promotion and protection of human rights including the right to equal treatment in Malta, and to make provision with respect to matters ancillary thereto or connected therewith.”*

Summarily, the Bill proposes to establish a **National Human Rights Institution (NHRI)** for Malta. According to the Bill and related presentations, the **Human Rights and Equality Commission (HREC)** will comply with the Paris Principles in terms of its establishment, composition, financing and activities<sup>3</sup>.

At the outset, we wish to underline our extremely positive response to the proposal of establishing an NHRI for Malta. Being one of the few EU Member States without an NHRI, Malta has long-suffered from not having a truly independent body with the primary mission of elevating the status of human rights on the national social, legal, political and economic agenda.

---

<sup>1</sup>Available at <http://www.humanrightsplatform.org/mt/white-paper-consultation-towards-the-establishment-for-the-human-rights-and-equality-commission/>.

<sup>2</sup>See [https://socialdialogue.gov.mt/en/Public\\_Consultations/MSDC/Pages/Consultations/HumanRights.aspx](https://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Pages/Consultations/HumanRights.aspx).

<sup>3</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

Whilst related institutions - such as the National Commission for the Promotion of Equality (NCPE), the Office of the Ombudsman and the National Commission Persons with Disability (KNPD) - have been central in partially fulfilling this important role, the individual and joint remits, powers and activities are limited in scope and effectiveness.

Our civil society perspective, and that of our Member Organisations as captured in our 2014 Annual Human Rights Report entitled 'Looking Beyond the Rainbow'<sup>4</sup>, is that the core human rights obligations of the State of **respect, protection and fulfilment** need to be mainstreamed throughout the public sector in order to ensure the adoption of legislation, policy and practices that do not merely passively steer clear of human rights violations, but that positively and actively disseminate human rights principles. In this regard, PHROM views the HREC as a most valuable partner in its national advocacy efforts.

These comments are largely based on the general principles highlighted in the January 2015 paper, clearly updated to reflect the Bill's details. Once again, on behalf of our Member Organisations, we thank MSDC for giving us the opportunity to participate in the establishment of this important institution and warmly congratulate it for the initiative.

As Malta's coalition of human rights organisations, PHROM is looking forward to acting as an engagement focal point with the HREC.

Whilst PHROM's overall feedback is positive, a number of issues raise serious concerns that affect the core of the HREC. These issues are flagged as **Red Lines** for PHROM's eventual engagement with the HREC.

By way of summary, all **Recommendations** and **Red Lines** are gathered in the document's next section.

---

<sup>4</sup> Available at <http://www.humanrightsplatform.org.mt/phrom-launches-looking-beyond-the-rainbow-annual-human-rights-report-2014/>.

## R E C O M M E N D A T I O N S & R E D L I N E S

1. PHROM strongly urges the inclusion of the Charter in the 'human rights' definition.
2. PHROM requests a clarification on which instruments are referred to in the 'human rights' definition, given its limited scope.
3. PHROM recommends mainstreaming the term 'person' in order for it to be truly comprehensive.
4. PHROM recommends further clarification on the status of Commission members, hoping that attempts will be made to stipulate provisions ensuring the Commission's smooth and efficient operation.
5. PHROM recommends the inclusion of specific eligibility criteria for Commission members, and elevated criteria for the Commissioner. Such criteria should include, as a minimum: a University degree, a clear commitment to human rights (possibly to be confirmed upon oath of office), and professional experience working in the human rights sector for a minimum number of years.
6. PHROM believes that the stipulation of minimum requirements for the position of Commissioner is a Red Line.
7. PHROM believes that the cumulative effect of the various appointment procedures of Commission members is in clear violation of the principle of independence, and indicates this as a Red Line.
8. PHROM recommends the introduction of one or more systems of introducing non-political elements into the discussion and appointment of Commission members, or as a minimum of the Commissioner.
9. PHROM recommends the introduction of on-going membership or active involvement in political activities as a bar to eligibility to Commission membership.
10. Clearly, conformity with the Constitution is deemed to be a Red Line.
11. PHROM recommends termination/resignation procedures that mirror appointment procedures.
12. Procedures for appointment of temporary members should not include the President.
13. Furthermore, PHROM recommends a clarification of the vague termination ground "if such member is unfit to continue in office..."

14. PHROM recommends inclusion of an obligation to declare conflict of interest situations as soon as the Commission member becomes aware, or could become aware of the situation.
15. PHROM recommends removal of all references to the President from Section 6, to be replaced with an appropriate alternative, such as the Commissioner or the Speaker of the House.
16. PHROM recommends that the Executive Director be formally authorised/required to attend meetings of the Commission, with no voting rights.
17. PHROM recommends: harmonisation of the provisions requiring the Commission to establish a formal complaints mechanism; harmonisation of the definition of "any person"; removal of the requirement for the Commission to provide support services; removal of the requirement to ensure legal or practical harmonisation; broadening of the nature of organisations with which the Commission will liaise.
18. PHROM believes that a minimum set of procedural safeguards in conformity with human rights law is a Red Line
19. PHROM recommends clearer explanation of the different stages within the complaints mechanism, specifying options, consequences, rights and obligations at each stage.
20. PHROM urges a clarification of "other adequate means of redress is or are available to the complaint under any other law".
21. PHROM recommends a clearer relationship between the Commission, the Law Courts and KNPD.
22. PHRM strongly urges the inclusion of procedural guarantees within the Commission's complaints mechanism.
23. PHROM recommends removing two matters from the list of issues excluded from Commission investigations: paragraphs 4 and 6.
24. PHROM recommends widening the definition of public entities falling within the scope of the Commission's complaints mechanism.
25. PHROM recommends including the possibility of the Commission delivering recommendations having a reparatory effect, with due consideration to the impact of such a decision on the necessity for improved procedural guarantees.
26. PHROM recommends provision of legal aid for persons interested in filing complaints.
27. PHROM recommends adding the power to impose interim measures where the Commission finds strong reason to believe an infringement would occur in the absence of such a measure.

28. PHROM recommends strengthening the procedural guarantees in the context of the Commission's imposition of a fine for failure to respect an interim measure.
29. PHROM recommends revising the appropriate forum for appeals against Commission decisions and recommends against imposing procedural rules onto a judicial entity the procedure of which is otherwise and elsewhere regulated.
30. PHROM believes that the independence and professional status of the Executive Director constitutes a red line.
31. The appointment of an Executive Director should not be optional, but should instead be given utmost priority. It ought to be the Commission's first task. In view of the importance of this role the Bill should include several detailed provisions detailing procedures for removal, resignation and vacancy,
32. PHROM recommends the inclusion of an indicative list of Executive Director tasks, as well as of minimum requirements for eligibility to the position.
33. PHROM advises against the possibility of the Executive Director and officers of the Commission being seconded public officers. If truly unavoidable, the Bill should include a phase-out of such a scheme for it to move towards complete independence within an obligatory timeframe.
34. PHROM requests clarity on the subparagraph (8), and urges the removal of any recruitment possibility occurring outside recruitment procedures conducted in good faith and in accordance with relevant legislation.
35. PHROM requests clarity on this paragraph.
36. PHROM requests clarity on this paragraph, yet also recommends that the Commission be enabled to seek additional funding sources as long as the minimum required for it to conduct its core mandate activities is in no way dependent, or made to be dependent on, such sources.
37. PHROM recommends indicating the House of Representatives as being the entity responsible to receive and review the Commission's annual statement of accounts.
38. PHROM believes that the possibility of the House of Representatives to in any way regulate the Commission's work is an unacceptable Government intrusion into the Commission's work, and considers it a Red Line.

# HUMAN RIGHTS AND EQUALITY COMMISSION BILL

## Section 2 - Interpretation

“*human rights*” - as the PHROM Head of Secretariat noted during the Bill's launch on 10 December 2015 this definition - and consequently the HREC's substantive scope - does not explicitly include the **EU Charter of Fundamental Rights**<sup>5</sup>. PHROM believes that the Charter is of crucial importance for a comprehensive inclusion of human rights in Malta, for various reasons.

The Charter is legally-binding on Malta as an EU Member State, having the same legal force as the EU Treaties. As such it carries considerable legal weight and can be invoked in national courts. Whilst it is true that Article 51 ('Field of application') specifies that the Charter's scope is limited to those instances when Member States are implementing Union law, jurisprudence of the Court of Justice of the European Union has consistently adopted an extremely broad approach to this term, echoing a pre-Charter approach to human rights within the EU legal and policy framework. To the extent that EU law does in fact pervade so many aspects of life, we are surprised to note this positive exclusion of the EU's foremost human rights instrument;

The EU Charter is currently nowhere visible in Malta's human rights framework. It is nowhere referred to in jurisprudence, debates in the House of Representatives, media reports and other key areas. We are concerned at this absence, since whilst the Charter's legal nature requires national legislation to conform with its provisions there seems to be no attempt (or intention) at Ministry, Attorney General or Parliament levels to vet proposed legislation and ensure compliance;

The Charter includes a far broader range of human rights than the European Convention of Human Rights, incorporating innovative and powerful elements such as the notion of human dignity (Article 1), the protection of personal data (Article 8),

---

<sup>5</sup> [http://ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm).

the right to education (Article 14), the right to conduct a business (Article 16), the right to asylum (Article 18), rights of the child, the elderly and of persons with disabilities (Articles 24 to 26) and the right to good administration (Article 41). Positively excluding these rights, and so many others, from the HREC's scope would be a terrible loss and a missed opportunity;

It is also noted that the second limb of this definition ("*and those fundamental rights and freedoms enshrined in other international human rights treaties...*") can actually be interpreted as including the EU Charter since it does fulfil all the criteria listed in this limb.

**PHROM strongly urges the inclusion of the Charter in the 'human rights' definition.**

"*human rights*" - the definition's second limb refers to international human rights treaties "*ratified by Malta in so far as they are enforceable by any person according to, and as part of, the Law of Malta*". Beyond the comments made above regarding the possible inclusion of the EU Charter within this second limb, we are not clear as to which texts this criteria would actually apply to. Malta's relationship with international law is a dualist one, preventing international instruments from being enforceable in the manner prescribed in this definition. In fact, none of the United Nations core human rights treaties are directly enforceable in Maltese courts.

**PHROM requests a clarification on which instruments are referred to in the 'human rights' definition, given its limited scope.**

"*person*" - the current definition clashes with other definitions of the same term under Maltese law, that include natural and corporate persons such as companies and other entities.

**PHROM recommends mainstreaming the term 'person' in order for it to be truly comprehensive.**

## Section 4 - Appointment and Composition, Remuneration of the Commissioner and other members of the Commission

On a general note, PHROM believes the Bill is unclear as to the actual status of the Commission and its members. The Bill does not specify if the members are to be part- or full-time members, or whether they are merely sitting on the Commission by virtue of an appointment and related honoraria. The Bill fails to clarify whether Commission members would be entitled to hold other employment/consultancy positions in parallel to the Commission.

Also, in relation to the complaints mechanism, the Bill is not clear as to how the Commission members will be involved in this mechanism. Will all members discuss and decide on all applications, including those members who do not possess the necessary skills and qualifications, or will a select group of expert members be established in order to investigate complaints?

**PHROM recommends further clarification on the status of Commission members, hoping that attempts will be made to stipulate provisions ensuring the Commission's smooth and efficient operation.**

In PHROM's view, Section 4 raises a number of extremely serious concerns that, if ignored, could result in the HREC failing to conform to the Paris Principles and also - probably more importantly - irreparably damaging Malta's human rights framework.

The Bill is extremely poor on the **personal, educational and professional qualifications** required for a person to be eligible for consideration as a Commission member and Chairperson. Section 4 merely states that such persons should be "*suited to deal with issues of human rights and equality...*", and Section 5 lists the regular disqualification criteria (e.g. member of the House of Representatives, previous conviction, etc.). PHROM believes in the most professional approach to human rights activities, in view not only of the extremely complex nature of such work but also of the HREC's national-level importance.

Clearly, whilst various Commission roles will require varying areas of expertise, such a consideration should not lower the Commission's overall professional standards.

**PHROM recommends the inclusion of specific eligibility criteria for Commission members, and elevated criteria for the Commissioner. Such criteria should include, as a minimum: a University degree, a clear commitment to human rights (possibly to be confirmed upon oath of office), and professional experience working in the human rights sector for a minimum number of years.**

**PHROM believes that the stipulation of minimum requirements for the position of Commissioner is a Red Line.**

The current appointment procedure leans heavily in favour of Government, with the consequence that there is a high risk of a Commission that lacks true independence and impartiality:

1. the Commission member who is the KNPD chairperson is appointed by the Prime-Minister, in terms of relevant legislation;
2. the other Commission members, excluding the Commissioner (if excluded the KNPD member, between five to eleven members), are to be appointed "by the President acting in accordance with a resolution of the House of Representatives". This effectively means that Government, having a majority of seats and votes in the House of Representatives, will appoint the Commission.

**PHROM believes that the cumulative effect of the various appointment procedures of Commission members is in clear violation of the principle of independence, and indicates this as a Red Line.**

Overall, PHROM notes that the Commission's composition procedures are essentially dominated by political entities, namely two political parties in the House of Representatives. The procedures do not envisage any form of **mandatory external, independent and non-political element**, whether in the form of nomination, questioning, commentary, veto or any other other.

PHROM fears that these procedures could result in Commission members being appointed either due to their affiliation or support of Government, or by way of a negotiating game between the two political parties voting on the necessary resolutions of the House. PHROM believes this to not be a mere risk, but a probably that ought to be avoided at all costs.

**PHROM recommends the introduction of one or more systems of introducing non-political elements into the discussion and appointment of Commission members, or as a minimum of the Commissioner.**

**PHROM recommends the introduction of on-going membership or active involvement in political activities as a bar to eligibility to Commission membership.**

## **Section 5 - Term of Office**

PHROM appreciates the legislator's intentions of improving the quality of the Commission members' independence, yet fears that various provisions here are misconstrued.

Subsection (2) stipulates procedures for the termination of office of Commission members, granting the President the power to act on his/her own discretion once any of the termination criteria are triggered. Subsection (3) regulates the resignation of Commission members, stipulating that a mere notice in writing to the President would constitute such resignation. Subsection (6) regulates procedures for appointment of temporary Commission members.

In the first instance, PHROM fails to understand how officers of Parliament, which is how Commission members are described in Section 4(1), can be removed by any entity other than that appointing them.

Secondly, an Act of Parliament does not have the legal authority to grant any authority, function or role to a Constitutional office such as is the **Office of the President**.

Thirdly, the instances where Malta's President is authorised to act on his/her own discretion are strictly regulated by the Constitution and limited to extremely exception circumstances, in-keeping with the position and role of Malta's President of the Republic.

Fourthly, the procedure for appointment of temporary members should not include a Presidential role, for the afore-mentioned reasons.

Finally, PHROM questions the logic of having Parliament-appointed Commission members presenting resignation letters to the President, instead of to the House of Representatives.

In light of the above, it seems that subsection (2) would be, as a minimum, in breach of Malta's Constitution.

**Clearly, conformity with the Constitution is deemed to be a Red Line.**

**PHROM recommends termination/resignation procedures that mirror appointment procedures.**

**Procedures for appointment of temporary members should not include the President.**

**Furthermore, PHROM recommends a clarification of the vague termination ground "if such member is unfit to continue in office..."**

## **Section 6 - Conflict of interest**

This section requires Commission members in a conflict of interest situation to declare such conflict "*at the first meeting of the Commission.*" In view of the importance of the principle of independence of the HREC, and of all Commission members, PHROM believes all conflict of interest situations should be declared immediately.

As above-mentioned, the involvement of the President in these affairs is misplaced since Commission members are officers of Parliament.

**PHROM recommends inclusion of an obligation to declare conflict of interest situations as soon as the Commission member becomes aware, or could become aware of the situation.**

**PHROM recommends removal of all references to the President from Section 6, to be replaced with an appropriate alternative, such as the Commissioner or the Speaker of the House.**

### **Provisions with respect to proceedings of the Commission**

**PHROM recommends that the Executive Director be formally authorised/required to attend meetings of the Commission, with no voting rights.**

### **Functions of the Commission**

PHROM welcomes the comprehensive list of tasks to be fulfilled by the Commission. It is clearly an ambitious list that will require strategic short-, mid- and long-term planning by the Commission. Importantly, effective implementation of these tasks will require a significant budget.

In relation to specific tasks, PHROM notes that the following:

1. distinctions between points (iii) and (iv) are not too clear, and require harmonisation for the sake of clarity;
2. the definition of “any person” in point (iii) conflicts with the definition in Section 2 actually incorporating PHROM’s above-mentioned observation;
3. point (vi), requiring the Commission to “provide independent assistance...to persons who are victims of human rights...” does not clarify what form of

assistance it meant to be provided. Is it legal, psycho-social, administrative, medical, psychological...? PHROM questions whether it ought to be the role of the Commission to actually provide such community services;

4. point (viii) requires the Commission to “ensure the harmonisation of national legislation, regulations and practices with international human rights instruments” when this duty pertains clearly and exclusively to the legislative and executive branches of Government respectively. The Commission does not have the legal authority to create, amend or revoke legislation or to regulate Government practices. Monitoring for and promoting such harmonisation are more appropriate Commission functions;
5. the functions mentioned in points (ix) and (x) should not be limited to organisations supporting the “particularly vulnerable”.

**PHROM recommends: harmonisation of the provisions requiring the Commission to establish a formal complaints mechanism; harmonisation of the definition of “any person”; removal of the requirement for the Commission to provide support services; removal of the requirement to ensure legal or practical harmonisation; broadening of the nature of organisations with which the Commission will liaise.**

## **Powers of the Commission**

PHROM welcomes the broad range of powers granted to the Commission.

### **Complaints, Refusal to Investigate...**

PHROM is happy to see a reform of Malta's system for complaints against discriminatory practices and human rights violations. Current procedures are fragmented in procedure and substance, limiting their accessibility for most persons, especially the most vulnerable. Specific elements of positive interest to PHROM are the following:

- straightforward accessibility procedure (in writing or orally);

- *locus standi* to associations and other legal persons;
- absence of victim status requirement;
- power to enter premises and access documentation/information.

PHROM notes, however, that there is lack of clarity between admissibility and other, more substantive, stages of the complaints mechanism, namely in subsection 5 and following sections (including 'Refusal to Investigate').

PHROM also notes an unclear relationship between the Commission's complaints procedure and the various legal remedies available before the **Law Courts**, including the Constitutional application. Whilst, on the one hand, it seems that the Commission will seek to provide a speedy, accessible and cheaper remedy than that offered by the Law Courts, the Bill is unclear about a number of important elements.

The Commission may refuse to investigate a complaint if "*other adequate means of redress is or are available to the complaint under any other law*". Given the availability, at least in theory, of human rights legal remedies before the Law Courts, PHROM is unclear how the HREC will interpret this provision as to whether or not to accept to investigate. Also, does this above-quoted clause empower the HREC to assess the adequacy of other means of redress, such as those before the Law Courts, by looking at elements such as their effectiveness, speed, cost, legal aid provisions, remedies offered, etc.?

What will be made of **conflicting interpretations** of the same human rights provisions (e.g. in the Constitution) by different entities, such as the Commission and the Constitutional Court?

Importantly, the **procedural guarantees** enshrined in the Bill are far from appropriate and do not conform to fundamental principles of natural justice and procedural fairness<sup>6</sup>. In this regard, PHROM echoes the concerns raised by the Office of the

---

<sup>6</sup> See for example the way the Commission receives arguments and counter-arguments from applicants and entities under investigation. Also, the possibility of the Commission imposing fines highlights the urgent need for procedural fairness.

Ombudsman in its submissions on the White Paper preceding the Bill<sup>7</sup>, and stresses that the Bill need to be clear about the HREC's actual status and its role within the broader system of remedies against human rights violations.

The **right to an effective remedy** is clearly part of Maltese and European human rights law, with an increasingly large area of scope. PHROM further notes that insofar as the Commission will be implementing, directly or indirectly, the anti-discrimination provisions contained in various EU directives, its own proceedings will be governed by the right to good governance and other procedural rights stipulated in the Charter.

**PHROM believes that a minimum set of procedural safeguards in conformity with human rights law is a Red Line**

PHROM is also unclear as to the relationship between the Commission and disability issues/complaints, including KNPD and the latter's own complaints mechanism. Is the relationship one of equal status, primacy, competing jurisdiction...?

The Schedule lists '**privileged**' matters, those automatically exempt from Commission investigations, and includes matters affecting internal or external security, inter-state relations, extradition-related affairs, judicial or a selection of quasi-judicial matters, the mercy prerogative and criminal investigations. PHROM has extremely serious concerns with two of these excluded matters, namely judicial proceedings and Police criminal investigations.

It is the experience of several of our Member Organisations, that human rights violations including violations of the principle of equality, occur within the context of these two excluded subject-matters. These are experiences often recounted by society's most excluded individuals (drug abusers, migrants, children and youth, persons with disabilities, transgender persons, sex offenders, etc.).

Furthermore, the EU Commission is keen bring judicial and police activities within the definition of 'services' for the purposes of EU anti-discrimination legislation<sup>8</sup>, also in

---

<sup>7</sup> <http://www.ombudsman.org.mt/wp-content/uploads/2014/01/The-setting-up-of-a-National-Human-Rights-Institution.pdf> .

<sup>8</sup> See for example, [http://ec.europa.eu/services\\_general\\_interest/interest\\_en.htm](http://ec.europa.eu/services_general_interest/interest_en.htm).

order to ensure oversight and access to effective remedies in situations of alleged violations.

In the section 'Finding and termination of a human rights infringement', it is not advisable to include an exhaustive list of entities falling within this section's scope, as is now contained in subparagraph (1). This approach might be exclude other public entities, present or future, not falling within the limitations of the proposed list. Furthermore, PHROM queries why recommendations having a reparatory effect are not included in the possible recommendations, limiting the options to prevention or cessation (subparagraph (1)).

Finally PHROM notes the absence of provision of **legal aid** for persons wishing to file a complaint before the Commission. Since the Commission will be receiving complaints of alleged human rights, being a complex area of law requiring in-depth argumentation, references to national/regional/international jurisprudence, evidence collection and other technical elements, legal assistance is central for the Commission's procedure to be effectively accessible - especially for vulnerable individuals.

**PHROM recommends clearer explanation of the different stages within the complaints mechanism, specifying options, consequences, rights and obligations at each stage.**

**PHROM urges a clarification of "other adequate means of redress is or are available to the complaint under any other law".**

**PHROM recommends a clearer relationship between the Commission, the Law Courts and KNPD.**

**PHRM strongly urges the inclusion of procedural guarantees within the Commission's complaints mechanism.**

**PHROM recommends removing two matters from the list of issues excluded from Commission investigations: paragraphs 4 and 6.**

**PHROM recommends widening the definition of public entities falling within the scope of the Commission's complaints mechanism.**

**PHROM recommends including the possibility of the Commission delivering recommendations having a reparatory effect, with due consideration to the impact of such a decision on the necessity for improved procedural guarantees.**

**PHROM recommends provision of legal aid for persons interested in filing complaints.**

## **Interim Measures**

The clause on interim measures is limited to those instances where the Commission finds "*a prima facie finding of an infringement*", whilst it is the experience of many of our Member Organisations that interim measures are most useful in situations prior to an actual infringement, highlighting their preventative strength.

Furthermore, the procedural guarantees preceding the imposition of a penalty for failure to respect an interim measures fall short of required standards, since these are limited to "*the opportunity of being heard*".

**PHROM recommends adding the power to impose interim measures where the Commission finds strong reason to believe an infringement would occur in the absence of such a measure.**

**PHROM recommends strengthening the procedural guarantees in the context of the Commission's imposition of a fine for failure to respect an interim measure.**

## **Right of appeal**

PHROM welcomes the possibility of any person to file an appeal against decisions taken by the Commission as this right enhances procedural safety and ensures judicial oversight of the Commission's workings. However, PHROM questions whether

the Court of Appeal in its Superior Jurisdiction is the most appropriate forum for such appeals, instead of lower and more accessible courts.

Furthermore, PHROM questions the Bill's authority and fairness in imposing procedural rules on the appellate Court, in view of competing and earlier applications before this Court.

**PHROM recommends revising the appropriate forum for appeals against Commission decisions and recommends against imposing procedural rules onto a judicial entity the procedure of which is otherwise and elsewhere regulated.**

### **Executive Director, Officers of the Commission**

The Bill envisages the (mere) possibility of the Commission to appoint an Executive Director, with the added possibility of the Executive Director being a public officer seconded from Government. The Bill does not describe the role, functions and powers of the Executive Director.

In PHROM's experiences with other similar entities, the role of the Executive Director is not a mere administrative one but extends to important aspects such as public appearances, external relations, participation at events, internal management, policy issues, etc. Furthermore, in the interests of HREC independence, including its perceived independence, it is not advisable for the Executive Director to be a seconded public officer.

**PHROM believes that the independence and professional status of the Executive Director constitutes a red line.**

On the latter point, PHROM also has serious reservations about the possibility of Commission staff being seconded public officers. Whilst we understand the practical and financial advantages to this approach, we strongly caution against a Commission staffed by officers whose primary allegiance and long-term financial dependence is associated with Government. Such a situation would render the

Commission extremely vulnerable to on-going conflict of interest situations that could cripple its operations and effectiveness.

Subparagraph (8) also speaks of the possibility of the Commission 'offering' permanent employment to such seconded public officers. PHROM interprets this clause as actually referring to employment offers presented following the implementation of public, transparent, accessible and non-discriminatory recruitment procedures. PHROM cautions against the 'offering' of any form of employment outside the parameters of strict recruitment procedures.

**The appointment of an Executive Director should not be optional, but should instead be given utmost priority. It ought to be the Commission's first task. In view of the importance of this role the Bill should include several detailed provisions detailing procedures for removal, resignation and vacancy,**

**PHROM recommends the inclusion of an indicative list of Executive Director tasks, as well as of minimum requirements for eligibility to the position.**

**PHROM advises against the possibility of the Executive Director and officers of the Commission being seconded public officers. If truly unavoidable, the Bill should include a phase-out of such a scheme for it to move towards complete independence within an obligatory timeframe.**

**PHROM requests clarity on the subparagraph (8), and urges the removal of any recruitment possibility occurring outside recruitment procedures conducted in good faith and in accordance with relevant legislation.**

## **Experts**

PHROM notes a possible error in this paragraph, in its reference to the Ombudsman.

**PHROM requests clarity on this paragraph.**

## Financial Provisions

PHROM welcomes the stipulation that Commission expenses are to be a charge on the Consolidated Fund, as also that these will be established in the context of a **financial plan** approved by the House of Representatives each year. It is hoped that the financial plan will be designed so as to enable the Commission to achieve its goals in an efficient, effective and timely manner.

PHROM is however unclear whether the relevant clauses limit the Commission's access to financial resources to the financial plan approved by the House of Representatives, or whether this financial plan is only obligatory in relation to the minimum amount required by the Commission. Put otherwise, PHROM queries whether the Commission is authorised to seek alternative sources of funding for its operations, clearly as long as its core activities are in no way made to be dependent on such alternative funding sources.

In this regard, PHROM believes that the Commission should be enabled and encouraged to seek sources of funding additional to, and not in replacement of, the financial plan approved by the House of Representatives. This would allow the Commission to enter into project partnerships with entities such as other NHRIs, NGOs, government entities, United Nations organs, academic institutions, etc.

Finally, PHROM questions why the Commission is to present its annual statement of accounts to the Minister instead of to the body to which it is answerable, i.e. the House of Representatives. This is also logical with the fact that Commission finances are not ministerial finances, but funds allocated by the House of Representatives.

**PHROM requests clarity on this paragraph, yet also recommends that the Commission be enabled to seek additional funding sources as long as the minimum required for it to conduct its core mandate activities is in no way dependent, or made to be dependent on, such sources.**

**PHROM recommends indicating the House of Representatives as being the entity responsible to receive and review the Commission's annual statement of accounts.**

## **Rules for Commission's guidance**

The Bill's Part VI states that the House of Representatives may, by simple resolution, "*make rules for the better implementation of the Act, including but not limited to rules regulating procedures to be followed by the Commission...*" PHROM is keen to stress the fact that a simple resolution of the House of Representatives effectively means a Government resolution, in view of the Government's majority of seats and votes in Parliament.

**PHROM believes that the possibility of the House of Representatives to in any way regulate the Commission's work is an unacceptable Government intrusion into the Commission's work, and considers it a Red Line.**