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House of Representatives of the States General

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Establishment of the Netherlands Institute for Human Rights (Netherlands Institute for Human Rights Act)

EXPLANATORY MEMORANDUM

I. GENERAL

1. Introduction

Constant vigilance is required in order to maintain human rights, mutual respect and human dignity. How they are safeguarded and protected is dealt with in different ways at different times.[1] As historical achievements, fundamental rights, democracy and the rule of law represent an intangible value of great importance.[2] This is emphasised in many treaties and conventions, other documents and court judgments that together form the basis of the national and international legal order. For example, the Universal Declaration of Human Rights of 1948 states that 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.' The preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950 adds, among other things, that the 'Fundamental Freedoms which are the foundation of justice and peace in the world [...] are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights on which they depend'. Article 1 of the Charter of Fundamental Rights of the European Union provides that 'Human dignity is inviolable. It must be respected and protected.' Similarly, the human rights objectives laid down in the Charter of the United Nations (UN) still apply in full: 'to achieve international cooperation in solving problems of an economic, social, cultural, or

[1] First Equal Treatment lecture given by the Minister of Justice on 11 November 2009 to mark the 15th anniversary of the establishment of the Equal Treatment Commission.
[2] Cf. the report entitled 'Fundamental Rights in a Plural Society', Parliamentary Papers II, 29 614, no. 2, section 3.1.

humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'

Article 90 of the Constitution reflects the importance attached to international cooperation and the promotion of the international legal order by providing that it is the government's duty to promote the development of the international rule of law. Human rights form an essential part of this and have a knock-on effect in the national legal order.[3] In addition, the Constitution naturally has its own catalogue of fundamental rights, including the right to equal treatment, freedom of expression, freedom of religion and the right to respect for privacy. Safeguarding and enforcing these rights is one of the characteristics of a constitutional democracy. When it comes to respecting and disseminating human rights the Netherlands has a high reputation to maintain, both nationally and internationally.

The government attaches much importance to effective human rights protection in the Netherlands and abroad. It has been agreed internationally, within both the UN and the Council of Europe, that all member states should establish a national human rights institution. The Netherlands has supported the calls for such action.

The aim of this Bill is to establish a national human rights institution, to be known as the Netherlands Institute for Human Rights. The object of the Institute will be to protect human rights in the Netherlands and promote observance of such rights. The Institute will act as a crucial link between civil society organisations, national and international organisations. For example, it will play an important role in providing guidance on how the principle of human dignity should be implemented in practice. The Institute will thus become the guardian of human dignity.

In the Paris Principles the UN formulated a number of criteria for national human rights institutions and their establishment. If an institution is to be eligible for 'A' status, the national government must establish an institution that has the function of protecting human rights and promoting their observance. The human rights institution should therefore have a broad mandate that includes all human rights. It will therefore have responsibility for advising on legislation and regulations, draft legislation and policy, conducting inquiries and investigations, reporting and making recommendations. It will also encourage the ratification, implementation and observance of treaties, guidelines and recommendations. In addition, the

[3] As regards this effect, see, inter alia, Parliamentary Papers II 1007/08, 29 861, no. 19 (reply to the Visser motion).

Netherlands Institute will collaborate with national, European and international institutions and civil society organisations engaged in the protection of one or more human rights and increase awareness and knowledge of human rights through information, teaching and publicity.

Finally, the Institute will take over the present duties of the Equal Treatment Commission, namely investigating whether discrimination as referred to in the equal treatment legislation has taken or is taking place and publishing its findings on this. This will be the responsibility of a separate division of the Institute.

2. Background

As a result of the adoption of the UN Resolution of 20 December 1993 containing the Paris Principles[4] and by virtue of Recommendation No. R (97) 14 of the Committee of Ministers of the Council of Europe[5] the Dutch government has acknowledged the importance of having a human rights institution. Moreover, when it declared its candidacy for membership of the UN Human Rights Council in 2005 and 2006 the Netherlands gave various undertakings that it would establish a human rights institution. The pledge of 23 February 2007 given by the Netherlands in connection with the election for membership of the UN Human Rights Council made explicit mention of the establishment of a human rights institution. And, within the EU, the European Parliament urged the member states to establish a national human rights institution that would capable of acting, among other things, as an interlocutor for the EU Fundamental Rights Agency,[6] which was yet to be established at that time.

The establishment of a human rights institution has been discussed in the House of Representatives on various occasions in the past. As long ago as 2001, the Minister of Justice and the Minister of the Interior and Kingdom Relations at that time undertook to draft legislation regulating the establishment of a national human rights commission.[7] In the period from 2005 to 2007 a ‘consortium’ consisting of the National Ombudsman, the Data Protection

[4] Principles relating to the Status of National Institutions (The Paris Principles) adopted by General Assembly Resolution 48/134 of 20 December 1993, UN doc. A/RES/48/134, annex (see: http://www.un.org/documents/ga/res/48/a48r134.htm).
[5] Council of Europe, Committee of Ministers, Resolution (97) 11 on cooperation between national human rights institutions of member states and between them and the Council of Europe (adopted by the Committee of Ministers on 30 September 1997 at the 602nd meeting of the Ministers’ deputies (see https ://wcd.coe.int/ViewDocjsp?id=589291&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75).
[6] Resolution of the European Parliament on the promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency (2005/2007(INI), A6-0144/2005 of 26 May 2005 (see http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//TEXT+TA+P6-TA-2005-0208+0+DOC+XML+VO//NL).
[7] Parliamentary Papers II 2001/2002, 28 000 VI, no. 38.

Agency, the Equal Treatment Commission and the Netherlands Institute of Human Rights (SIM) published a number of reports on a possible blueprint for a human rights institution. In April 2007 the consortium presented its summary report to the Minister of the Interior and Kingdom Relations. The report recommended that a new institution should be established and that the existing human rights infrastructure should be maintained.

The government's reaction to the report was forwarded to the House of Representatives on 18 July 2008.[8] This also dealt with the Karimi, Koenders and Koser Kaya motion previously passed by the House of Representatives, in which the House had pressed for the establishment of a human rights institution with all due speed.[9] In its reaction the government proposed that the new institution should form part of the same organisation as the National Ombudsman. Following a parliamentary committee meeting held with members of the government on 2 and 18 December 2008, the House of Representatives asked the government to re-examine whether the duties of the new organisation could be assigned to existing institutions and organisations.[10] After further analysis the government proposed on 10 July 2009[11] that the Equal Treatment Commission should be merged with the new institution.

2.1. The Paris Principles

The government's letter of 18 July 2008[12] set out the basic conditions to be fulfilled by the organisation. An important condition was that it should meet international requirements.

The UN has formulated a number of criteria for the establishment of national human rights institutions, which have been included in the Paris Principles. If an institution is to be eligible for 'A' status (i.e. full participation in the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC)[13]), the national government must ensure that it has the function of protecting human rights and promoting their observance. The ICC was founded in 1993 by the national human rights institutions in order to coordinate their activities and ensure that they operate in conformity with the Paris Principles. For this purpose the ICC collaborates with organisations such as the Office of the High Commissioner for Human Rights and the UN Human Rights Council and exchanges

[8] Parliamentary Papers II 2007/2008, 31 200 VI, no. 75.

[9] Parliamentary Papers II 2006/2007, 30 800 V, no. 29.

[10] Parliamentary Papers II 2008/2009, 31 700 VII, no. 52.

[11] Parliamentary Papers II 2008/2009, 31 700 VII, no. 95.

[12] Parliamentary Papers II 2007/2008, 31 200 VI, no. 75.

[13] The ICC was founded in 1993 by the national human rights institutions in order to coordinate their activities.

information and organises meetings. The ICC also assesses whether the existing and new institutions comply with the Paris Principles.

The national institutions also meet in other contexts. For example, the Committee of Ministers has decided to hold regular meetings of national human rights institutions in the context of the Council of Europe. The aim of these meetings is to share ideas and information on the promotion and protection of human rights (both among themselves and with the human rights organs of the Council of Europe).

The main points of the Paris Principles are briefly set out in the box below.

A human rights institution:

- promotes and protects human rights within the international legal order;
- has as broad a mandate as possible, which covers all human rights.

A human rights institution is authorised:

- to advise, monitor and supervise;
- to promote the harmonisation of national legislation in keeping with international human rights instruments;
- to encourage ratification of international human rights instruments;
- to contribute to and advise on reports drawn up for international purposes;
- to cooperate with other institutions (for example at international level);
- to support and assist in the formulation of programmes for the teaching of, and research into, human rights;
- to publicise human rights and efforts to combat all forms of discrimination through information and education and by making use of all press organs.

A human rights institution may be authorised:

- to hear and consider complaints concerning individual situations;
- to provide support to victims of human rights violations.

In order to perform these duties the institution should:

- be independent;
- be established under public law;
- be expert;
- be able to determine its own activities;

- have guarantees of its independence, which should preferably be laid down by law, such as financial independence and independence in appointing and dismissing members and staff;
- have a diverse membership ('pluralism of membership');
- have access to all requisite data;
- maintain good contact with other organisations and institutions while preserving its independence.

The Paris Principles require that the institution should be independent (of government). It should be able to determine its priorities on the basis of a statutory mandate setting out its power to investigate human rights violations independently, free of government control, monitor observance of human rights, take positions and provide information to a broad public.

Despite the desired independence of the institution it cannot be completely separated from government. Unlike a non-governmental organisation its duties are defined by law. The legislator therefore plays a central role in determining the nature and scope of its mandate. In addition, the government allocates the budget and sets conditions for funding. The government can also play a role in appointing the members of the institution.

The Paris Principles also set out requirements for pluralism: the organisation must be such as to ensure the pluralist representation of the sectors of society involved in the protection and promotion of human rights. National governments should be free to choose the most suitable structure for the institution, provided that it meets the specified criteria and conditions.

When deciding whether to confer 'A' status, the UN checks whether the mandate of the national human rights institutions complies with the minimum requirements of the Paris Principles. 'A' status is generally conferred only after the new organisation has submitted its first annual report. After obtaining 'A' status in the present UN ranking of human rights institutions[14] the Netherlands can participate fully (i.e. with voting rights) in the UN Human Rights Council and the treaty monitoring committees and in the International Coordinating

[14] The organisations are ranked in four categories: A = compliant with the Paris Principles ('A (r)' is 'A' status accreditation subject to reservation), B = observer status, not fully compliant with the Paris Principles, C = not compliant with the Paris Principles.

Committee of National Institutions for the Protection and Promotion of Human Rights (ICC). Without an institution accredited with 'A' status, the Netherlands can at most participate as observer. At present the Equal Treatment Commission is accredited with ICC 'B' status on account of the limited scope of its mandate.

The government aims to obtain the 'A' status in the UN system. This is why the duties and powers of the new institution and its organisation and composition are described in such detail as to comply with the Paris Principles and its statutory basis is regulated.

3. The mandate, duties and structure of the new institution

3.1. Mandate

The Netherlands Institute for Human Rights is to be given a broad mandate. The Institute can promote the protection of all human rights in the Netherlands. Human rights are included in the Constitution as well as in treaties and directives. The Institute must be able to operate flexibly and set priorities in establishing a programme of work. This is why no definition of human rights is included in the Act.

The human rights that come within the Institute's sphere of competence include those contained in:

- the Constitution;
- the Universal Declaration of Human Rights;
- the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- the revised European Social Charter;
- the Charter of Fundamental Rights of the European Union;
- the International Covenant on Civil and Political Rights;
- the International Covenant on Economic, Social and Cultural Rights;
- the International Covenant on the Elimination of All Forms of Racial Discrimination;
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- the Convention on the Rights of the Child;
- the Convention on the Elimination of All Forms of Discrimination against Women;

- the Convention on the Rights of Persons with Disabilities.

The sphere of competence also includes soft law, such as the European Prison Rules and many declarations and recommendations of the Parliamentary Assembly of the Council of Europe, as well as UN Guidelines. This is not an exhaustive list. As already noted, the Institute can also deal with human rights included in other existing or future treaties, directives, guidelines, agreements and national (implementing) legislation.

As is also apparent from the human rights documents referred to above, the scope of the mandate includes both classic fundamental rights and social fundamental rights. The co-existence of these two categories of fundamental rights reflects the principle that under the rule of law the responsibilities of the state to guarantee the freedom of its citizens are twofold: its first duty is to refrain from (unwarranted) interference in the individual's enjoyment of human rights and its second is to use its best endeavours to create conditions that enable citizens to live freely. Basically, the former duty is guaranteed by the classic fundamental rights and the latter by social fundamental rights. However, the distinction between the two is not always clear as some fundamental rights such as the freedom of education have both classic and social elements. Moreover, the state may also have a duty to take positive action to ensure the enjoyment of classic human rights – a so-called positive obligation. And, as described in section 3.1, human rights also apply in every relationship with the state, and may sometimes also have a knock-on effect on relations among citizens.

Although its sphere of competence includes all human rights and violations of them the Institute will not concern itself with all rights to the same extent. It will be up to the Institute to decide on its work and activities and also therefore to set priorities. The Institute will also exercise the responsibility that it obtains under, for example, the Convention on the Rights of Persons with Disabilities and other conventions.

3.2. Statutory duties

The new Institute will have the following statutory duties:

- conducting investigations into the protection of human rights, including investigating matters relating to equal treatment and communicating its findings;
- reporting on and making recommendations about human rights;

- advising on Acts, Bills, orders in council, draft orders in council, ministerial orders and drafts of ministerial orders that relate directly or indirectly to human rights;
- providing information on and encouraging and coordinating education about human rights;
- encouraging research into the protection of human rights;
- cooperating on a systematic basis with civil society organisations and with national, European and other international institutions engaged in the protection of one or more human rights, for example by organising activities in partnership with civil society organisations;
- pressing for the ratification, implementation and observance of human rights treaties and for the withdrawal of reservations to such treaties;
- pressing for the implementation and observance of binding resolutions of international organisations on human rights;
- pressing for observance of European or international recommendations on human rights.

These duties are explained in the explanatory notes on the individual sections. The statutory duties currently assigned to the Equal Treatment Commission are to be transferred to the Institute for Human Rights. In its reaction[15] in 2008 to the report of the 'consortium' on the blueprint for a human rights institution, the government indicated that the Institute should not deal with individual complaints (other than those concerning a possible violation of the equal treatment legislation), but should instead refer complaints to the appropriate authorities. Examples would be the National Ombudsman and the Data Protection Agency, as well as lawyers or other legal advisers who could help in proceedings before the national courts or the European Court of Human Rights.

3.3. Duties in relation to other organisations

Dozens of organisations are concerned with human rights in the Netherlands. The National Ombudsman, the Equal Treatment Commission and the Data Protection Agency are also involved in promoting human rights in their own fields. Other organisations actively involved with human rights include Amnesty International, the Dutch Refugee Council, Movisie, E-Quality, the Dutch National Association Against Discrimination, the Dutch CEDAW Network,

[15] Parliamentary Papers II 2007/2008, 31 200 VII, no. 75.

the Johannes Wier Foundation for Health and Human Rights, Justitia et Pax, Aim for Human Rights, the Council for the Chronically Sick and Disabled and the Dutch Lawyers Committee for Human Rights. In addition, the Office of the National Rapporteur on Trafficking in Human Beings reports on human trafficking. The Human Rights Education Platform and the future House for Democracy and the Rule of Law play a role in human rights education. Also of great importance are the activities of the Netherlands Institute of Human Rights and of university experts, particularly those at the institutions that form part of the School of Human Rights Research.

Hitherto, each of these Dutch organisations has dealt with its own particular aspects of human rights and highlighted human rights issues from its own specific perspective. However, there is also a need for advice and opinions on and research into human rights issues and proposals both in general and in relation to one another. This is where the Institute can play a role of importance.

On behalf of the Minister of the Interior and Kingdom Relations the broad steering group for the national institute prepared an analysis in 2008 of how the duties of the new organisation should relate to those of other bodies in the human rights field in order to prevent overlapping.[16] The steering group concluded that if the new organisation were to have the minimum range of duties under the Paris Principles, it would still be of value and fill gaps in the present coverage of human rights, without duplicating the work of other organisations. The value of the Institute would be apparent in its role as:

- a recognisable, independent institution for human rights which can work with other organisations and institutions to develop a vision for the protection of human rights and how such rights and any tensions between them should be dealt with in the Netherlands and can advise, provide information and communicate on this both nationally and internationally;
- a body charged with providing authoritative and comprehensive opinions and reports on human rights issues, including those set out in generally binding regulations and policy documents;
- a general and easily accessible desk for answering all kinds of questions about human rights;

[16] Parliamentary Papers II 2008/2009, 31 700 VII, no. 95.

- a central information and contact point for Dutch, foreign and international organisations, including UN agencies, the Council of Europe and national human rights institutions of other states.

As the Institute will be relatively small in comparison with scale of its activities it will have to rely on the expertise available in other organisations. How this collaboration is arranged is up to the Institute itself. The Institute will seek to work closely with these organisations, but can also provide them with support.

Owing to the broad definition of responsibilities in the Paris Principles, some overlapping in the mandate of the different organisations is inevitable. However, this need not result in duplication of effort. The Institute can avoid such duplication by ensuring that it makes the correct policy choices in a policy or implementation plan and rules of procedure to be drawn up by it. These can set out in the division of responsibilities and procedures for the co-operation. In drawing up the policy or implementation plan and designing the collaboration, the Institute should naturally take account of its responsibilities under the Paris Principles, the European directives and, for example, the Convention on the Rights of Persons with Disabilities and of any responsibilities that it may obtain under other conventions.

3.4. Structure

The Paris Principles contain no directions about the structure of a national human rights institution. Various types of institution are therefore possible: commissions, ombudsmen and institutes. The type of human rights institution has no direct effect on whether or not it obtains 'A' status. The national context may determine that a given type of human rights institution is more suitable or more efficient for the protection of human rights.[17]

Of the eleven human rights institutions with 'A' status in the European Union, six are commissions, three are ombudsmen and two are institutes. In France, Luxembourg, Greece, Ireland, Northern Ireland and the United Kingdom the human rights institutions are

[17] European Union Agency for Fundamental Rights: National Human Rights Institutions in the EU Member States, *Strengthening the fundamental right architecture in the EU*, p. 12.

commissions. In Poland, Spain and Portugal the 'A' status has been conferred on ombudsmen. Denmark and Germany have opted for an institute.[18]

The structure chosen for the Netherlands Institute for Human Rights, as for the majority of European human rights institutions, is that of a commission. This means that the duties are conferred on the Institute as a whole. In other words, the Institute as a whole is responsible for the duties in the field of human rights and equal treatment. A division with special responsibility for conducting investigations will be established. It is up to the Institute itself to decide how the other duties should be divided among the different members and among the staff of the office. This means that some members may be concerned only with hearing complaints and some only with preparing advice and reports whereas others may be involved in both sets of activities.

Like the Equal Treatment Commission at present, the Institute will have a chair and two assistant chairs. The rules governing the legal status of the members of the Institute will provide (as do those of the Equal Treatment Commission at present) that the chair is responsible for dividing the responsibilities between the members and alternate members.

It is proposed that the Institute should have a minimum of nine and a maximum of twelve members. Alternate members may also be appointed. The Equal Treatment Commission presently has nine members. The Institute will be assisted in the performance of its duties by an expert and properly equipped office. This will enable the members of the Institute to confine themselves to broad policy issues, with the exception of the conduct of investigations where more direct involvement will be necessary. This is why section 9 provides that there will be a separate division for the conduct of investigations. This also ensures that this aspect of the work will always receive sufficient attention. It is up to the Institute itself to decide whether other divisions should be established and, if so, what their duties or mandate should be. The Institute should also take account of the requirements of the Paris Principles in relation to its internal organisation so that the members (and alternate members) meet regularly. It should be noted that the Equal Treatment Commission already fulfils these requirements.

[18] European Union Agency for Fundamental Rights: National Human Rights Institutions in the EU Member States, *Strengthening the fundamental right architecture in the EU*, p. 24.

3.5. Equal Treatment Commission

As already noted, the duties of the Equal Treatment Commission are to be assumed by the Institute for Human Rights. The Equal Treatment Act (chapter 2) provides for the establishment of an accessible and independent Equal Treatment Commission. The Equal Treatment Commission is an autonomous administrative authority and consists of nine members. It was set up in 1994 to give people who consider that they have been discriminated against a simple form of recourse to a separate government body responsible for supervising compliance with the legislation.[19] The Commission is responsible for investigating and assessing whether a particular act must be treated as discrimination prohibited by law. It also provides solicited and unsolicited advice on equal treatment. In addition, the Commission reports to international authorities in its capacity as a human rights institution with 'B' status accreditation.

The Equal Treatment Commission's present duties with regard to the investigation and assessment of equal treatment cases will pass in full to the Institute. The government attaches great importance to the exercise of these responsibilities. Under the European legislation (the equal treatment directives) the Equal Treatment Commission qualifies as a body that monitors equal treatment in a member state. In view of the conditions to be fulfilled by such a body, the equal treatment duties of the present Equal Treatment Commission should remain intact. These European conditions for an equal treatment body, such as its independence and the allocation of a budget, are also in keeping with the Paris Principles. A separate division will be established within the Institute for these purposes.

The government has decided that the Equal Treatment Commission should be merged with the newly established Institute for the following reasons. First, it considers that the principle of equality is not only an independent human right but also a key element of all other human rights. Respect for what is unique to the individual forms the core of and basis for the protection of human rights. This is borne out by the first articles of the Universal Declaration of Human Rights and the Charter of Fundamental Rights of the European Union. The prohibition of discrimination – i.e. acts that compromise the unique nature of individuals and thus violate their dignity – is the most direct expression of this. This prohibition therefore also protects freedoms such as freedom of religion and belief and physical (and also sexual)

[19] Parliamentary Papers II 1990/1991, 22 014, no. 3.

integrity. The prohibition of discrimination is therefore at once a very fundamental constitutional norm and a fundamental right that can be enforced only by means of a real capacity to comprehend the diversity in society. The transfer of the equal treatment duties of the Equal Treatment Commission to the new Institute will create synergy, thereby benefiting the horizontal and vertical effect of the rights concerned. While fundamental rights apply in any dealings between citizens and the state (vertical effect), they can also impact relations between citizens (horizontal effect). An example of horizontal effect is the application of the prohibition of discrimination on the grounds of sex to the relationship between employers and employees.

The activities to promote awareness of human rights and the right to equal treatment can be mutually reinforcing. Various activities such as the international reporting, education and information programmes, which are presently limited to the equal treatment legislation, can be expanded in the future to encompass other human rights, thereby creating a broader and more coherent picture.

The government also has a more practical reason for allowing the Equal Treatment Commission to be subsumed into the Institute for Human Rights, namely that it is in keeping with government policy not to expand the number of government bodies. Moreover, it has been seen in practice in other countries that the human rights institution and its equal treatment counterpart can be successfully integrated with each other. An example of this is the British Equality and Human Rights Commission.

4. Funding and administrative burden

4.1. Funding

The government wishes the establishment of the Institute to be arranged on a budget-neutral basis so that no extra demands are made on the public purse. The funding arrangements provide for various ministers to contribute to the costs by means of adjustments within their own budget. The Minister of Justice is currently responsible for the operating expenses of the Equal Treatment Commission. As it has been decided that the Commission should become part of the Institute, the Minister of Justice will also assume responsibility for administering the newly established organisation. The costs of setting up the Institute will be borne by the Minister of Justice. The basic criterion is that the new duties should be implemented on a sound and economical basis. The Institute’s total budget will consist of the budget of the Equal Treatment Commission plus 900,000 euros for the first three years of its existence.

From the fourth year onwards, the budget of the Equal Treatment Commission will be permanently increased by 600,000 euros.

Contributions to this funding will be made by the Minister of the Interior and Kingdom Relations, the Minister of Justice, the Minister of Education, Culture and Science and the Minister of Health, Welfare and Sport. For the first three years after the establishment of the Institute the Minister of Foreign Affairs, the Minister of Social Affairs and Employment and the Minister for Housing, Communities and Integration will each contribute 100,000 euros annually. An evaluation of the activities and functioning of the Institute will be carried out two years after its establishment (i.e. in its third year). Depending on the results, the government will decide on the funding requirements for the subsequent period and arrange for them to be met.

The maximum increase in the number of full-time equivalent (FTE) civil servants as a result of the establishment of the Institute is eight.

In keeping with the Paris Principles the Institute must also be able to manage its own funding by means of agreed allocations from the central government budget. The Institute is financed by central government. For this purpose the Institute must submit an annual budget that requires the approval of the Minister of Justice. The present Bill does not contain any provision about the budget: the funding is instead regulated in the annual Budget Acts. The Institute's budget will be shown in chapter 10 of the budget of the Ministry of Justice, in the section on autonomous administrative authorities and legal persons with statutory duties.

As the draft budget submitted by the Institute will be public it will be clear how much the Institute itself thinks its operations will cost in a subsequent year, based on its own information, expectations and experience. If the Institute's budget differs from its draft budget as shown in the budget of the Ministry of Justice, this will be stated in the explanatory memorandum to the Ministry's budget. In this way the legislator will be in a position to make a sound and informed decision on the budget.

4.2. Administrative burden

Although the Bill will increase the administrative burden of businesses and non-profit organisations (NPOs) as they have a duty to provide the Institute with information when this is needed for the performance of its duties (section 6 of the present Bill), the impact will be limited. This duty already exists under the Equal Treatment Act (section 19), but will now be more wide-ranging as the Institute will also have duties in respect of other human rights. As

investigations in the broad field of human rights are expected to focus mainly on government authorities, there will be only a limited increase in the administrative burden for businesses and non-profit organisations. It is expected and estimated that no more than 20 businesses and non-profit organisations will be asked to supply information as referred to in section 6 of the Bill in any given year. This represents an increase of 11,700 euros in the administrative burden. The Bill will not increase the administrative burden of citizens as the Institute will not have any role in handling individual complaints in the broad field of human rights.

4.3. Judicial workload

No increase in the judicial workload is expected.

4.4. Consequences for local and regional authorities

As the Bill does not impose any duties on local and regional authorities it has no consequences for them. After the Bill becomes law, however, local and regional authorities will be able to ask the Institute for advice. Similarly, the Institute will be able to advise local and regional authorities on its own initiative on generally binding regulations and policy. In addition, the Institute will be able to request information from local and regional authorities once it has initiated an investigation. Although the resulting burden on local and regional authorities is likely to remain small, this will depend to a large extent on how the Institute interprets its duties.

5. Relationship with other legislation

5.1. The Equal Treatment Act

The duties, powers and composition of the Equal Treatment Commission are presently regulated in chapter 2 of the Equal Treatment Act. To ensure the accessibility, clarity and systematic drafting of the legislation, it has been decided that everything concerning the Institute, including the present duties of the Equal Treatment Commission, should now be contained in a separate Act. As the future Institute will deal with more than just equal treatment issues, it is no longer logical for it to be regulated in the Equal Treatment Act. Chapter 2 (the Equal Treatment Commission) of the Equal Treatment Act will therefore be repealed. Once the present Bill becomes law the Equal Treatment Act will contain only the substantive provisions dealing with equal treatment. This Bill contains the provisions from the Equal Treatment Act that relate to the duties and powers of the Equal Treatment

Commission (chapter 2). These have been transposed unchanged as far as possible. The underlying orders too remain intact, save for a few necessary modifications.

5.2. Autonomous Administrative Authorities Framework Act

The Autonomous Administrative Authorities Framework Act will apply to the Institute as it will be an administrative authority of the central government that is invested with public authority and is not hierarchically subordinate to a Minister. As everyone has a statutory obligation to provide the information demanded by the Institute that may reasonably be considered necessary for the performance of its duties, save for exceptions, the Institute is deemed to be invested with public authority. Failure to comply with this obligation is a criminal offence under article 184 of the Criminal Code.

An autonomous administrative authority may be established only if the criterion in section 3 of the Autonomous Administrative Authorities Framework Act is fulfilled. The Institute is to be established to meet the need for independent opinions based on specific expertise (section 3 (a) of the Autonomous Administrative Authorities Framework Act). The Institute must be able to form an opinion on violations of human rights and the equal treatment legislation independently of government. This is required under the Paris Principles and also under the provisions of European law on equal treatment bodies.

The Ministers should possess certain powers in order to be able to exercise ministerial responsibility for the Institute as an autonomous administrative authority. These powers do not detract from the necessary independence of the Institute. The Minister is responsible only insofar as his powers extend. The scope of these powers takes account of the special nature of the Institute. The Institute must, after all, have the freedom, where necessary, to take measures against human rights violations for which a Minister can be held accountable. This is why an exception is made to sections 21 and 22 of the Autonomous Administrative Authorities Framework Act which define the power of the Minister to adopt policy rules and, as an ultimate remedy, to reverse decisions made by an administrative authority. An exception is also made to section 12 of that Act (the Minister’s power to suspend or dismiss members of the Institute by way of disciplinary punishment). Finally, the Bill provides that notwithstanding section 20 of the Administrative Authorities Framework Act the Institute may refuse to provide information to Ministers or to allow them to inspect case data and papers relating to the content and handling of current investigations. The Minister of Justice has

previously announced these exceptions in respect of the Equal Treatment Commission.[20] These exceptions are explained in more detail in the explanatory notes on individual sections. Annexe 3 to these explanatory notes lists which sections of the Administrative Authorities Framework Act do and do not apply.

5.3. Advisory Bodies Framework Act

As the Institute will have a statutory duty to provide advice, it constitutes an advisory body as referred to in section 1 (a) of the Advisory Bodies Framework Act. It follows that the Framework Act is applicable, with the exception of chapters 3 and 5 and section 28 as the provision of advice is not the primary duty of the Institute. Annexe 4 to this explanatory memorandum lists which sections of the Advisory Bodies Framework Act do and do not apply.

5.4. National Ombudsman Act

The present Bill does not result in any change in relation to the National Ombudsman Act. The Equal Treatment Commission had the possibility of conducting an investigation to determine whether the conduct of an administrative authority constituted discrimination. The Institute will function in the same way, as there will be a statutory procedure under administrative law that must first be completed in cases involving an investigation into discrimination. Once the Institute has disposed of a case the National Ombudsman's power to hear a complaint against an administrative authority for an infringement will revive. The Institute is not given any power to hear individual complaints in the broad field of human rights. It follows that the National Ombudsman is the appropriate authority to hear complaints about administrative authorities, even where they concern human rights.

5.5. Personal Data Protection Act

In its position paper on the advisory report of the Advisory Committee on Security and Privacy and the evaluation of the Personal Data Protection Act the government announced that when drafting the legislation for the Institute for Human Rights it would re-examine whether the description of the Data Protection Agency's remit to advise on legislation is worded sufficiently accurately.[21] The undersigned have considered in particular whether

[20] Parliamentary Papers II 2007/2008, 25 268, no. 60.
[21] Parliamentary Papers II 2009/2010, 31 051, no. 5, p. 26.

there is reason to amend section 51, subsection 2 of the Personal Data Protection Act in view of the wording of the Institute's advisory role. There does not appear to be any necessity for this. The choices that have been made in respect of the Institute's advisory role expressly leave open the possibility of drawing a certain parallel between the advice given by the Institute and that given by the Data Protection Agency on draft legislation. The two bodies can work together in order to ensure the consistency of their advice. It follows that the definition of the Data Protection Agency's role as legislative adviser need not be changed and that the formal description of its role remains unchanged, including the limitations on this role resulting from the system adopted in the Personal Data Protection Act.[22]

5.6. Relationship with international and European legislation

This Act implements Resolution A/RES/48/134 of the General Assembly of the United Nations of 20 December 1993 and Recommendation R (97) 14 of the Committee of Ministers of the Council of Europe of 30 September 1997. The present Bill has therefore been drafted by reference to the Paris Principles, which are an annexe to the UN Resolution. The minimum requirements set out in them have been adopted and amplified so that the Institute can obtain 'A' status. Under various European directives (Directive 2000/43/EC of the Council of the European Union of 29 June 2000, Directive 2004/113/EC of the Council of the European Union of 13 December 2004 and Directive 2006/54/EC of the European Parliament and the Council of the European Union of 5 July 2006) the member states have an obligation to create a body with responsibility for supervising the equal treatment legislation. The Netherlands has complied with this obligation by establishing the Equal Treatment Commission. This compliance will be continued in full once the Institute for Human Rights has been established, as this will assume all the duties of the Equal Treatment Commission.

6. Consultation

6.1. Manner of consultation and organisations consulted

The following organisations and institutions have been consulted:

- the Association of Netherlands Municipalities;

[22] Parliamentary Papers II 1997/1998, 25 892, no. 3, p. 178.

- the governing councils of Bonaire, St. Eustatius and Saba;
- the Advisory Board on Supervision of the Administrative Burden;
- the Council for the Judiciary;
- the Data Protection Agency;
- the National Ombudsman;
- the Netherlands Institute of Human Rights (SIM);[23]
- the Equal Treatment Commission;
- the Dutch Human Rights Consultative Body, consisting of Aim for Human Rights, Amnesty International, COC Netherlands, the Johannes Wier Foundation for Health and Human Rights, the Dutch Helsinki Committee, the Dutch Lawyers Committee for Human Rights, the Dutch CEDAW Network and YWCA Netherlands;
- the Human Rights Education Platform;
- E-Quality;
- Movisie;
- the Dutch National Association Against Discrimination, and
- the President of The Hague court of appeal.

In addition, the UN High Commissioner for Human Rights advised the Equal Treatment Commission informally and confidentially in mid-June 2010 on the Bill's compliance with the Paris Principles. The State of the Netherlands also requested the UN High Commissioner for Human Rights for advice at the end of August 2010.

Besides having the opportunity to comment in writing on the Bill, a large number of the organisations referred to above were present at a meeting organised by the Ministry of the Interior and Kingdom Relations and the Ministry of Justice, at which they were able to discuss their first impressions of the draft legislation. A 4-week online consultation procedure was organised to give other interested parties the opportunity to comment on the Bill. Seven online responses were received, namely from the Council for the Chronically Sick and Disabled, Vrijbit, the Civil Rights Protection Platform, the Johannes Wier Foundation for Health and Human Rights and three private individuals. The government would also like to acknowledge the contribution made by the students of the Vrije University Amsterdam to this

[23] The Netherlands Institute of Human Rights submitted its comments after consulting with experts from other departments of the School of Law of Utrecht University and of the School of Human Rights Research, to which the School of Law of Utrecht University, the Law Faculties of the Erasmus University, Leiden University, Maastricht University, Tilburg University and the T.M.C. Asser Institute are affiliated.

Bill. As part of their legislative studies they were given the assignment of drafting a bill for the establishment of the human rights institution. The quality of the work they submitted was high.

6.2. The reactions[24]

Below is a summary of the main reactions received on each subject. Each reaction is followed by a description of the action taken in response.

Establishment

The reaction to the establishment of the Institute for Human Rights was generally positive. The online consultation procedure produced one negative reaction from Vrijbit, an association dedicated to the protection of the right of privacy. It argued that the need for a new organisation had not been demonstrated and that citizens would notice little of it. It also contended that the Institute would be without powers.

The government takes the view that the Institute will have sufficient powers to make a difference for citizens. Through its authoritative investigations, reports, information and recommendations the Institute will be able to expose infringements of human rights.

Budget

Many organisations (the Equal Treatment Commission, the Data Protection Agency, the Dutch Lawyers Committee for Human Rights, the Netherlands Institute of Human Rights (SIM), the Dutch National Association Against Discrimination, Amnesty International, E-Quality, Movisie, the Human Rights Education Platform, the Council for the Chronically Sick and Disabled, the Dutch CEDAW Network, Aim for Human Rights, Justitia et Pax, the Civil Rights Protection Platform and Vrijbit) observed that the Institute's budget would not be sufficient to enable it to achieve its aims.

In its position paper of 10 July 2009 the government indicated that the new duties would be implemented on a sound and economical basis. The 'consortium' partners (the Data Protection Agency, the Equal Treatment Commission, the National Ombudsman and the Netherlands Institute of Human Rights (SIM)) stated in their report on the blueprint for a human rights institution in April 2007 that a budget of 1.15 million euros would be necessary

[24] Deposited for inspection at the Central Information Point of the House of Representatives.

for an office with a small staff. However, the assumption had been that the organisation would be based on a twinning or shared services model. The decision to integrate the human rights institution with the Equal Treatment Commission is expected to yield synergy benefits, not only in organisational terms but also as regards substance. Moreover, an evaluation will be carried out after two years to determine whether the Institute's existing budget is adequate.

Collaboration with civil society organisations

Almost all the organisations that were consulted commented on the collaboration between the Institute and the various civil society organisations. A number of respondents recommended that this should be regulated in greater detail in the Bill, for example through the establishment of an advisory council. The UN too recommended that the cooperation with civil society organisations should be regulated in the Bill.

The government shares the view of the various organisations that it is important for the Institute to work closely with the different civil society organisations. This would prevent duplication of effort and enhance the quality of the work performed by the Institute. In this way the Institute can focus on duties that are not performed (or not yet adequately performed) by other organisations. The government has therefore decided on reflection to establish an advisory council (see section 15). This council will advise the Institute annually on its proposed policy plan and will also advise the Minister on the appointment of members and alternate members. The advisory council will consist of the National Ombudsman, the chair of the Data Protection Agency, the chair of the Council for the Judiciary, representatives of civil society organisations concerned with the protection of one or more human rights, representatives of organisations of employers and employees and people drawn from academia. Owing to its composition the advisory council can contribute to the 'pluralism' of membership required of the Institute under the Paris Principles. The Bill also provides that one of the duties of the Institute is to organise activities in partnership with the civil society organisations.

The name 'College voor mensenrechten en gelijke behandeling'

Almost all the organisations commented that the choice of the name 'College voor mensenrechten en gelijke behandeling' (literally, Board for Human Rights and Equal Treatment) was unfortunate. The name was criticised as being confusing, unappealing and largely unrecognisable both in the Netherlands and abroad and generating no support.

Alternatives mentioned by the organisations were ‘institute’ or ‘commission’. Some organisations also argued that only human rights and not equal treatment should be mentioned in the name.

As a result of these reactions, the government has decided that for the sake of international recognition the new organisation should bear the English name ‘Netherlands Institute for Human Rights’. Where necessary for the sake of clarity, the word Equality can be added to the name in international forums where equal treatment organisations meet. It has also been decided to state in subsection 2 of section 1 that the Institute is the national human rights institution. As the name Netherlands Institute for Human Rights is as yet relatively unknown, the Dutch name will continue to be ‘College’ (Board). However, although the government considers it essential for equal treatment to be given an important place in the activities of the Institute, it has decided, partly a consequence of the advice received from the organisations it consulted, not to include the term equal treatment in the name. The advantage of choosing the term ‘college’ (board) in the Dutch name rather than ‘instituut’ (institute) is that the former covers both the body itself and the staff. If the term ‘instituut’ were to be adopted, it would be necessary to have a committee at its head.

Distinction and balance between human rights and equal treatment duties
The Dutch Lawyers Committee for Human Rights, Amnesty International, Aim for Human Rights, the Netherlands Institute of Human Rights (SIM), the Dutch National Association Against Discrimination, Justitia et Pax, the Dutch CEDAW Network and the Human Rights Education Platform all made similar comments about the balance between human rights and equal treatment. Comments to the same effect were made by those participating in the online consultation. These organisations argued that there appeared to be an imbalance: the government seemed to have added human rights as something of an afterthought rather than establishing a new human rights institution. Moreover, the distinction was said to be artificial since equal treatment is also a human right. Comments were also made about the order in which the duties were listed in section 3, as reference is made first to the hearing of equal treatment complaints and only afterwards to the duties in the broad field of human rights. It was argued that this should be reversed.

It is evident from these comments that the Bill and the explanatory memorandum have wrongly created the impression that a human rights institution is being tagged on to the Equal Treatment Commission rather than that a new human rights institution is being created

to which the duties of the Equal Treatment Commission are being added. This is why the government has made various changes to the Bill and the explanatory memorandum. For example, the title of the Act and the name of the organisation have been changed. In addition, the specific duty of ensuring equal treatment is no longer listed first in section 3. Sections 3 and 5 (mandate) refer to human rights, on the assumption that they include equal treatment for this purpose. This better reflects the fact that the Institute is given wide-ranging duties in the human rights field, which includes equal treatment, but is also given a specific responsibility in relation to equal treatment, namely arriving at a finding. This duty of arriving at a finding requires more coverage in terms of sections than the duties relating to human rights, because it involves special (procedural) requirements.

Structure of the Institute: number of members

The Data Protection Agency, the Netherlands Institute of Human Rights, Justitia et Pax and the Civil Rights Platform made observations about the structure of an Institute having nine to twelve members. They argued that an increase in the number of members would not be appropriate for an organisation that needs to act decisively. The ability to take decisive action is also essential for the recognisability of the new organisation. One suggestion was that there should be an executive board consisting of just a few members, and that the director should play a vigorous role in representing the Institute in its external dealings. The government agrees with the view that it is conducive to the recognisability of the organisation for the chair to have a vigorous external role. This is why it has added section 14, which provides that the Institute is represented by the chair or, in his absence, by an assistant chair.

However, the government has decided against having an executive board with just a few members. It considers that the ability of the Institute to act decisively is determined not by the structure of the organisation as laid down by law but by its actual structure and procedure. The Institute will be supported by an expert and properly equipped office. This will enable the members of the Institute to confine themselves to broad policy issues, with the exception of the conduct of investigations where more direct involvement will be necessary. Members may also be appointed on a part-time basis. In choosing this structure the government has taken other human rights institutions as an example. Well-functioning institutions such as the Irish Human Rights Commission have adopted a similar structure. The explanatory notes (section 3.4) have been amplified in this respect. It is now clear that the Institute as a whole

is responsible for duties relating to the broad field of human rights and that a division is to be set up to deal specifically with investigations.

Pluralism and independence of the Institute

Comments were made about the composition and appointment of the Institute and the office. It was questioned whether they were in keeping with the Paris Principles and whether the appointments were sufficiently independent. The UN advised that the provisions relating to the appointment of the members and the office and the provision that public servants may assist the Institute should be revised. The question was how to ensure that the Institute and the office reflect the diverse composition of the population. One suggestion made was to include target figures for the number of men and women. It was also proposed that the Paris Principles should be applied literally by arranging for the Institute to include representatives of human rights organisations, trade unions, academia, parliament and so forth. The wish was also expressed to give civil society organisations a formal role in appointments.

The government has decided to make substantial changes to the manner of appointment of the members and the office. The members and alternate members will now be appointed by Royal Decree on the recommendation of the Minister of Justice. Moreover, an advisory council will advise the Minister of Justice on the appointment of the members and alternate members. This ensures that the process includes more safeguards for the independence of the Institute and the involvement of civil society organisations. The government considers that rather than including target figures in the legislation or specifying the sectors of society from which the members of the Institute should be drawn, the matter should ideally be regulated in practice by means of a transparent selection process.

Moreover, the staff of the office will now be appointed by the chair of the Institute rather than by the Ministry of Justice. This guarantees the independence of the office. Furthermore, the provision allowing the Institute to be assisted by public servants designated by Minister (the present section 18, subsection 1 of the Equal Treatment Act) has been dropped.

Finally, in keeping with the recommendation of the UN, a provision has been included in the Bill for the advisory council to take account in the selection procedure of the need for an expert and independent Institute and of the wish to ensure diversity in its membership (section 16, subsection 2).

Handling of individual complaints

Various organisations recommended that the duty of hearing complaints should be extended to all human rights. However, the opposite view was taken by Amnesty International, the Dutch Lawyers Committee for Human Rights, the Dutch National Association Against Discrimination and the Data Protection Agency.

The Paris Principles provide that a national human rights institution may be authorised to hear and consider complaints and petitions concerning individual situations. At an earlier stage, on the basis of the report of the 'consortium' partners of April 2007, the government decided that the human rights institution would not be given the responsibility of hearing individual complaints. In response to a complaint the National Ombudsman may investigate whether or not the state has acted properly. The National Ombudsman checks whether the actions of the state are compatible with fundamental rights and human rights. To prevent overlapping it is therefore undesirable for this responsibility to be given to the Institute. There are only a few foreign human rights institutions that can hear and rule on individual complaints and, where this is the case, they and the national ombudsman form an integrated organisation. In principle, parties whose interests have been adversely affected by conduct of the state in the form of an order (within the meaning of the General Administrative Law Act) have protection under administrative law.

Legal action

The National Ombudsman and the Council for the Judiciary commented on the fact that section 15 of the Equal Treatment Act had been widened in the Bill to include the broad field of human rights (under this section the Institute can request the courts to rule that conduct infringing a human right is unlawful or prohibited). The National Ombudsman considers that the significance of the wider scope of the section was unclear and that further consideration was necessary. The Council for the Judiciary pointed out that any ruling by the Institute could be binding only on the parties to the action.

In response to these comments the government has decided not to expand the scope of section 50 of the Equal Treatment Act to the broad field of human rights. The Institute can publish its reports, recommendations and advice and forward them to the authorities concerned and to the government and the States General. In this way the Institute is able to raise human rights issues in a broad and coherent manner and also expose violations. Given

the legal protection already available in the Netherlands and the possibility of lodging a complaint with an ombudsman the government sees no good reason to give the Institute its own jurisdiction to hear legal actions in the broad field of human rights. Moreover, conferring jurisdiction in this way would entail the risk that the Institute would have to hear individual complaints about human rights violations, although this is the job of the National Ombudsman insofar as the complaints concern the conduct of administrative authorities. Obviously, the government wishes to prevent duplication of effort. However, the Institute can act as an expert in legal actions when a member of the Institute is summoned to appear by the courts.

Incompatibility of positions and outside positions of members of the Institute
The Netherlands Institute of Human Rights, the Dutch Lawyers Committee for Human Rights, the Dutch National Association Against Discrimination) and Justitia et Pax commented on the issue of the incompatibility of positions and outside positions of the members and alternate members. They argued that it should not be possible for a member or alternate member to hold a position at a ministry. In response to these comments, two subsections have been added to section 17 of the Bill. Subsection 3 provides that public servants subordinate to a Minister are not eligible for appointment as a member or alternate member of the Institute. And subsection 4 provides that, in accordance with section 13 of the Autonomous Administrative Authorities Framework Act, alternate members too must report outside positions to the Minister and disclose them publicly.

Requirements governing eligibility for appointment as judicial officers apply to the chair and assistant chair
The present section 16, subsection 2 of the Equal Treatment Act stipulates that the chair and two assistant chairs must fulfil the requirements governing eligibility for appointment as judicial officers (section 5 of the Judicial Officers (Legal Status) Act). It follows that they must have a university law degree (or equivalent legal training) and have acquired during their education a thorough knowledge and command of certain fields of law or have ample practical experience of the law. In the draft presented for consultation, it was proposed that this requirement should apply only to the chair and one assistant chair. The Dutch Lawyers Committee for Human Rights, the Netherlands Institute of Human Rights and the Equal Treatment Commission commented on this section. They argued that since the requirement is connected with the duty of hearing complaints it should in any event no longer apply to the chair. As the representative of the Institute in its external dealings the chair should certainly be absolved of the need to hear complaints. The Dutch Lawyers Committee for Human

Rights proposed that the requirement should apply to two members charged with hearing complaints. The Equal Treatment Commission recommended that the requirement should apply to five members, including one of the assistant chairs.

In view of the reactions received the government has decided to relax the educational requirements to some extent. Upon reflection, the government considers that it is sufficient for the chair and one of the assistant chairs to have a university law degree (or equivalent legal training). It follows that the requirement that these members should also have a thorough knowledge and command of certain fields of law or have ample practical experience of the law is no longer necessary. This provides sufficient flexibility to ensure a more plural composition of the Institute and thus to respond to a change in the scope of the human rights duties and the duty of hearing complaints. It should be noted that, if desired, certain educational requirements can still be applied to the other members of the Institute (e.g. those members who will be specifically involved in hearing complaints) during the recruitment and selection procedure.

Encouraging ratification of conventions

The Netherlands Institute of Human Rights (SIM), the Dutch Lawyers Committee for Human Rights, Aim for Human Rights, the Dutch National Association Against Discrimination, Justitia et Pax and the Council for the Chronically Sick and Disabled commented on the duty of the Institute to encourage ratification of conventions and ensure their implementation. The UN too requested modification of these provisions. In the light of these comments the government has decided to change the wording of this part so that it is clear that the Institute has the job of encouraging the government, parliament and any other bodies to ratify and implement human rights conventions. In response to these comments the explanatory notes too have been amplified in this respect in order to clarify the role of the Institute.

Human rights in practice

Various organisations commented that their overriding impression was that the Institute would be examining the human rights situation in theory rather than in practice. Reference was made in this connection to section 5 (duty to provide advice).

The government would note that section 5 does not detract from the description of the Institute’s duties in section 3. By carrying out investigations, reporting and making recommendations the Institute will be in a position to assess the situation in practice. The

Institute can also take this information into account in its advice on policy or legislation. This is clarified in the explanatory notes on sections 3 and 5.

Seat

The National Ombudsman, the Human Rights Education Platform and the Johannes Wier Foundation for Health and Human Rights wondered where the Institute would have its seat. They felt that The Hague, as a centre of international law, would have the best claim. However, the government considers that when the Institute is established its seat should remain in Utrecht in order to avoid burdening the staff of the Institute with a relocation during the process of reorganisation and change.

Annual report

The UN and the Dutch Lawyers Committee for Human Rights would like the Bill to include a provision that the Institute is responsible for reporting on the human rights situation. The government has modified section 3 of the Bill to make it clear that the Institute reports annually on the human rights situation in the Netherlands.

Publication of advice, reports, investigations and recommendations and the follow-up

On the recommendation of the UN, the government has added a new section 8 to the effect that all advice, reports, investigations and recommendations should be published by the Institute. It also provides that the Minister concerned should give the Institute the opportunity to discuss these documents with him.

Other comments

The government has also adopted a good many other suggestions, including the following:

- inclusion of the Convention on the Rights of the Child in the non-exhaustive list of the mandate;
- modification of the text on the international reporting duty to show that the Institute writes reports in its capacity as ‘specialised body’;
- an addition to section 5 enabling the Institute to advise on bills, draft orders in council and ministerial orders as well;
- an addition that the Institute will also collaborate with university institutions;
- clarification in the preamble that the Netherlands is obliged under various European directives to have an equal treatment institution.

The Association of Netherlands Municipalities expressed its support for the Bill, but made two comments about the burden on local and regional authorities. Although these authorities do not have a duty to request the Institute for advice, doing so may well be a logical course of action in certain cases. Moreover, the Institute can request information from local and regional authorities if it is conducting an investigation. The consequences in terms of the administrative and financial burden will probably be small, but this depends in part on the activities undertaken by the newly established Institute. The explanatory notes have been amplified in this respect to clarify that there will be a (small) burden for the local and regional authorities.

The Council for the Judiciary noted that the provision that the president of The Hague court of appeal could impose a disciplinary measure on the chair of the Institute represents a departure from the normal rules of relative competence. According to the Council of the Judiciary, this power should be assigned to the president of Amsterdam court of appeal as the law stands at present and to the president of Arnhem court of appeal after the entry into force of the Modernisation of the Judicial System (Evaluation) Act. The Council for the Judiciary advised that either the explanatory notes on this point should be amplified or that the power should be assigned to the president of the Court of Appeal of the court region within which the district of Utrecht falls. The explanatory notes have accordingly been amplified.

The Advisory Board on Supervision of the Administrative Burden has indicated that it has not selected this Bill for review. The Association of Provincial Authorities and the Association of Water Boards have stated that they have no need of consultation since the Bill has only a limited impact on their activities. The president of The Hague court of appeal has confirmed his approval of section 17, subsection 1 (a) of the Bill.

No reactions have been received from the governing councils of Bonaire, St. Eustatius and Saba, but in the period before the entry into force of the Act the Institute will discuss with these governing councils how the legislation will operate on the islands.

II. EXPLANATORY NOTES ON THE INDIVIDUAL SECTIONS

Chapter 1. Establishment, duties and powers

Section 1

Subsection 1

The human rights institution is to be named ‘the Netherlands Institute for Human Rights’. The choice of this name has been discussed in the general part of this explanatory memorandum.

Subsection 2

The Netherlands wishes to obtain ‘A’ status by establishing the Netherlands Institute for Human Rights. This is why it is proposed that the Bill should clarify that the Institute is the national human rights institution referred to in the relevant UN Resolution and in the Recommendation of the Council of Europe. The UN will decide whether the Institute obtains ‘A’ status. As noted above, the English name ‘Netherlands Institute for Human Rights’ will be used internationally.

Subsection 3

This subsection sets out the object of the Institute, namely to protect human rights, including the right to equal treatment, and to promote observance thereof in the Netherlands. This object is in keeping with the Paris Principles (point 1). In addition, a human rights institution is required under the Paris Principles to be able to determine its priorities on the basis of a statutory mandate setting out the power to act independently, free of control by the state. This mandate has therefore been defined in broad terms and can be interpreted by the Institute itself.

Section 2

The Act will be partially applicable in the territories of the public bodies Bonaire, Sint Eustatius and Saba. This means that the Institute will also carry out part of its duties in these

territories as well. Some of the duties (e.g. the provision of advice and information on the website) can also be carried out remotely. The position is different for other duties (e.g. hearing complaints). The question of how the duties can be implemented will be considered in the period before the entry into force of the Act, in consultation with the governing councils of the islands.

A temporary exception will be made for Bonaire, Sint Eustatius and Saba in respect of the sections relating to the Institute's duty to investigate and publish findings on whether there has been discrimination as referred to in the Equal Treatment Act. This is because the equal treatment legislation does not apply to the public bodies at the time of the transition. It is therefore not possible for the Institute to hear complaints on the basis of this legislation from the moment when the Act enters into force. The basic principle under the Final Declaration of 11 October 2006 has always been that from the start of the new constitutional position of the three islands the Netherlands Antilles legislation in force until the date of transition will continue to apply and that the Dutch legislation will gradually be introduced thereafter.

The principle of equality in article 1 of the Constitution and international conventions will, however, apply to Bonaire, Sint Eustatius and Saba. The inhabitants of the three islands and of the European part of the Kingdom of the Netherlands can claim the protection of the Constitution, including the principle of equality as recorded in article 1. Protection is thus afforded against discrimination. For example, there is a right of appeal against a decision taken on the basis of the Administrative Decisions (Appeals) Act for Bonaire, Sint Eustatius and Saba in the event of discrimination by the state (sections 143b to 143e).[25] Application may also be made to the courts for a declaration that the conduct of a private individual is unlawful. The government will consider when the relevant legislation on equal treatment and the related powers of the Institute can be introduced.[26]

Section 3

Section 1, subsection 3 sets out the object of the Institute, namely to protect human rights, including the right to equal treatment, and to promote their observance. Sections 3 and 5 deal with the 'protection of human rights'. This includes promoting their observance. As the wording used in the Paris Principles is 'promote and protect human rights', it has been

[25] Parliamentary Papers II 2008/2009, 31 959, no. 2.
[26] Parliamentary Papers II 2008/2009, 31 959, no. 6, p. 7.

decided that explicit reference to the promotion of their observance should be made in the object of the Institute.

Moreover, human rights include the right to equal treatment since equal treatment, as referred to in the Equal Treatment Act, is also a human right.

Point (a)

The Institute will investigate possible violations of human rights, particularly systematic violations, and the level of protection of these rights in a specific field. The Institute must be able to decide independently whether it wishes to conduct an investigation and report on it.

The Institute can carry out three kinds of investigation. First, it can investigate the protection of human rights. An example could be an investigation into the situation in Dutch prisons. If the Institute advises on primary and secondary legislation (see the explanatory notes on section 5), the advice can be based on an investigation. Second, the Institute can investigate in response to a written request whether discrimination as referred to in the equal treatment legislation has taken or is taking place. Such an investigation is limited to equal treatment and results in findings and is therefore of a different nature than the first type of investigation. Finally, the Institute can investigate on its own initiative whether there is systematic discrimination and publish its findings on this. Such investigations too are limited to equal treatment and result in findings. In addition, there must be a suspicion of systematic discrimination.

Investigations of the second and third types referred to above are transferred unchanged from the Equal Treatment Commission to the Institute for Human Rights (section 12, Equal Treatment Act). It will continue to be of great importance for people who believe they have been subjected to discrimination to have a straightforward means of redress through a separate government authority responsible for supervising compliance with the equal treatment legislation. This is one of the requirements for effectively combating discrimination. The Institute is therefore the enforcer of the equal treatment legislation. This function of the Institute is dealt with in more detail in the explanatory notes on section 10.

It is not the job of the Institute to hear individual complaints about violations of human rights other than equal treatment. The Institute can refer individual complaints to the appropriate

authorities. However, it is conceivable that in an investigation into a situation involving human rights violations the Institute may examine individual cases in order ultimately to draw general conclusions relevant to the investigation. In such cases the Institute will, nonetheless, not give a ruling on an individual case.

In discharging its duty of investigation the Institute must naturally take into account article 162 of the Code of Criminal Procedure. This article provides that where, in the course of carrying out their duties, public bodies and public servants become aware of an indictable offence that does not come within their investigative remit, they are obliged to report this immediately and to hand over any documents relating to the case to the public prosecutor or one of his assistant public prosecutors.

Point (b)

The Institute can publish a report following an investigation. It will also report once a year on the human rights situation in the Netherlands. The Institute may choose to combine this report with the annual report (section 21). It may also make recommendations about how to improve the situation or to deal with certain practices. Recommendations differ from advice (section 5) in that advice is given only to administrative authorities and to the Senate and House of Representatives and relates only to primary and secondary legislation and policy, whereas recommendations can have a broader scope. For example, the Institute may make recommendations to hospitals and schools or to organisations concerned with protecting human rights. It is up to the Institute to determine how often and to whom these recommendations are made.

The Institute, in its capacity as ‘specialised body’, will also prepare reports on the protection of human rights and equal treatment in an international context. The United Nations wishes to have a report not only from the government but also from an independent organisation or independent institution. The Equal Treatment Commission currently draws up reports on equal treatment. An example is its report prepared in response to a government report on the International Covenant on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women. An example of a subject on which it will report in the future is the Convention on the Rights of Persons with Disabilities. In addition, shadow reporting by non-governmental organisations will naturally continue to be possible in response to government reports.

Point (c)

This duty is explained in more detail in the explanatory notes on section 5.

Point (d)

There is a need in the Netherlands for an easily accessible, expert and objective centre where not only government bodies but also businesses and private individuals can obtain advice on situations in which human rights are at issue. Resolution A/RES/48/134 of the General Assembly of the United Nations of 20 December 1993 on national institutions for the promotion and protection of human rights provides that the national human rights institutions should disseminate information about UN human rights conventions and activities. The duty of providing information is also mentioned in the accompanying Paris Principles.

One of the Institute's statutory duties is therefore to provide information and encourage and coordinate education about human rights. The Institute may provide information on request or on its own initiative. The Equal Treatment Commission currently provides information on matters relating to equal treatment by means of a website, a telephone surgery, meetings, lectures, training sessions, publicity campaigns and teaching material. The Institute will be able to continue this in a comparable manner and to expand the service to include all human rights. In doing so it will take account of the activities already undertaken in this field by other organisations. In many cases the Institute will therefore refer questions to other bodies. For example, questions about the processing of personal data will be referred to the Data Protection Agency and in many cases too to the National Ombudsman. This is because the Institute's responsibility for hearing complaints will be confined to the present remit of the Equal Treatment Commission and will not extend to the broad field of human rights. The National Ombudsman handles complaints about administrative authorities, including those relating to human rights.

There are all kinds of ways in which the Institute can increase public awareness and knowledge of human rights. Information, education and publicity can boost awareness of human rights and equal treatment and help to combat infringements. The Institute can also approach the media. Here too it is up to the Institute itself to determine how and to whom human rights education and information can be provided most effectively. The Human Rights Education Platform and the future House for Democracy and the Rule of Law would be logical partners for the Institute in its efforts to promote human rights education.

Point (e)

The Institute can also take the initiative in carrying out research into the protection of human rights. Alternatively, it can have such research carried out by another organisation or make a financial or substantive contribution to research by other organisations.

Point (f)

Dutch, European and international organisations need a central and recognisable point of contact where they can request information and seek and share expertise. At present, there is no national centre where they can coordinate their activities and strategy and consult together about a joint approach. The Institute will be able to carry out its activities by cooperating and keeping in touch with civil society organisations and university bodies such as the School of Human Rights Research. As explained in the general part of this explanatory memorandum, many organisations work in the human rights field and the Institute will therefore seek to cooperate with them. Besides the various civil society organisations they include the National Ombudsman and the Data Protection Agency. Naturally, the Institute will also continue the present cooperation of the Equal Treatment Commission with various organisations active in the field of equal treatment.

The Institute can also serve as a point of contact for the government, Parliament and other administrative authorities.

The Institute will be able to act as an extra point of contact for international organisations with a human rights mandate. This concerns, above all, the United Nations (including the Human Rights Council and its special rapporteurs, as well as the supervisory committees for the UN human rights conventions), the Council of Europe (including the Commissioner for Human Rights and supervisory committees such as the European Commission against Racism and Intolerance, the European Committee for the Prevention of Torture, the European Committee of Social Rights, the Steering Committee for Human Rights and the Advisory Committee on the Framework Convention for the Protection of National Minorities), the Organisation for Security and Cooperation in Europe (including the High Commissioner for National Minorities) and the European Union (in particular the Agency for Fundamental Rights).

Some conventions stipulate that the national government should cooperate with the relevant non-governmental organisations (NGOs). Examples are the Convention on the Rights of Persons with Disabilities and the conventions of the International Labour Organisation (ILO). The Institute can play a facilitating role in this cooperation as well. The Institute can also

participate in the International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights (ICC) and other international consultative structures and projects. A national human rights institution has voting rights in the ICC only if it has ‘A’ status on the basis of the Paris Principles.

Points (g), (h) and (i)

The Institute is given the job of pressing the government and possibly parliament to ratify and implement human rights treaties (in good time). For example, it may advise the government on how ratification will affect government policy. It may also advise on whether legislative and organisational measures are necessary if the Netherlands is to perform its treaty obligations effectively. In this way the Institute can help to bring national legislation into line with international obligations. The Institute can also advise or focus attention on the implementation of European directives and the correct observance of treaties and European and international recommendations in practice. By recommendations the government means instruments of European and international bodies that need not be ratified, such as declarations and resolutions as well as recommendations of treaty committees for treaties and conventions ratified by the Kingdom of the Netherlands.

Finally, the Institute will press various administrative authorities for correct observance of treaties and conventions in practice. In cases where the government fails to implement international and European obligations or fails to do so correctly, the Institute has the duty of focusing attention on this, for example by publishing a report, making recommendations or contacting national, international and European institutions or the press.

Section 4

The need for the Institute to have an independent position has already been explained in the general part of this explanatory memorandum. The independence of the Institute is also apparent from a number of institutional provisions in the Bill, for example sections 16, 17 and 18.

Section 5

Advice is an important instrument in promoting awareness of human rights and the right to equal treatment and ensuring that they are observed. The provision of advice is also a means of answering more general questions in this field. Moreover, the Paris Principles state that a human rights institution must be able to advise on ‘legislative or administrative provisions’. This is why the government has departed from the Legislative Drafting Instructions (AR 124c, paragraph 2). This instruction provides that the duty of advising on generally binding regulations or the policy to be pursued by the central government may not be given to an independent administrative authority.

It is government policy not to create statutory obligations for government to seek advice. Consequently, there is no obligation to seek the advice of the Institute. Naturally, however, it will be logical for government to seek such advice in certain cases. The Institute can advise in cases in which primary or secondary legislation or policy (or a change to such legislation or policy) directly or indirectly affects the protection of human rights in the Netherlands. This means that the Institute can be asked for advice not only about the implementation of treaties or directives in the field of human rights but also about national legislation that has a direct or indirect impact on this. Although a situation in which the advice of the Institute is frequently sought and given would be desirable, it is important, given its limited capacity, that it should also be able to continue performing its other duties properly. The field of human rights is broad, as is the scope of its advisory duties. This is why it has been decided that the Institute should have a duty to advise only in respect of certain requests.

Where advice is requested by one or more ministers or by the Senate or the House of Representatives on acts, bills, orders in council, draft orders in council, ministerial orders and drafts of ministerial orders that relate directly or indirectly to human rights, the Institute is under a duty to advise. The situation is different where advice is requested by other administrative authorities. In that case the Institute may advise, but has no obligation to do so. Nor does the Institute have a duty to advise administrative authorities or the Senate and House of Representatives on policy. The Institute may, on its own initiative, advise all administrative authorities and the Senate and House of Representatives on all generally binding regulations and policy. When providing advice on its own initiative the Institute is obliged to inform the minister or ministers concerned and both houses of the States General. This is a consequence of section 18 of the Advisory Bodies Framework Act. A deadline may be set where advice is requested (section 3:6, General Administrative Law Act). However, the period may not be so short as to prevent the Institute from properly performing its duties.

Under section 3 the Institute is to have the duty of investigating and reporting on the protection of human rights. This means that in carrying out these duties it will focus on how legislation and policies that affect human rights work in practice. It is also logical that when the Institute advises on policy or legislation it can and should take into account the application of such policy in practice. As the Institute does not have responsibility for hearing individual complaints in the broad field of human rights, it is not the intention that it should advise on the application of policy in an individual case. However, the possibility cannot be excluded that in exceptional circumstances an investigation into an individual case will result in an advice on policy. As explained in relation to section 3 (b), advice differs from recommendations. However, an advice will often include recommendations as to how primary and secondary legislation or policy should be modified.

The field of work of the Data Protection Agency overlaps in some areas with that of the Institute. It is therefore only logical that the Agency should adopt a low profile in relation to matters concerning the processing of personal data. But in some situations it may be desirable for both organisations to advise on a given matter. Section 24 of the Advisory Bodies Framework Act regulates the cooperation between the two advisory bodies in such cases: the Institute and the Agency may issue advice jointly and are obliged to do so if this has been specified in the request for advice.

Section 6

The Paris Principles provide that a human rights institution must be able to obtain information to a sufficient extent. An institution cannot fulfil its duties properly if it does not have sufficient information to assess whether there has actually been a violation of human rights. The Institute is therefore given the power to demand all information and documents that may reasonably be considered necessary for the performance of its duties. As the Equal Treatment Commission currently has this power, this section has been transposed from the Equal Treatment Act (section 19). Section 18, subsection 2 of the Equal Treatment Act has been combined with this section. Everyone is obliged to provide the information and documents demanded pursuant to subsection 1 in full and in accordance with the truth. This obligation does not apply insofar as it concerns information and documents the provision of which would be contrary to the interests of national security or violate a duty of official or professional secrecy. Nor does this obligation apply if, in doing so, the persons concerned would expose themselves or a relation by blood or marriage in the direct or collateral line in

the second or third degree or their present or former spouse or their present or former registered partner to the risk of conviction for an indictable offence. The rationale is that a person cannot be compelled to incriminate himself or a relation by blood or marriage. Failure to comply with the obligation to provide information or documents is an offence under the current article 184 of the Criminal Code. Naturally, however, there are limitations on the disclosure of such data (see the explanatory notes to section 8, subsection 1).

Section 7

This section gives the Institute the power to gain access to all places, other than a dwelling without the consent of the occupant. The Equal Treatment Commission has this power pursuant to article 14 of the Equal Treatment Commission (Procedures) Decree. It is proposed that this power should be regulated by law and be extended to the entire field of work of the Institute.

If insufficient information is obtained from the documents or, in an equal treatment case, from hearing the parties, it may be useful to conduct an on-site investigation. Although the Institute is entitled to do this (within its remit), it is unlikely to make much use of this possibility in practice in view of the time constraints. In addition, the Institute may be expected to make as much use as possible of existing reports prepared by inspectorates or national or international organisations that have carried out on-site investigations.

During periods in which meeting places of general representative bodies, places where religious services or contemplative meetings of an ideological nature are held and rooms in which court hearings are conducted are in use as such, only limited access to them is possible. This is regulated in section 12 of the General Act on Entry into Dwellings, which is in this respect a limitation on this section.

In view of the importance of the inviolability of the home as guaranteed in the Constitution, no home may be entered without the consent of the occupant. To gain access to a home with the consent of the occupant, it is necessary to comply with the procedural rules on identification as contained in section 1 of the General Act on Entry into Dwellings. Nor is it permitted to enter places that are designated as prohibited places pursuant to the Protection of State Secrets Act. Examples of such places are the buildings of the General Intelligence and Security Service and the Military Intelligence and Security Service. Naturally, when the occasion arises, the Institute may gain access after obtaining consent.

Section 8

Subsection 1

The Institute will publish its investigations, recommendations, reports and advice. Obviously, the Institute is subject to certain limitations when publishing data. As an organ of the state in its capacity as legal person the Institute is an administrative authority as referred to in section 1:1, subsection 1, of the General Administrative Law Act. It follows that the Government Information (Public Access) Act, including sections 10 and 11 of that Act, apply to the Institute. This limitation is also a consequence of section 2:5, subsection 2 of the General Administrative Law Act and the Personal Data Protection Act. Under section 9 of the Government Information (Public Access) Act, administrative authorities that receive advice are obliged to publish it.

Subsection 2

It is important for the Institute to be able to discuss with the Minister, if it so wishes, what will be done with the investigations, reports, recommendations and advice. This is why the Bill provides that the Minister concerned should give the Institute the opportunity to discuss these matters with him. This means that in the case of reports or recommendations concerning the prison system the Institute should contact the Ministry of Justice, but in the case of a recommendation relating to human rights it should contact the Minister of Education, Culture and Science.

Chapter 2. Investigations and findings relating to equal treatment

Section 9

A separate division within the Institute will hear complaints relating to discrimination, as this responsibility differs in various respects from the Institute's other duties. The knowledge of equal treatment and the skills necessary to hear such complaints differ from those required for the other duties of the Institute. In addition, the members of the Institute responsible for duties in the broad field of human rights can confine themselves to basic principles, with the support of an expert office, whereas hearing complaints requires more direct involvement on the part of the members. As explained in section 3.4 of this explanatory memorandum, some members may be concerned only with hearing complaints and some only with preparing

advice and reports whereas others may be involved in both sets of activities. It does not necessarily follow, therefore, that a member of the Institute who sits on the division responsible for hearing complaints will not in practice have any involvement in preparing advice or reports.

Section 10

This section has been transposed unchanged from the Equal Treatment Act. This statutory remit ensures that the Institute assumes the duties of the Equal Treatment Commission in promoting observance of the prohibition of discrimination. Its main instrument in this connection is its power to determine whether there has been a breach of the equal treatment legislation (Equal Treatment Act, Equal Treatment (Men and Women) Act and article 646, Book 7 of the Civil Code, as well as (see the amending sections) the Equal Treatment of Disabled and Chronically Ill People Act and the Equal Treatment in Employment (Age Discrimination) Act). In addition, the Institute may, on its own initiative, conduct an investigation into forms of systematic discrimination. Its findings do not have the force of a binding recommendation or of a judicial or quasi-judicial ruling. No specific legal consequences are attached by law to the results of an investigation. It is the authority and expertise of the Institute that determine what is done with any findings and recommendations by those concerned or by the courts, the administrative authority or interested parties. The primary aim of this arrangement is to bring the parties to a dispute closer together by providing authoritative and expert advice.

The Institute may, in response to a written request from someone who believes that he or she is a victim of discrimination, investigate whether discrimination has taken or is taking place. A written request of this kind may also be submitted by persons and institutions that wish to know whether they are discriminating and by works councils and comparable employee participation bodies. The Institute is empowered to investigate and publish its findings as referred to in the equal treatment legislation.

The Institute thus provides an extra possibility for promoting observance of the equal treatment legislation. The Institute’s procedure is relatively informal and no costs are charged to a petitioner (no registry fee and no risk of an order for costs). Pursuant to section 19 the procedure will be laid down in an order in council, in keeping with the Equal Treatment Commission (Procedures) Decree.

Section 11

This section has been transposed unchanged from the Equal Treatment Act (section 13).

Subsection 1
Subsection 1 lists the persons to whom the findings must be notified.

Subsection 2
When forwarding its findings the Institute may make recommendations with a view to preventing discrimination. Often this will happen where a breach of the law has been discovered. The recommendations may relate to various matters such as policy, a specific case or actual circumstances.

Subsection 3
The Institute may forward its findings to the Ministers concerned, organisations of employers, employees, professionals, public servants, consumers of goods and services and relevant consultative bodies. The aim of this provision is to inform the organisations concerned of findings of interest relating to enforcement of the prohibition of discrimination. In many cases the findings will be anonymised before publication.

Section 12

This section has been transposed unchanged from the Equal Treatment Act (section 14). The possibility of gaining access to the Institute in the event of discrimination on grounds other than those mentioned in the Bill is excluded. In addition, the interests of the petitioner or the seriousness of the conduct must be sufficient to institute an investigation. This exception is intended to reflect what is customary in comparable legislation and regulations and to meet the needs found to exist in practice. A time limit has also been included. Naturally, the Institute should notify the petitioner if it decides against conducting an investigation.

Section 13

Subsection 1

This section has been transposed unchanged from the Equal Treatment Act (section 15). In this way the Institute – like the Equal Treatment Commission at present – obtains the power to apply to the courts for a binding ruling on whether conduct breaches the equal treatment legislation. There may be various reasons why the Institute would wish to obtain a court judgment either as an interim measure or by way of final resolution of a dispute. This might be warranted in the light of the seriousness of the discrimination, the precedent that the conduct may be expected to set or the nature of the decision to be taken on the interests involved.

Hitherto this power has not been exercised by the Equal Treatment Commission. As the findings of the Equal Treatment Commission are adopted in approximately 75% of cases annually, there has been little occasion to exercise this power. Moreover, the Equal Treatment Commission has to some extent been reluctant to interfere in matters of compliance in order to avoid any appearance of partiality. It has been found that in cases where findings were not adopted in the past two years, this occurred in certain specific fields such as pregnancy and employment. The Equal Treatment Commission is therefore currently reviewing its use of the power to bring legal actions.

Subsection 2
It goes without saying that the Institute refrains from exercising its power to bring legal proceedings if the person adversely affected by the conduct objects.

Chapter 3. Composition and procedure

Section 14

Subsection 1

As explained in the general part of this explanatory memorandum the government has chosen a management model headed by an Institute of relatively small size. Members who devote all or a substantial part of their working time to the Institute can use their expertise to the full. Additional expertise in specific areas can be provided through the system of alternate membership.

This is why it is proposed that the number of members should be set at a minimum of nine and a maximum of twelve. Part-time members may also be appointed. Under the Paris Principles, however, there must be full-time members of the Institute. As a maximum of twelve members may be appointed and it is expected that the duties can be carried out by no fewer than nine full-time members, there will certainly continue to be a need for the appointment of full-time members in the future. Clearly, although there is a degree of flexibility in the number of members this may not result in an overshoot of the Institute's approved budget.

When this Bill becomes law the members of the Equal Treatment Commission will be appointed by law as members of the Institute. However, this does not mean that these nine members will continue to deal solely with matters of equal treatment after the entry into force of the Act and that the three new members will deal solely with human rights duties. The duties are entrusted to the Institute as a whole and there are also synergy benefits to be achieved by combining the Commission and the Institute. As the Institute will be supported by an expert office, it will be able to concentrate on matters of principle. More direct involvement on the part of the members will be needed for the job of hearing complaints: for this duty a separate division will be established. When future appointments are made, attention will also be given to ensuring that members have sufficient knowledge of and involvement with the public bodies Bonaire, Sint Eustatius and Saba.

Subsection 2

The present section 16, subsection 2 of the Equal Treatment Act provides that the chair and both assistant chairs of the Equal Treatment Commission must fulfil the requirements governing eligibility for appointment as a judicial officer. These three members should have a university law degree (or equivalent legal training) and have acquired during their education a thorough knowledge and command of certain fields of law or have ample practical experience of the law. The first sentence of subsection 2 provides that the chair and one of the two assistant chairs must have a university law degree (or equivalent legal training). This means that no educational requirements are made in respect of one of the assistant chairs and that the requirement of a thorough knowledge and command of certain fields of law or ample practical experience of the law no longer applies to the other assistant chair or to the chair.

The government believes that it should be possible to depart from the eligibility requirement for the chair in special cases. It may be desirable for the purposes of exercising the duties of chair to appoint people who have special, non-legal qualities, experience and expertise. This is why the second sentence has been included in subsection 2. See also the general part of this explanatory memorandum (§ 6. Consultation). It should be noted that, if desired, certain educational requirements may also be set when recruiting and selecting the other members of the Institute, for example members who will be specifically concerned with hearing complaints.

Subsection 3
It is important for the Institute to have an extra contact for national, European and international institutions and organisations connected with the protection of human rights. For the sake of its national and international profile it is desirable for the Institute to be represented by the chair in external dealings. This means that the Institute will have a voice in the national and international media and be present at and address important European and international meetings of the human rights institutions. In the absence of the chair an assistant chair can deputise for him.

Section 15

Subsection 1
This subsection establishes an advisory council (referred to below as the council) of the Institute. The council advises the Institute each year on the Institute's proposed policy plan. It also advises the Minister on the appointment of the members and alternate members of the Institute. This is amplified in section 16, subsection 2. The Council thus contributes to the legitimacy of the Institute and to the quality of its work.

The council is not an autonomous administrative authority as it has no public authority. Nor is it an advisory body within the meaning of the Advisory Bodies Framework Act since it does not advise on generally binding regulations or on the policy of the central government (section 1 (a) of the Advisory Bodies Framework Act).

Subsection 2
One of the requirements to be fulfilled by the Institute under the Paris Principles is that the appointment procedure should ensure diversity in the membership of the Institute in the form

of representatives of civil society organisations concerned with protecting and promoting human rights. The Paris Principles give countries the scope to organise this ‘pluralism’ in a manner best suited to them within the context of the country concerned. It is proposed that the Paris Principles should be implemented by the establishment of an advisory council whose members come from the different sectors of society.

The council has three permanent members: the National Ombudsman, the chair of the Data Protection Agency and the chair of the Council for the Judiciary. The council also has a minimum of four and a maximum of eight members drawn from civil society organisations concerned with the protection of one or more human rights, from organisations of employers and employees and from academia. The knowledge and network of civil society organisations is important to the activities and composition of the Institute. Organisations of employers and employees will also be represented on the council as many questions concerning the protection of human rights arise in labour relations (e.g. the right to equal treatment, freedom of religion and protection of privacy). Finally, the members of the council will include academics with a specific knowledge of human rights. As indicated in the Paris Principles, it is also possible for journalists, politicians (e.g. members of the Senate and House of Representatives), representatives of religious institutions and public servants to sit on the council. The alternating members sit on the council in their personal capacity. Even if they are representatives of a civil society organisation or an organisation of employers or employees, they should not be in the position of having to obtain authorisation from their organisation in order to take decisions.

Subsection 3

The alternating members of the council are appointed, suspended and dismissed by the Minister of Justice in agreement with Minister of the Interior and Kingdom Relations. Before making an appointment the Minister of Justice hears the Institute, the National Ombudsman, the chair of the Data Protection Agency and the chair of the Council for the Judiciary. These members are appointed for a term of four years and may hold office for a maximum of eight years in total.

Subsection 4

The council chooses a chair from among its members and determines its own procedures independently of the Institute and the Minister. It would be logical for the council to meet at

least once a year to discuss the proposed policy plan with the Institute. Further agreements between the council and the Institute may be recorded in rules of procedure.

Subsection 5

Although the council is not an autonomous administrative authority (see the explanatory notes on subsection 1), section 13 of the Advisory Bodies Framework Act applies *mutatis mutandis* to the members of the council. Most members of the council will also hold one or more outside positions. Owing to the influence of the council on the appointments of the Institute, these positions should be disclosed and notified to the Minister of Justice upon acceptance of a new position. For this purpose an outside position means a position in addition to membership of the council. This may therefore be the principal position of a person who sits on the council.

Section 16

Subsection 1

The members of the Institute are appointed by Royal Decree because the promotion and protection of human rights has a bearing on the policy of almost all ministers. Appointments are made on the recommendation of the Minister of Justice. A draft of the Royal Decree will be discussed in Cabinet.

Subsection 2

The council advises the Minister of Justice on the suitability of the candidates before they are recommended. This advice is given in agreement with the Institute. The Minister of Justice is not obliged to heed the advice. In most cases, however, the Minister is likely to adopt the advice since it is important for the legitimacy of the Institute that it commands broad support throughout society.

This procedure implements the Paris Principles, which provide that the composition of the human rights institution and the appointment of its members should be established in accordance with a procedure that affords all necessary guarantees to ensure the 'pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights', particularly through cooperation with or representation of:

- civil society organisations responsible for the protection of human rights;
- trade unions, organisations of employers and employees, for example associations of lawyers, doctors, journalists and academics;
- trends in philosophical or religious thought;
- universities and qualified experts;
- Parliament;
- government ministries (only in an advisory capacity).

In giving its advice, the council takes into account that the Institute needs expertise in the broad field of human rights. When a vacancy arises, the council must therefore consider the requisite expertise in relation to the existing composition of the Institute. Moreover, for the sake of the Institute's independence, the council and the Institute should take into account during the selection procedure the need for the members to be independent. This means that people should not be appointed if there are doubts as to their capacity to carry out their

duties as members of the Institute independently of government and despite social pressures.

In other respects the guarantee of the independence and expertise of the members lies in their own person. Their expertise, experience and knowledge are decisive. As already noted, expertise means for this purpose legal expertise as well as expertise in the field of human rights and equal treatment and expertise in the fields affected by human rights. The expertise of the Institute should be distributed evenly among the different members.

Finally, account should be taken in the advice of the wish to ensure that the composition of the Institute reflects the diversity of Dutch society in terms of identity and background and religious and philosophical trends. The council and the Institute may give practical effect to this wish by giving notice of the vacancies to the civil society organisations involved in the protection of human rights (see subsection 3). In doing so, the council is bound by the constraints of the equal treatment legislation. Pursuant to section 2, subsection 3 of the Equal Treatment Act and section 3 subsection 1 (c) of the Equal Treatment of Disabled and Chronically Ill People Act, specific (preferential) measures may be taken for the benefit of women, persons belonging to a given ethnic or cultural minority and persons with a disability or chronic sickness, provided that the measures are proportionate to the aim.

Subsection 3
The vacancies are published by the Institute. The Institute must also actively draw vacancies to the attention of civil society organisations concerned with the protection and promotion of human rights. In addition, it must publish the selection procedure for the members and alternate members.

Section 17

Subsection 1
To emphasise the independence of the members and alternate members of the Institute, subsection 1 states that, save for a few exceptions, the provisions of the Judicial Officers (Legal Status) Act concerning dismissal, suspension and disciplinary measures apply *mutatis mutandis* to the members and alternate members. This is currently regulated in section 16, subsection 4 of the Equal Treatment Act. Subsection 1 contains five changes.

First, section 46h, subsection 1 of the Judicial Officers (Legal Status) Act is added to the list. This provision states that the employment of a judicial officer will be terminated at his or her own request by Royal Decree on the recommendation of the Minister of Justice. The reference to section 46h replaces the present section 16, subsection 5, last sentence of the Equal Treatment Act ('Their employment is terminated at their own request by the Minister of Justice.').

Second, the second subsection of section 46l of the Judicial Officers (Legal Status) Act (termination of the employment of a judicial officer at his/her own request by Royal Decree 'in the event of unsuitability to perform the duties of the office other than on account of sickness') is declared applicable *mutatis mutandis* as the appointment too is made by Royal Decree.

Third, the subsection rectifies the omission that it is unclear under section 16, subsection 4 of the Equal Treatment Act who is authorised to issue a written warning to the chair of the Institute by way of disciplinary measure. This power is now granted to the president of the court of appeal, in view of their respective job grades. The power is conferred on the president of The Hague court of appeal since issues concerning suspension or dismissal are decided by the Supreme Court, which also has its seat in The Hague.

Fourth, it is put beyond doubt that the subsection applies not only to the members but also to the alternate members.

Fifth, the subsection rectifies the omission that it is unclear under section 16, subsection 4 of the Equal Treatment Act who must be designated as the 'superior' for the purposes of sections 46j and 46o of the Judicial Officers (Legal Status) Act. The president of the Institute is designated for this purpose in subsection 1.

Subsection 2

The Paris Principles provide that the mandate and duration of the membership must be recorded in an 'official act'. The term of the appointment is hereby regulated in the Bill. The appointment is for a term of six years. This is important for the purposes of continuity. Reappointment is possible. Subsection 2 is identical to the first two sentences of the present section 16, subsection 5 of the Equal Treatment Act. As regards the third sentence ('Their

employment is terminated at their own request by the Minister of Justice'), which is now omitted, see the explanatory notes on the proposed subsection 1.

Subsection 3

It is clear from section 9 of the Autonomous Administrative Authorities Framework Act that a member or alternate member of an autonomous administrative authority cannot also be a public servant subordinate to the Minister who is politically responsible for the administrative authority concerned. In order to guarantee the independence of the Institute, subsection 3 provides that a member or alternate member may not also be a central government civil servant.

Subsection 4

Section 13 of the Autonomous Administrative Authorities Framework Act provides that members of an autonomous administrative authority may not hold outside positions that are undesirable from the point of view of the proper discharge of their duties or maintenance of the independence or trust therein. A member who intends to accept an outside position must notify this to the Minister. Moreover, the outside position must be disclosed publicly. This subsection provides that the same arrangement applies to the alternate members. For this purpose an outside position means a position in addition to membership of the council. In the case of an alternate member this may therefore also be his/her principal position.

Subsection 5

The further rules governing the legal status of the members and alternate members as referred to in this subsection will not relate to the remuneration and indemnification referred to in section 14, subsection 2 of the Autonomous Administrative Authorities Framework Act. Both these subjects will be regulated in an order of the Minister of Justice. Pursuant to the Equal Treatment Act (Evaluation) Act (Bulletin of Orders and Decrees 2005, 516), subsection 2 of section 21 of the Equal Treatment Act contains a basis for regulating the legal status of the members of the Equal Treatment Commission on a broader basis than has been possible hitherto. Various subjects relating to legal status for which rules must in any event be laid down by order in council are also listed. This list is taken from section 21 of the Equal Treatment Act, albeit subject to some modification. For some of the subjects mentioned adequate provision has already been made by law (e.g. disciplinary measures and suspension) and for others (e.g. career planning) there is, upon reflection, no reason for the time being to introduce any rules. At the same time, the present list fails to mention certain

subjects for which there is certainly a need for rules to be laid down by order in council for the members of the Institute (e.g. holidays and sickness and disability benefits). The proposed list is not exhaustive.

Section 18

Subsections 1 and 2

Under the Paris Principles a human rights institution must have its own staff. Previously, at the time of the review of the 'B' status of the Equal Treatment Commission, the UN High Commissioner for Human Rights made critical comments about the appointment of the staff of the office by the Minister of Justice.[27]

The government wishes to emphasise that in its view the appointment of the staff by the Minister of Justice does not compromise their independence. Numerous examples can be given of highly independent organisations whose staff are appointed by a minister.[28] Nonetheless, in order to avoid a situation in which 'A' status is refused on account of this manner of appointment, the government has decided that responsibility for appointing the staff of the office should rest with the president. This arrangement is comparable to that of the Council for the Judiciary. Although the Council for the Judiciary also lacks legal personality, it does appoint its support staff.

Subsections 3 and 4

The competent authority is no longer the Minister of Justice and is now the Institute. Further rules about this will be laid down by order in council.

Section 19

This section is derived from section 21 of the Equal Treatment Act. The relevant order in council (the text of which will be derived from the Equal Treatment Commission (Procedures) Decree in which these subjects are currently regulated) will enter into force at the same time as this Act.

[27] See, for example, the recommendations in the report on the re-accreditation of the Equal Treatment Commission published in March 2010: enclosure with a letter of 6 April 2010 from the UN High Commissioner for Human Rights to the president of the Equal Treatment Commission.

[28] Examples are the Data Protection Agency, the Netherlands Competition Authority and the Supreme Court of the Netherlands.

Section 20

Subsection 1

Section 12 of the Autonomous Administrative Authorities Framework Act does not apply because of the independent character of the Institute. The procedure applicable to the imposition of disciplinary measures, suspension and dismissal under chapter 6a of the Judicial Officers (Legal Status) Act is not proportionate to the provisions of section 12 of the Framework Act. Moreover, the members are appointed by the Crown. The appointment of the members and alternate members has been regulated in section 16 of this Bill. In addition, section 21 of the Framework Act – dealing with the power of the Minister to adopt policy rules relating to the discharge of duties by an autonomous administrative authority – does not apply. This too is connected with the desire for political bodies to be independent and with the fact that the Institute makes pronouncements about the state itself.[29] The Minister must not be able to determine the nature of the duties and the manner of their implementation.

Subsection 2

This provision makes a qualified exception to section 20 of the Autonomous Administrative Authorities Framework Act. The Institute is not obliged to provide information to the government concerning the content and handling of specific investigations. This is connected with the independence of the Institute. It must be able to carry out investigations independently, without the interference of the government. However, the Minister may request information connected with the management of the Institute. Similarly, he may inquire whether a particular incident is being investigated and what the current status of the investigation is. The right to obtain information is therefore limited to information of a procedural nature: i.e. information about the stage and subject of the investigation. In cases where Parliament demands an investigation into alleged violations of human rights, the Minister must be able to inform it whether the Institute is conducting an investigation and, if so, what stage the investigation has reached. Naturally, the Institute need not provide information about who has been approached or involved in the investigation or about the findings to date.

[29] Gerritse Commission, August 2007, *ZBO's binnen kaders*.

Subsection 3

This provision makes an exception to the power of the Minister under section 22 of the Autonomous Administrative Authorities Framework Act to reverse decisions. These are decisions within the meaning of the General Administrative Law Act, namely a written decision of an administrative authority constituting a juristic act under public law. Although decisions of such a kind are unlikely to be made by the Institute in carrying out its task of hearing and investigating complaints, this provision excludes the possibility that the Minister could reverse such a decision. This too is connected with the requisite independence of the Institute: political interference must be excluded.

Chapter 4. Annual report and report of findings

Section 21

Section 18 of the Autonomous Administrative Authorities Framework Act provides that the annual report should contain a description of the tasks performed and policies pursued, including the policy on quality assurance. Whether a human rights institution is eligible for 'A' status depends in part on the annual report. The UN therefore wishes to see a number of items covered in the report. This is why it is proposed to lay down that the Institute's annual report should describe all investigations carried out and advice given by the Institute and contain a summary of the other activities undertaken by the Institute. A description of the human rights situation in the Netherlands (section 3 (b)) can also form part of the annual report.

Section 22

Every five years the Institute (like the Equal Treatment Commission at present) must draw up a report of its findings on how the equal treatment legislation operates in practice. Besides the evaluation of the Equal Treatment Act, the Equal Treatment (Men and Women) Act and article 646, Book 7 of the Civil Code, the Institute must prepare an evaluation every five years of how the present Bill operates in practice.

Section 23

Section 33 of the Equal Treatment Act provides that after receipt of the report of the Institute referred to in section 20, the Minister of the Interior and Kingdom Relations, in agreement with the other Ministers concerned, must forward a report to both houses of the States General about how the equal treatment legislation operates in practice. The present section now adds that the report must also describe how the present Bill operates in practice. The report also requires the consent of all Ministers through approval in Cabinet. Section 39 of the Autonomous Administrative Authorities Framework Act provides that the Minister must send a report to both houses of the States General so that the efficiency and effectiveness of the functioning of an autonomous administrative authority can be assessed. As the term for submission of these reports is the same, the two can in practice be combined to form a single report.

Chapter 5. Amendments to other Acts

Section 24

As all provisions of chapter 2 of the Equal Treatment Act have been incorporated into the present Bill, this chapter can be repealed. The same applies to section 33 of the Equal Treatment Act.

Sections 25 to 34

These sections contain technical modifications to various Acts in which reference is made to the Equal Treatment Commission.

Chapter 6. Transitional and concluding provisions

Sections 35 to 38

The members, alternate members and staff of the office of the present Equal Treatment Commission will become members or staff, as the case may be, of the Institute for Human Rights and retain their current legal status. In the case of the members and alternate members, the date of their appointment to the later post is equated with the date of their

appointment to the earlier post. This means that the members and alternate members now employed at the Equal Treatment Commission become members of the Institute from the date of entry into force of this Act for the remainder of their current term of office. When members or alternate members are appointed or reappointed, special attention will be given to their expertise in the broad field of human rights. In the case of recent appointments and of appointments and reappointments in the period until the Bill becomes law, account will be taken of the new situation: those appointed will have a wider view and knowledge of human rights.

Together the members of the Institute already have a breadth of knowledge, for example of immigration law, the rights of women, children and ethnic minorities, health law and fields on which human rights have a special impact. Members and alternate members of the Equal Treatment Commission who are currently subordinate to a Minister (see section 17, subsection 3) will not be appointed by law as an alternate member of the Institute.

A large proportion of the present staff of the office will continue to be engaged in the preparation of findings in cases relating to equal treatment. However, new staff will also be recruited to deal with the broad field of human rights. Special emphasis will be placed on finding people who have the expertise that is lacking at present. Moreover, the present staff of the Commission will be given the opportunity, depending on their position, to take courses to familiarise themselves to a greater or lesser degree with other human rights. Not only does this ensure the continuity of the equal treatment duties and provide certainty for the members, alternate members and office staff currently employed at the Commission as regards their legal status but it also guarantees that the new organisation will have sufficient in-house expertise to handle the broad field of human rights after the entry into force of the Act.

The current investigations will be continued by the Institute and the records and archive of the Commission will be transferred to the Institute.

As the date of entry into force may differ for the different sections (see section 39) these sections are linked to the entry into force of section 1, i.e. the moment when the Institute for Human Rights comes into existence.

Section 39

The Act will enter into force on a date to be set by Royal Decree. This is because two underlying orders in council must still be amended. The government intends the Act to enter into force in the first half of 2011. In the period prior to the date of entry into force of the Act preparations (that will not be irreversible) will be made to enable the Institute to function from this date. However, these preparations will not be irreversible.

Ernst Hirsch Ballin
Minister of the Interior and Kingdom Relations
Minister of Justice

Ank Bijleveld-Schoten
State Secretary for the Interior and Kingdom Relations