Change at the Top: The Necessity of Transitional Leadership Provisions in the Laws of Independent State-Based Institutions

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Article

Change at the Top: The Necessity of Transitional Leadership Provisions in the Laws of Independent State-Based Institutions

Kirsten Roberts Lyer*

Abstract

The leadership of independent state-based bodies is critical to their independence and proper functioning. Where leadership ends, either within or outside of the term of office, legislation must ensure that the institution can continue to function. Transitional leadership provisions provide for the continuation of the powers of office in the event of the absence of the mandate holder. Through a textual analysis of the legislation of National Human Rights Institutions (NHRIs) and ombudspersons from 85 jurisdictions, this article identifies a lack of provision for transitional arrangements in enabling laws. It also discusses the problematic aspects of these legislative arrangements where they are present. It identifies the core requirements to ensure there is no leadership gap for an institution. The *findings of the article* are relevant for a broad range of state-based institutions including anti-corruption and data protection commissions, equality bodies and police oversight bodies, because all state mandated institutions risk their ability to function being undermined where legislation fails to account for a gap in leadership or does not include sufficient protections, such as immunity, for transitional office holders. This article calls for more robust focus on comprehensive transitional provisions in international standards on NHRIs and ombudspersons, and for the inclusion of such transitional provisions in the enabling laws of all legislatively mandated independent state-based institutions.

Keywords: Leadership; national human rights institutions; ombudspersons; security of tenure; transitional provisions.

1. Introduction

The independence and effective functioning of state-based bodies, such as National Human Rights Institutions (NHRIs) and ombudspersons, can be seriously undermined by an absence of institutional leadership. This is because the head often holds the powers and functions of the institution, as well as much of the legitimacy of the institution, because of their position as publicly appointed official(s) of high standing. The risk to such institutions from an absence of leadership is significant, potentially crippling their ability to operate. To reduce this risk, it is essential that enabling laws contain comprehensive transitional leadership provisions. Transitional provisions in enabling laws ensure that when the leadership of such an institution finishes, either because of the end of the term of the individual

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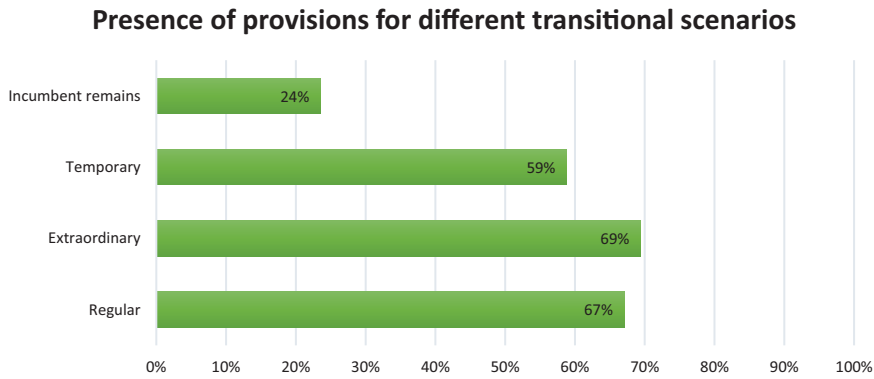


Figure. 1. Percentage of enabling laws with transitional provisions for different scenarios.

power-holder, or because of death, resignation, termination or other reason, it is clear how the institution's powers and functions will continue to be exercised pending a new appointment. However, despite the importance of this issue to their functioning, transitional provisions have received little attention compared to other aspects of these institutions' enabling laws.

A gap in leadership resulting in the inability of the institution to exercise its functions may occur where the legislation does not, or does not sufficiently, provide for a temporary office holder. Particularly in cases of unexpected end of term of office, the institution may be leaderless until a new appointment is made. While a leadership gap may occur as a result of poor legislative provisions, it may also result from deliberate efforts by the state to undermine the institution. It is well documented that NHRIs are under increasing threat[1] (for example, OSCE 2022:12). One particular means of threatening NHRIs is 'slowly undermining the ability of the institution to function' (OSCE 2022:12), and often this is done by undermining the leadership. Comprehensive transitional provisions can help to ensure the continued operation of state-based bodies during leadership changes.

Through an analysis of the text of the enabling legislation of NHRIs from 85 countries and jurisdictions, this article finds a widespread failure to include these important provisions and identifies common flaws where the legislation does provide for a leadership transition, including failure to specify an appointment timeframe and failure to provide for functional immunity. It argues that because of the risk to all state-based institutions from a leadership gap—and particularly those with critical oversight or regulatory functions such as NHRIs and ombudspersons—their legislation must include comprehensive transitional provisions as standard.

Fig. 1 illustrates the extent of the problem identified by this article, showing the percentage of the presence of transitional provisions in enabling laws covering regular end of term (including provision that the incumbent remains in office), extraordinary termination of office, and temporary absence of leadership for all institutions reviewed.[2] The findings are discussed in more detail in subsequent sections.

Fig. 2 illustrates the data in figures by institution type. The total number of each institution-type reviewed for this article is indicated in brackets beside the name of the institution type. As can be seen, 77 per cent (33 out of 43) of the ombudspersons institutions

1 The definition of 'threat' from the OSCE's 2022 publication on the resilience of NHRIs, which is, 'an intentional, organized effort to diminish or eradicate the capacity of an NHRI to fulfil its mandate independently and effectively in accordance with the UN Paris Principles'.

2 This data shows the presence of some provision for the indicated type of transitional scenario, but does not reflect the quality or sufficiency of that provision.

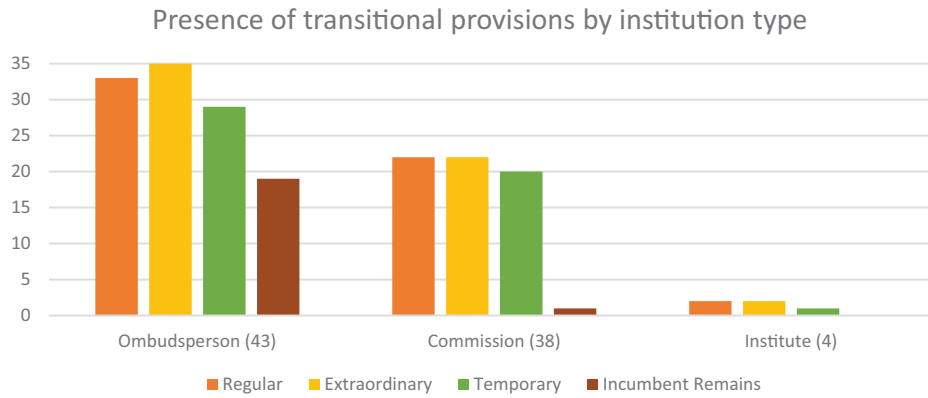


Figure 2. Number of enabling laws with provisions for different transitional scenarios by institution type.

provide for transitional provisions in situations of the end of the regular term of office, while only 58 per cent (22 out of 38) of the commissions do so. For situations where there is an extraordinary end of term of office, the numbers are 81 per cent (ombudspersons or ombuds-type)[3] and 58 per cent (commissions). For temporary absence of the power-holder, the number decreases for both types of institution to 67 per cent (ombudspersons) and 53 per cent (commissions). These findings are discussed in more detail in subsequent sections.

The widespread gaps in the inclusion of transitional provisions is of concern, as examples show that in practice, prolonged periods without a leader can significantly affect the ability of an institution to function. Perhaps the most striking example is in relation to the NHRI of Argentina, where a gap in leadership began in 2009 following the resignation of the ombudsperson before the end of his second term. Pursuant to the transitional provisions in the law the ombudsperson was replaced by a deputy. However, despite provisions in the law that such replacement is a temporary measure (Argentina 1993: Article 13), the deputy remained as acting ombudsperson until 2013, when their term expired without the appointment of an ombudsperson. By 2016, the Global Alliance of NHRIs' (GANHRI) Sub-Committee on Accreditation (SCA) expressed concern that despite multiple attempts, an ombudsperson (*Defensor*) had still not been appointed, and an 'undersecretary' – the secretary general of the organization—was acting in the position (SCA 2016: 8). The situation continued into 2018. Emphasizing why this was so problematic, the SCA stated 'in the strongest terms its concern that the failure to appoint a Defensor has an actual or perceived impact on the permanency and institutional independence of the [Argentine NHRI]. It also restricts its ability to effectively carry out the full extent of its mandate. In this regard, the SCA notes that the [Argentine NHRI] is unable to initiate new procedural cases in the absence of a Defensor' (SCA 2018: 22). The failure to appoint an ombudsperson was the subject of a 2016 Supreme Court of Argentina ruling which urged the legislature to make the appointment to the position as provided for by the constitution, and noted the negative impact on access to justice from the vacant post (Basaure Miranda 2017). Basaure Miranda, writing about the lengthy leadership gap, noted a problematic aspect of the arrangement as the legislation provides for the ombudsperson to be temporarily replaced by a deputy, but that individual is not empowered to exercise all the constitutional functions of the ombudsperson (Basaure Miranda 2017: 206). This further illustrates the

3 'Ombuds-type' refers to institutions that are usually single-member led with a mandate that has a focus on case-handling functions and includes ombudspersons, as well as public defenders' offices.

need for legislative provisions dealing with transitional periods to be not merely included, but sufficiently comprehensive.

Other examples of lengthy leadership gaps include Paraguay's NHRI, with a gap of more than five years (UN Committee Against Torture 2011), Nepal's NHRI during a situation of national turmoil prompting an SCA special review of its accreditation status in 2013 (SCA 2013: 24), and the long delays in the appointment of deputies for the NHRI in North Macedonia (UN Committee on Economic, Social and Cultural Rights 2016). Even a leadership gap for a relatively short amount of time has been a cause for concern at the international level. The Committee on the Elimination of Discrimination against Women (CEDAW) expressed its concern over a vacancy of six months in the case of the Lithuanian ombudsperson for equal opportunities (UN CEDAW 2014: para 12; CEDAW 2019: paras 19-20). These concerns arise because of the substantive functions vested in the individual—such as the right to initiate cases and to address parliament and the government—as well as because of the damage to the institution's continuity, stability and independence.

This article first discusses the relevant international standards for NHRIs and ombudspersons on transitional provisions. It then examines gaps and challenges in enabling legislation, including provisions for the end of term of office, whether expected, unexpected, or temporary, the allocation of functional immunity, and the assignment of powers to deputies. It considers related issues of the selection and appointment of leadership and functional immunity, before addressing specific considerations for multi-member institutions.

The article concludes that the fundamental principle from which enabling laws should begin is that there should always be a full-time leader at the head of the institution who is able to effectively exercise all powers and functions. To avoid a situation where the institution is unable to function due to the absence of a mandate holder, the law must provide that all the powers and functions are always assigned to an identified individual in all likely scenarios. The exercise of power must be accompanied by the relevant immunity and other protections. Enabling laws must also clearly provide the timeframe and process for the appointment of the new mandate holder. Going forward, international standards on NHRIs and ombudspersons should ensure that these issues are addressed. Finally, while the focus of the legislative analysis in this article is NHRIs and ombudspersons, the findings are relevant for a broader range of state-based institutions, as all such institutions risk their ability to function being undermined where their legislation fails to provide for the situation of a gap in leadership.

1.1 Methodology

The 85 NHRIs and ombudspersons covered by this article represent just over 70 per cent of all A and B status NHRIs accredited by GANHRI (GANHRI 2022).[4] GANHRI members are divided into four regions, which are also used in this article: Africa, the Americas, Asia and the Pacific, and Europe (GANHRI 2022). All institutions in Europe and Central Asia were examined, as the variety of institution type in the OSCE region is the most diverse. Additionally, this region benefits from input from the Organization for Security and Cooperation in Europe (OSCE) and the European Commission for Democracy through Law (Venice Commission) in the strengthening of NHRI legislation, meaning the OSCE region should have the most robust legislation. Between 50 and 60 per cent of the GANHRI A and B status NHRIs from each of the other regions were reviewed. Fig. 3 illustrates the range of institutions covered and illustrates it against the total number of GANHRI members for the same regions. The selection of institutions for this article includes all GANHRI regions and provides broad global coverage. A breakdown of the geographic distribution of countries covered in this article, differentiated by institution type, is illustrated in Map 1.

4 Only one institution reviewed was unaccredited—Turkmenistan. This accounts for the disparity in the figure for Europe and Central Asia in Fig. 3.

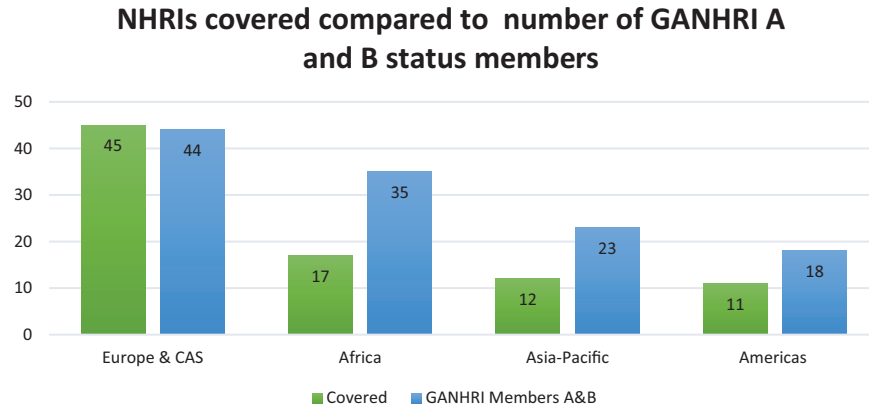
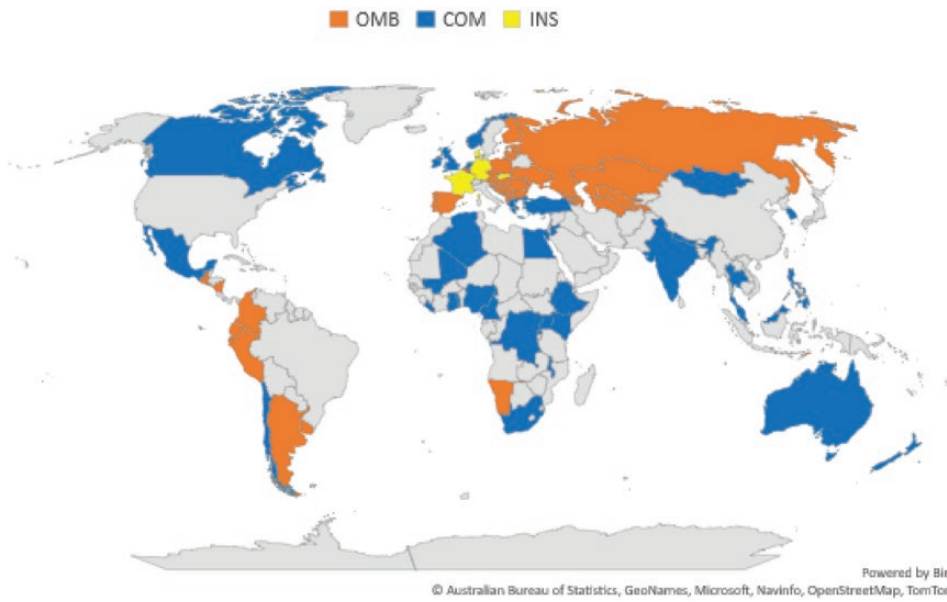


Figure 3. Number of NHRIs covered in the article compared to total GANHRI A and B status members by region.



Map 1. Geographic distribution of countries covered.

Discussing NHRIs as a homogenous group necessarily results in generalization, however given their 'common basis on a set of international principles, membership of a global network, review on the basis of agreed standards (by the SCA) and common modes of interaction at the international level', approaching NHRIs in this way is justifiable (Langtry and Roberts Lyer 2021: 22).

The relevant enabling laws used in this analysis were sourced either through the website of the institution itself, or, where this was not accessible, through the official online legislative database of the country concerned. A small number of pieces of legislation could not be found online from local sources and were sourced from non-local international organization websites such as the International Labour Organization's NATLEX database of national labour, social security and human rights legislation. In a number of instances,

other legislation or instruments had to be reviewed in addition to the enabling law—for example, for institutions with a constitutional basis or where relevant provisions were contained in the by-laws of an institution. The rationale for the focus on enabling laws is explained in the next sub-section. The list of laws used in this analysis is provided in the bibliography, and in-text dates refer to the to the date of the most recent amendment stated in the law. Due to the frequency of legislative amendments the laws analysed may not be the most recent version—the version used in the analysis is indicated in the citation and appendix.

In assessing whether an institution had a transitional provision in its enabling law, the legislation was read to identify clauses that would cover a transfer of power in the event of regular (end of term), extraordinary (death, resignation and so on), or temporary absences.[5] Provisions solely requiring a new appointment to be made when a vacancy occurred were not considered transitional provisions for the purpose of this article, as they do not guarantee continuity of powers pending a new appointment. Where power was shared in the institution among multiple members, the law was classified as including a transitional provision, as no gap in functioning would occur in the absence of a specific member. The entire enabling law was reviewed in all circumstances.

While official English-language versions were sought where possible, much of the analysis in this article has been undertaken on the basis of unofficial translations or machine translations, thus some errors in language may occur. Further, as noted, this article has only looked at the enabling law of the institutions themselves (as well as the Constitution, and internal regulations, where directly relevant). Thus, in some instances, there may be another national legislative provision that provides clarity or further detail on the transitional arrangements, immunities or appointments relevant to the institution. The review of the legislation included analysis of both selection and appointment provisions, and took into account different institution types, as explained in the following sub-sections.

1.2 Selection and appointment provisions

To fully understand transitional provisions for the transfer of power between office holders, they must be examined holistically with appointment and dismissal provisions, as these provisions often partially regulate the circumstances of the absence of an office holder; in particular, the permanent absence of the office holder requires an appointment procedure to take place. Transitional provisions must take into account the different appointment scenarios provided for elsewhere in the law. For these reasons, the present review of enabling laws includes, and refers to, selection and appointment provisions as appropriate.

In some instances, what appear to be transitional provisions may need to be examined as selection and appointment provisions using the scrutiny and standards required for these processes. For example, in the law of Azerbaijan, the previous commissioner should remain in office until the election of the new commissioner (2016: Article 4.3). However, where the commissioner's mandate expires unexpectedly, the law provides only that a list of three candidates is to be provided by the President to the parliament within 30 days (Article 7.3), and for an 'appropriate decision on the election of the commissioner' to be taken within a further 15 days. This is an example of both a transitional provision, and a selection and appointment provision.

Selection and appointment processes for the leadership of independent state-based institutions are critical to their independence (see, for example, Langtry and Roberts Lyer 2021: ch. 4.4). The SCA has set out clear requirements for the process. Specifically, states are required to:

5 Where a legislative provision was so excessively vague or unclear, it was marked as not being present. The institutions in Sweden and Liechtenstein were reviewed, but the enabling laws contained insufficient information to include in the data.

a) Publicize vacancies broadly;
b) Maximize the number of potential candidates from a wide range of societal groups;
c) Promote broad consultation and/or participation in the application, screening, selection and appointment process;
d) Assess applicants on the basis of pre-determined, objective and publicly available criteria; and
e) Select members to serve in their own individual capacity rather than on behalf of the organization they represent (SCA 2018:22).

A review of the enabling laws in this analysis indicates a number of different appointment scenarios that may occur:

1) Regular appointment due to the end of term of the incumbent;
2) Extraordinary appointment due to resignation;
3) Extraordinary appointment due to death or incapacity of the incumbent;
4) Dismissal for cause.

Fig. 1 illustrates the presence of the different transitional provisions, including provision for temporary absence, by institution type. It shows that significant gaps exist in the inclusion of provisions covering all of these scenarios. Where provisions are made for scenarios number two and three, they often set out an appointments process that is shorter and thus less robust than that for regular end of term of office appointments, as will be discussed further in section 3.4 below. Where dismissal provisions are overly broad, and there is a lack of transitional provisions in the legislation, it increases the risk of a gap in leadership, including by way of threat against the institution aimed at undermining its functioning.

1.3 Implications for different institution types

NHRIs exist as a range of different institution types. The most common types are ombudspersons and multi-member human rights commissions. As illustrated by Fig. 4, in November 2022, of the 120 NHRIs accredited with A and B status by GANHRI, 69 (58 per cent) were multi-member institutions (primarily, human rights commissions) and 47 (39 per cent) were ombuds-type institutions (GANHRI 2022).

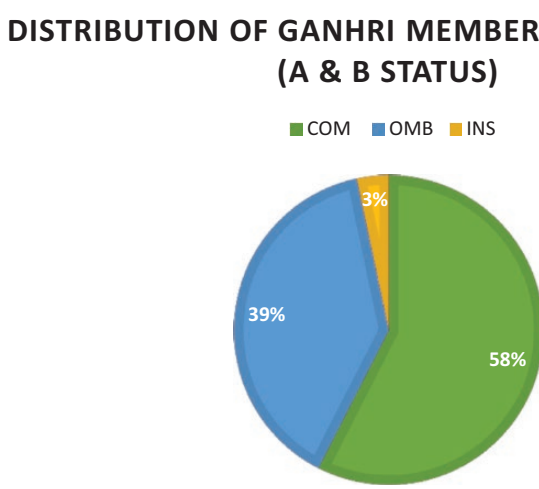


Figure 4. Percentage distribution of GANHRI A and B status members in November 2022 by institution type.

When considering the potential impact on the institution of a leadership gap arising from the absence of transitional provisions, the leadership structure is particularly important. The classic ombudsperson/commission/institute division does not provide a sufficient indication of the likely risk in this regard. More important is the location and concentration of power in the institution. Some multi-member commissions have a chair or chief commissioner in whom powers are concentrated (for example Cameroon, Ghana, India, Mongolia, Scotland), making them akin to single-member headed institutions. Some ombudspersons are in fact multi-member for the purposes of the centralization of powers (for example, Bosnia and Herzegovina with three ombudspersons or Uruguay that operates via a five-member board).

Transitional leadership problems are most likely to arise in an institution where power is concentrated in a single individual. Thus, nuance between the classical typography of NHRIs is required, with attention paid to the presence of multiple leaders, deputies, and the presence of transitional provisions in order to discern whether an institution can be most accurately classified as solely led by one person and then, the likely risk to it.

The notable disparity in the absence of transitional provisions in many commissions' enabling laws found by this article, and illustrated in Fig. 2, is perhaps based on the presumption of continuity due to the number of members. However, this potentially being less problematic should not exempt states with multi-member institutions from including transitional provisions in their enabling law except for institutions where the sharing of power is manifestly clear and covered by the law.

Institutions may be classified as single-member led for the purposes of the present analysis where legislative provisions place critical[6] powers and functions of the institution with one individual. The presence or absence of a deputy/vice-president/vice-chair/other full-time commissioners is the second point of analysis to determine the level of risk to the institution from an absence of one individual leader. Further, where there is also an absence of a clear appointment timeframe, this will add to lower overall risk of leadership gap.

A number of questions can be asked to determine the level of risk to the institution from an absence of transitional provisions:

1) Are critical powers placed with one individual?
2) If yes, is there provision for a deputy, other commissioners, vice-chair or similar?
3) If yes, are these individuals empowered to take over from the main office holder in all circumstances where there is a vacancy?
4) Are provisions in place for the filling of the vacancy with a clearly defined timeframe?
5) Do provisional office holders have the immunities and protections of the primary power-holder?

Institutions with concentrated power structures and with absent or poor transitional provisions can be more easily negatively affected by the failure to provide for the transfer of power prior to the appointment of a new head when compared to institutions where there are other individuals available for continuity of leadership.

One additional point to note in relation to the different institution types is that multi-member institutions such as human rights institutes often operate under a more complex leadership structure than ombudspersons or commissions, having a board, as well as a chairperson, and director/secretary general in whom different functions reside. They are generally less susceptible to leadership gaps, and because of this, and also because of their low number globally, do not form a significant part of the analysis in this article.

6 'Critical' here means operational power in the institution to make substantive decisions regarding the implementation of the institution's mandate—such as taking cases or initiating inquiries.

1.4 Relevant international standards

When considering the transitional provisions in NHRIs and ombudspersons' enabling laws, the relevant international standards for such laws is a necessary starting point both to understand both the general requirements, and what they say about transitional provisions. The UN Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights, adopted by UN General Assembly Resolution 48/134 of 20 December 1993 (UN General Assembly 1993) (hereafter, the Paris Principles) set out the role and functions of NHRIs. They are applied by the SCA through a process of periodic peer-review accreditation (Langtry and Roberts Lyer 2021). Because of the relatively scant nature of the Paris Principles themselves, the SCA has developed a set of General Observations, which elaborate and expand on the Principles (SCA 2018). This peer-review process is recognized as authoritative by the UN (Langtry and Roberts Lyer 2021: 10), and its findings are relevant therefore to understanding the Paris Principles.

Enabling laws should provide for the mandate, powers, functions, guarantees of independence and budget of NHRIs (UN General Assembly 1993; Council of Europe 2021). Thus, the enabling law is where transitional provisions should be located. Security of tenure, functional immunity, and appointment and dismissal protections serve to enhance the NHRI's ability to engage in critical analysis and commentary on human rights issues, or safeguarding the independence of senior leadership, and promoting public confidence in the NHRI. The Paris Principles provide guidance on NHRI's stability of mandate, emphasizing that this encompasses 'appointment … by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured' (UN General Assembly 1993). While the SCA does not have a specific General Observation on the issue of transitional provisions, it has emphasized the necessity of a stable mandate for the leadership of NHRIs to ensure independence and the 'ongoing and effective fulfilment of the NHRI's functions' (SCA 2018).

Related to this stability of mandate, the SCA also stresses the requirements for full-time members. In its 2018 General Observation 2.2 on full-time members of an NHRI, it recommends that the enabling law of the NHRI should provide that members of its decision making body include full-time remunerated members. This assists in ensuring:

a) The independence of the NHRI free from actual or perceived conflict of interests;
b) A stable tenure for the members;
c) Regular and appropriate direction for staff; and
d) The ongoing and effective fulfilment of the NHRI's functions (SCA 2018: 36).

A number of international standards relevant to NHRIs and/or ombudspersons directly address the question of transitional provisions. Council of Europe Committee of Ministers Recommendation CM/Rec(2021)1, on the development and strengthening of effective, pluralist and independent national human rights institutions, provides that: 'The duration of the appointment [of leadership] should be clearly set out in the founding legislation, so that the leadership posts of the NHRI do not stay vacant for any significant period of time' (Council of Europe 2021). Similar language is contained in Committee of Ministers Recommendation CM/Rec(2019) 6 on the development of the Ombudsman institution (Council of Europe 2019). The Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments recommends that:
Parliaments should clearly lay down in the founding law that, where there is a vacancy in the composition of the membership of a NHRI, the vacancy must be filled within a reasonable time. After expiration of the tenure of office of a member of a NHRI, such member should continue in office until the successor takes office (UN Human Rights Council 2012). The Venice Commission has similarly recommended that the current office holder should remain in place until the successor is appointed (Venice Commission 2009). In its Venice

Principles on ombudspersons, however, the Venice Commission, does not directly address the issue.

A common recommendation in relation to the content of transitional periods is that the current office holder remain in place. In commenting on the draft of the enabling law of the NHRI of Iceland, the OSCE emphasized that in order to safeguard the continuity of the Icelandic NHRI Board, 'the current members and the Chairperson should remain in office after the end of their terms until a successor is appointed'. It particularly emphasized the importance of this rule as crucial in the case of the change of the chairperson, to ensure the proper transfer of duties between the old and the new office holder (OSCE 2017: para 53). The OSCE Opinion also identified the importance of clear provisions on the consequences of termination of the office-holders mandate (OSCE 2017: para 74). Some international standards recognize that the common recommendation that the incumbent remains in office may not always be possible or appropriate, as it does not address situations where there are vacancies as a result of death, incapacity or other legitimate removal of the leadership outside of the ordinary end of the term of office (OSCE 2020; OSCE 2011: para 44).

Although some international standards address transitional leadership issues, none address all the situations that may arise when there is a gap in leadership. Further, those that do address the issue are insufficiently precise to ensure institutions are protected. For example, requiring a vacancy not be left open for any 'significant period of time', as proposed by the Council of Europe, may still allow for a situation where there is no leadership of the institution for a period of time long enough to have a substantial negative impact on an institution. This is particularly the case in the absence of clarity as to the definition of 'significant'.

2. End of regular term of office

As was seen in the sub-section above on international standards, it is expected that a typical transitional leadership provision contained in the enabling laws reviewed for this article is for the incumbent to remain in office until the appointment of the new office holder in cases where their mandate has expired. This is the most basic and foreseeable circumstance where transitional arrangements should be in place. However, in fact this provision is uncommon, with just 24 per cent of all institutions reviewed including this in their enabling law (Fig. 1). A significant disparity was apparent between the different classical institution types as can be seen. Of 43 ombuds-type institutions examined, 19 included provisions for the incumbent to remain in office following the end of their regular term. This is compared to only one of the 38 commission-type institutions.

Permitting an incumbent to remain until a successor is appointed has some obvious logic and should be included in legislation as part of the overall package of transitional provisions. However, this provision is insufficient in itself, and it can become problematic in two situations in particular:

1) In the absence of a specified timeframe for the new appointment;
2) Where the incumbent is unable to remain in the role due to death, illness, or other reasons.

In practical terms, having the incumbent remain in office may not be possible or even desirable—for example, if the person is leaving to take up a governmental or political post. Thus, an alternative where the individual is no longer available to hold the office, or where the individual has accepted a position that is incompatible with the role, must also be included in the legislation.

Further, in the absence of a deadline by which a new appointment must be made, the incumbent could potentially remain indefinitely. The Venice Commission has also raised

concerns where a timeline is placed on the period of office of the temporary office holder, pending the new appointment. In that instance, the draft law provided that a member whose mandate had expired 'shall serve until the appointment of a new member, but no longer than three months'. The Venice Commission raised the concern that this 'may compromise the well-functioning of the Commission in case the Parliament does not manage, for some reason or other, to elect new members'(Venice Commission 2018). However, the other side of this is that it may be damaging to an institution where a deputy remains for an extended period—as was seen in the case of Argentina, discussed above. This is particularly the case where the deputy is not properly endowed with all the powers of the primary office holder.

The situation of the Polish ombudsperson illustrates a further point of concern in having the incumbent remaining as the sole transitional provision. In that instance, a transitional provision in the enabling law that the incumbent would remain in place until the appointment of a new ombudsperson was declared unconstitutional. The term of office of the ombudsperson ended on 9 September 2020. The incumbent remained in place. However, following a request to the courts from a member of parliament, the legislative provision was ruled incompatible with the constitutional provisions on the ombudsperson on 15 April 2021, with a 3-month period given by the court for the ruling to come into effect (ENNHRI 2021). This raised serious concerns from international organizations about the ability of the institution to function.[7]

A small number of laws reviewed provided transitional provisions for the continuation of institutional powers in all cases except for ordinary expiry of term of office. For example, the law on the ombudsperson of Spain (2012: Article 5(4)): 'In the event of the death, dismissal or temporary or permanent incapacity of the Ombudsman, and until Parliament makes a subsequent appointment, the Deputy Ombudsmen, in order of seniority, shall fulfil his duties'. This suggests that the deputy would take over in the situations underlined above, but not at the end of the regular vacancy. Such apparent inconsistencies underscore the need for a comprehensive approach to be taken to transitional provisions.

The 2015 enabling law of the ombudsperson of Kosovo is a positive example of a simple means of covering the different eventualities, detailing the requirements for expiry of mandate and other situations, with Article 14 of the law covering situations of death, resignation, expiration of mandate, dismissal, permanent or temporary disability. In most of these situations, a deputy replaces the ombudsperson, and senior staff in the deputy's absence. In situations where the mandate expires, the ombudsperson or deputies may exercise the functions (Kosovo 2015).

A related issue is where parliament fails to elect a new office holder. The 2017 Czech Republic law provides that a Defender whose oath has expired remains in office until the oath of the new Defender (Czech Republic 2017: section 4(1)), however, in the event that this is not possible due to the position becoming vacant, the election is to take place within 60 days (section 6(7)). If this election is unsuccessful, another 60 days is granted. The legislation thus appears to allow for a situation where there is a perpetual gap—if there is a recurring failure to elect a new defender—similar to the situation that occurred in Argentina, discussed in the first section. This could become particularly problematic for the functioning of an institution in the absence of other transitional provisions.

Consideration should also be given in the legislation to the situation where reappointment is done by parliament, but the parliament is out of session or dissolved. The Portuguese enabling law is one of the few reviewed that provide explicitly for this in Article 6(4) (2013):

7 For example, a tweet from the Council of Europe Commissioner for Human Rights expressed concern that 'Today's Constitutional Court ruling creates a worrying gap in the functioning of the Ombudsman institution in-btw terms and the protection of #humanrights in #Poland. A successor must urgently be selected fully respecting the Polish Constitution and law & international standards' (@CommissionerHR 15 April 2021).

> Where the Parliament has been dissolved, or is out of session, the appointment shall be made within fifteen days of the first sitting of the new Parliament or of the new session, unless an extraordinary session of Parliament session is convened for such purpose.

3. Unexpected end of term of office

There is a gap in many enabling laws where the end of the term of the office holder occurs outside of the regular term. In 32 out of 43 ombudspersons laws and 29 out of 38 commission laws where the end of the term of office outside of the regular term is addressed, the solution proposed is the assignment of deputies, vice-chairs or other commissioners to fill the role on an interim basis. However, many laws fail to include provisions that can account for the full range of possibilities whereby a mandate unexpectedly becomes vacant, and some even fail to cover all the situations provided for elsewhere within their own texts.

For example, the 2017 law of the Seimas ombudsperson of Lithuania provides in Article 9(4) that '[i]n the cases specified in subparagraphs 1 and 2 of this Article the Seimas Ombudsman shall continue in office until the new appointment is made to the post of the Seimas Ombudsman' (Lithuania 2017). The sub-paragraphs referred to include circumstances such as death, temporary incapacity, conviction, or no-confidence vote, that would clearly preclude continuation in post. Article 7(3) provides that '[i]f the powers of the Seimas Ombudsmen are terminated ahead of term, the Seimas shall make a new appointment to the position of the Seimas Ombudsman'. Under the law, one of the ombudspersons is assigned to be head of office. Article 25(1) provides that 'In the absence of the Seimas Ombudsman – head of the Office, the other Seimas Ombudsman shall act for him'. There is no clear provision in the law for the absence of the non-head of office ombudsperson or both ombudspersons, nor a legislated timeframe for appointments.

Where deputies are the chosen transitional option in case of an unexpected end of the term of office, a number of particular considerations arise, which are discussed further here, as well as in the next section on immunity.

3.1 Appointment and powers of deputies

How the deputy who is to take on the role of the office holder during a transitional period is appointed is an important consideration for independent institutions. Where deputies are elected in a manner similar to the primary office holder in compliance with the UN Paris Principles, this may enhance the legitimacy of their temporary assumption of the role, pending the new appointment.

For some institutions, such as in Slovenia and North Macedonia, the determination of the role of deputies is left to the ombudsperson. This may be appropriate in supporting independence in the assignment of powers, but it is important that it does not result in lack of clarity or gaps in transitional arrangements. Provisions covering a situation where the office holder has not yet appointed a deputy, or the deputy position is otherwise vacant are particularly critical where it is a deputy who would fill the transitional role.

Related to this is where there is a gap between the appointment of the main office holder and deputy provided for in the law. The 2021 law of the Commissioner in Hungary provides that if the mandates of the commissioner and deputy terminate at the same time, the newly elected commissioner will make a proposal for the deputy within 30 days of his/her election (section 7(2a)). There is no specified timeframe for election of the deputy by the parliament. Should the commissioner be unable to undertake their functions prior to this proposal going forward, the institution could be without the primary office holder and the deputy who is supposed to replace them in their absence. In the case of the Hungarian institution, the role of the deputy is particularly important, as specific mandates are assigned to them (minorities, section 5(4) and 'future generations', section 3), which allow them to

use the title of Ombudsman for the Future Generations and Ombudsman for the Rights of National Minorities (Hungary 2021: section 3(4)).

In circumstances where the deputy's term of office is tied to the principal ombudsperson some laws are unclear as to what happens when the principal ombudsperson steps down. For example, in the 2018 law People's Advocate of Moldova (Article 15(6)), 'Deputies are appointed for the duration of the People's Advocate mandate, in no more than 60 days from the appointment of the People's Advocate' (Moldova 2018). In the absence of additional clarity as to the situation when the advocate leaves office unexpectedly, this potentially risks a situation where there is a gap in leadership in the institution despite the presence of deputies. In the 2016 law of the Chancellor of Justice of Estonia, there is a provision whereby one of the two deputy chancellors replaces the chancellor in the event of his/her temporary or other inability to continue in office (Estonia 2016: section 37(2)). Section 37 also requires additional provisions to have been put in place for the substitution 'pursuant to the procedure … determined by the Chancellor', raising the question of what happens if such a procedure has not been previously determined. Similar concerns arise for multi-member institutions where provisions are in place for the potential delegation of functions without other specifications as to when this should occur. For example, the 2016 law in South Korea (2016: Article 6(2)), specifies that 'Where the chairperson of the Commission is unable to perform his/her duties for unavoidable circumstances, a full-time commissioner, whom the chairperson designates in advance, shall act on behalf of the president'. Issues will arise where such designation has not been made in advance and the primary power-holder's position becomes vacant.

3.2 Language on temporary assignment of powers

The clarity of transitional leadership provisions in legislation and its precision in relation to the exact nature of the role the deputy or other temporary office holder assumes is an issue in a number of laws reviewed. Transitional provisions require sufficient precision on the extent of the transfer of powers to safeguard the legitimacy and continued smooth operation of the institution. Some laws are quite clear on the nature of the powers transferred. For example, the law of Uzbekistan (Article 5, 2004) specifies the assignment of rights and protections: 'In case of the dismissal of the [Authorized Person (AP)], the Deputy of the AP performs his/her duties until a new AP is elected, and during this period he/she enjoys all the guarantees provided for the AP'.

Often the word chosen for the transfer of powers is translated as 'duties'. It is important that this term is sufficient in the national context to cover all of the necessary aspects of the office holder's power. Particularly, it should be clear whether it is to be understood as simply the current obligations or workload, or if it has a wider meaning that encompasses the entirety of the powers, functions, rights and responsibilities of the office holder. In this regard, the language of the Bulgarian ombudsman law (Bulgaria 2013: Article 17(2)), 'shall take up his position', would seem a useful approach, as it indicates that the deputy is acting as the ombudsperson. The language in some legislation would seem to suggest that the individual would not take on the full role of the office holder, but merely 'keep the office running', which may be insufficient to ensure the continued operation of the institution in the absence of the office holder. Other common terms used are 'replace' or 'substitute', which would need to be understood in the national legal context, but may also risk a lack of clarity as to whether this is sufficient for the individual to temporarily take over all the duties and functions of the primary power-holder.

The Canadian Human Rights Commission has a clear provision that would appear to cover all necessary aspects. Article 31(3) provides:

> In the event of the absence or incapacity of the Chief Commissioner and the Deputy Chief Commissioner, or if those offices are vacant, the full-time member, other than the Accessibility Commissioner, with the most seniority has all the powers and may perform all the duties and functions of the Chief Commissioner (Canada 2019) [emphasis added].

Finally, it may be noted that in many laws where deputies or vice-chairs are provided for, they are either designated to be a transitional power-holder, and/or to have specific functions within the institution such as being the head of the National Preventive Mechanism (NPM) under the Optional Protocol to the Convention Against Torture (NPM) (for example, Slovenia). For that reason, it is prudent to also have transitional arrangements in place for deputies (see, for example, Canada 2021: Article 31(3)).

3.3 Staff as transitional leaders

In a limited number of cases, enabling laws reviewed provided for powers to be assigned to a senior member of staff in the absence of the primary office holder. For example, in case the Public Defender of Armenia is temporarily absent, or his/her powers have been terminated, the 2016 enabling law provides that 'one of the department heads holding discretionary office within the Staff of the Defender shall substitute the Defender upon his or her decision' (Armenia 2016: Article 14). In case of impossibility of a decision on substitution or in case the Defender resigns, he or she will be 'substituted by the head of a department within the Staff of the Defender who is elder'. However, the assignment of powers is limited by the same article. The powers that the relevant individual cannot exercise include decisions on a complaint, administration and management of the secretariat, powers of the Defender with regard to improving normative legal acts, powers of the Defender as the NPM. Further, it is unclear if the Defender's immunity would attach to this individual. Clearly, this could seriously curtail the ability of the designated individual to continue the proper functioning of the institution. The enabling law of the Hungarian Commissioner for Fundamental Rights includes provision for the delegation of duties from the commissioner to members of staff. Provided such delegation occurs, this may assist in a situation where there is a vacancy at the head of the institution. However, in that law, under the NPM section, only limited powers may be delegated, and it is not clear whether such authorization would remain should the commissioner leave office. The 1997 law in Romania allows for the assignment of certain powers of a *deputy* ombudsperson to staff in cases of resignation, incompatibility, inability to fulfil duties, or death, '[u]ntil the appointment of a new deputy, his/her duties shall be delegated, by order of the People's Advocate, to a person from the specialized staff' (Romania 1997: Article 11(9)). In that instance, deputies have mandate-specific roles (for example, in relation to the NPM).

3.4 Extraordinary appointments timeframe

Where a leadership gap arises, there must be a clear timeframe for a new appointment to take place. In the absence of a specified timeframe, the vacancy of the office holder or the transitional provisions can potentially remain in place for a long period of time, as seen in the examples of Argentina and Panama in the introduction. However, despite its importance, the specification of a timeframe is a significant gap in enabling laws. As can be seen in Fig. 5, just 39 per cent of institutions provided for a regular reappointment timeframe and 39 per cent for extraordinary appointments where their mandate ends due to reasons apart from the natural end of term of office.

A related problem to the absence of a timeframe is when the law sets a deadline for non-regular appointments, but it is excessively short. Provisions here vary considerably. The 2014 law in Albania provides that in extraordinary appointments, the announcement for the vacant position is to be made 'within 10 days from the creation of the vacancy' (2014: Article 9(2)), and that 'The People's Advocate is elected by three-fifths of all the members not later than 30 days from the mandate termination/dismissal [emphasis added]'. This means that a new People's Advocate could be selected and appointed within a period of 20 days. A similarly short provision is provided for in Kyrgyzstan (2014: Article 4(11)), which states that in cases of early termination of powers, the 'election … must be held within a month'. The law from Portugal (2013: Article 15(3)) provides that 'In case of vacancy of the

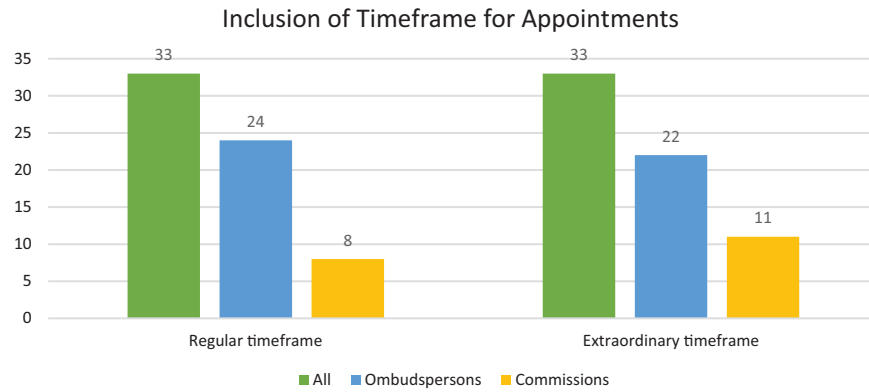


Figure 5. Inclusion of timeframe for regular or extraordinary appointment in enabling law.

office, a new Ombudsman must be appointed within the following thirty days'. The same one-month timeframe is in place in the Human Rights and Equality Institution of Turkey (Turkey 2016), in Bulgaria (2013: Article 17(1)), and in South Korea (2016: Article 7(2)). Slightly longer appointment periods of 45 days (Uruguay 2019: Article 42) and 60 days/2 months are provided for in other laws such as the Russian Federation (2016: Article 14), Mongolia (2020: Article 12.10), Czech Republic (2017: Article 6(6)), and Tajikistan (2009: Article 10(3)). Other laws require a nomination within a short period of time for regular or special appointments, such as Ukraine (2014: Article 6), which sets out a period of 20 days.

These short timeframes for extraordinary appointments raise serious concerns for the independence and legitimacy of the new office holder. They limit the possibility of following the procedures required under the UN Paris Principles. In particular, it is difficult to see how the required broad and participatory process could be undertaken in such a short period of time. The availability of high quality candidates within such a short timeframe is a further point of concern. The end of the ordinary term of office of a mandate holder will have been well anticipated and candidates will already have prepared themselves to apply. A one-month timeframe for a senior, high quality candidate to change jobs is likely to be unrealistic.

Further, the person appointed in these rushed circumstances may serve a full term of office if their term is not otherwise specified, meaning their selection is even more critical. The term of office for extraordinary appointees is thus also an issue. Some laws provide that the new appointee will serve out the remainder of the term of the office holder who has left (for example, Bosnia and Herzegovina 2006: Article 10(2); Austria 2009: Article 148g(4); Togo 2019: Article 11). Such provisions are perhaps included as a means of recognizing the shorter appointment process that has taken place. However, this change to the term of office of the NHRI leadership may breach the SCA's requirement for the duration and stability of the mandate (Langtry and Roberts Lyer 2021: 144). Such provisions may undermine the office holder, suggesting that they are somehow a temporary appointment, affecting the stability and independence of the institution.

3.5 Dependency on actions of the state

Particular problems for the continuation of an institution's functions may arise where transitional leadership provisions are dependent on initiation by the state, as this opens a risk that the institution may be left without a leader either intentionally or unintentionally. Dependency on the state to appoint a replacement as the sole provision in an enabling law

was found in seven (out of 85) laws indicating that while relatively rare, it is sufficiently present to warrant attention to its risks.

For the Indian Human Rights Commission, there is a chairperson in whom power resides. A risk arises where the Chairperson position is vacant as the temporary assignment of these powers is at the discretion of the President of the country. Article 7(1) provides that 'the President may, by notification, authorise one of the Members to act as the Chairperson until the appointment of a new Chairperson' (India 2006: Article 7(1)). Even where the Chairperson is temporarily absent, the functions of the Chairperson cannot be exercised by another member of the Commission except by authorization of the President (India 2006: Article 7(2)). A further clause in the law does provide that no act or proceedings of the Commission shall be invalidated because of 'any vacancy or defect in the constitution of the Commission' (India 2006: Article 9). However, with specific powers assigned to the Chairperson, its functioning in practice may be severely restricted.

Problems may also arise in the absence of a timeframe for government action. For example, the 2014 Irish Human Rights and Equality Commission Act provides:

> Section 13 (2) Where a vacancy arises, or is anticipated will arise, on the Commission, the Government shall, for the purposes of identifying persons and making recommendations to the Government in respect of those persons for appointment as members of the Commission, invite the Service to undertake a selection competition. [emphasis added] (Ireland 2014).

As can be seen, while this is a requirement on the government ('shall'), no specific timeline is given for the selection competition, and this leaves open the possibility that there may be a long period where a vacancy exists if the government is disinclined to act.

The law of the NHRI of New Zealand is further illustrative of the potential problems in reliance on the state for the activation of transitional provisions, namely, where the government directly selects the temporary office holder. In this instance, in case of the resignation and incapacity of the Chief Commissioner, or if the Chief Commissioner considers it is not proper or desirable that he or she should participate in respect of a particular function or activity of the Commission, the minister 'may designate a Commissioner or an alternate Commissioner to act as the Chief Commissioner' (New Zealand 2020: Article 9(2)). A similar situation can be found in the legislation in Ghana: where a vacancy arises due to death, resignation or removal 'the President shall, acting in consultation with the Council of State, appoint a person qualified to be appointed Commissioner or Deputy Commissioner to perform those functions until [a new] appointment' (Ghana 1993: section 4(3)). Concerns also arise for this type of situation outlined in the law of Samoa where, in the event of the death of the ombudsperson, the Head of State 'may' designate an assistant ombudsperson to carry out the office's functions (Samoa 2013: Article 13) and Namibia (Article 2(3)). The law in Timor-Leste states that for extraordinary vacancies, the parliament 'shall, as soon as possible and for such time as it may decide, appoint a Deputy Ombudsman as interim Ombudsman for Human Rights and Justice' (Timor-Leste 2004: Article 20(1)). The risks inherent in these laws emphasizes that to support institutional independence, transitional provisions should be self-activating and not dependent on the government for their initiation.

4. Temporary leadership absence and suspension of powers

As seen in Fig. 2, almost 60 per cent of laws reviewed include transitional provisions for the situation of a leader's temporary absence due to incapacity (actual inability to perform functions). Where laws are silent, or insufficient on this point, it opens up significant questions of the functioning of the institution during such absences. Some laws provide for a period of absence of up to six months before any measures under the law are taken. It is

worth recalling that the CEDAW Committee previously raised concerns in relation to a six-month leadership gap (CEDAW 2014). While it is appropriate that there would be a sufficient period of time given to ensure that the office holder is not arbitrarily deprived of their powers, the scenario of a lengthy period of absence of the individual exercising the power of the institution emphasizes the need for transitional provisions to also cover the *temporary* absence or inability of the office holder to function. Where there are no, or insufficient, provisions, situations may arise where the institution is effectively unable to function for a period of many months. Temporary absences should therefore be explicitly covered. The main provision on this could be in the enabling law, with the exact means for its application specified in the institution's internal regulations or by-laws.

Some laws reviewed contained provision for the temporary *suspension* of powers of the office holder. For example, the 2021 law in Latvia provides that the ombudsperson's powers can be suspended where the parliament has given consent for criminal prosecution against the ombudsperson. This can last until 'until the time when a court judgement of acquittal comes into effect in the relevant criminal case or the criminal prosecution against the Ombudsman is terminated' (Latvia 2021: section 8). In this eventuality, the deputy ombudsperson performs the duties of the ombudsman (Latvia 2021: section 16(3)). This is not without its potential problems, including the length of criminal proceedings in many countries. The Venice Commission has previously noted the need to address this type of issue in its comments on the draft law in Moldova (People's Advocate): 'As the court decision must be final to result in revocation, such legal proceedings may involve several months or even years after their initiation' (Venice Commission 2015). It is outside the scope of this article to consider the appropriateness of such temporary power-suspending provisions. However, careful consideration is required as to the appropriate steps to be taken in these circumstances. On the one hand, there is the critical presumption of innocence to which any charged person is entitled, and the risk of misuse of this type of provision to target the office holder. However, these considerations must be balanced against the potential harm to the legitimacy of the institution where the office holder has been charged with a serious crime. It may not always be appropriate for the office holder themselves to make a determination of their fitness to continue. A decision here may appropriately be placed in the hands of the judiciary or a two-thirds majority of parliament.

Detailed legislative provisions for a temporary office holder will alleviate the major risk to the functioning of the institution.

5. Functional immunity for transitional office holders

Immunity provisions are poorly provided for in the enabling laws reviewed. 42% of institutions had no immunity provision in the enabling law. The variation of immunity provisions in enabling laws for all institutions and by institution type, is illustrated by Fig. 6.

By classical institution type, commission-type NHRIs have the least provision for immunity with 56 per cent having no provision for immunity compared to just 21 per cent of ombuds-type institutions failing to include an immunity provision. Where immunity is included, it does not always attach to those persons assigned powers under transitional provisions. As can be seen from Fig. 6, 23 institutions (27 per cent) had an immunity provision, but only one covered the head of the institution explicitly. When taken together (no provision plus head only), this means that 68 per cent of the institutions (58 out of 85) did not have sufficient immunity provisions in place to explicitly protect a temporary office holder.

The requirement for functional immunity for leadership and staff include that national laws should include provisions which protect legal liability of members of the NHRI's decision-making body for the actions and decisions that are undertaken in good faith in their official capacity (SCA 2018: General Observation 2.3). In its justification to the General Observation, the SCA sets out the reason why immunity is so critical for all those working in NHRIs:

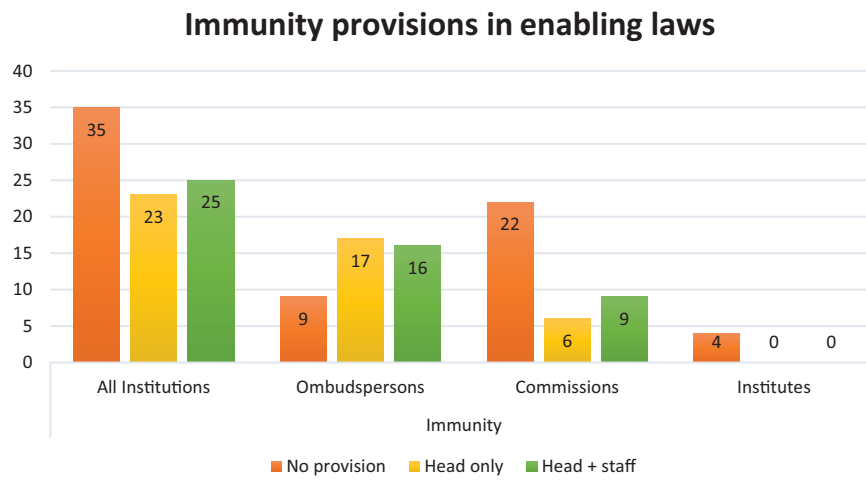


Figure 6. Presence and coverage of immunity provisions in enabling laws.

> External parties may seek to influence the independent operation of an NHRI by initiating, or by threatening to initiate, legal proceedings against a member of the decision-making body or a staff member of the NHRI. For this reason, members and staff of an NHRI should be protected from both criminal and civil liability for acts undertaken in good faith in their official capacity. Such protections serve to enhance the NHRI's ability to engage in critical analysis and commentary on human rights issues, safeguard the independence of senior leadership, and promote public confidence in the NHRI.

The Venice Commission in its Venice Principles on ombudspersons similarly emphasizes the need for immunity for the ombudsperson, deputies and decision-making staff (Venice Commission 2019: Principle 23).

Immunity of temporary office holders is essential to enable them to effectively exercise the powers of office. The 2019 law of the Public Defender of Georgia provides an example of a clear provision covering immunity for the transitional period:

> The First Deputy Public Defender of Georgia shall perform duties of the Public Defender of Georgia until a new Public Defender is elected. In this case, he/she shall enjoy the rights, legal guarantees and immunity granted to the Public Defender of Georgia [emphasis added] (Georgia 2019: Article 9(3)).

The need for laws to contain clear provision for immunity for office holders and staff in the performance of their functions becomes particularly relevant for some of the transitional provisions that appoint staff in the event that there is a gap in leadership, as this role may expose them to risks in the execution of their functions that they otherwise may not have had. In this regard, the 2015 Kosovo law provides that a senior staff member may take on the functions in the absence of both the ombudsperson and deputies, and the law provides immunity for staff (Kosovo 2015: Articles 12, 14). This helps ensure a measure of protection for the temporary office holder that will enable them to exercise the powers of the office without fear of criminal or civil liability for acts undertaken in good faith in their official capacity. Legislative provisions must thus be clear that those exercising power in transitional situations benefit from the same immunity as the original primary office holder.

6. Specific considerations for multi-member institutions

For institutions that operate powers through a multi-member commission or similar entity, or have multiple ombudspersons, there may be less of a risk to its independence and stability from the absence of one individual, provided that the decision-making power is not centralized in that one individual. For example, the Austrian Ombudsperson works on the basis of a board and has provisions in its enabling law and standing orders that cover transitional situations through the reallocation of responsibilities among members of the board (for example, Article 148g (3)–(4) and Standing Orders of the Austrian Ombudsman Board (2009): Article 11(1)-(3)). A similar solution appears for the ombudsperson of Bosnia and Herzegovina, which comprises 3 ombudspersons, and where 'the remaining Ombudsmen shall provisionally perform his or her duties until the appointment of a new ombudsman has been completed'(Bosnia and Herzegovina 2006: Article 12(5)). This is also beneficial in terms of the legitimacy of the temporary office holder. For institutions that operate with a board, some specific considerations arise, as will be discussed below.

6.1 Gaps in board membership

One issue that may arise during a transitional period for multi-member institutions is where there is a requirement for a quorum to take decisions. This has real-world implications for the ability of an institution to function. In the case of the National Human Rights Commission of Thailand (NHRCT), the SCA expressed concerns in 2020 that delays in the appointment of the commissioners 'resulted in a short period in which the NHRCT was unable to make decisions with respect to complaints due to an insufficient number of Commissioners, which resulted in a lack of quorum' (GANHRI 2020).

Some laws expressly provide for a continuity scenario in the absence of members. The Irish Human Rights and Equality Commission has a provision in its 2014 enabling law that '[t]he Commission may act notwithstanding any vacancy among its members' (Ireland 2014: section 12(5)). While at first glance this may seem a positive way of ensuring continuity of functions, the desirability of such provisions may be in question where there is an absence of provisions for appointments (with accompanying timeframe), as the departure of a significant number of members could threaten the legitimacy of the institution, in particular where there are government appointees. The law in Slovakia, provides for nine members, three of whom are appointed by organs of state (the President, Speaker of the National Council and Minister of Labour, Social Affairs and Family (Article 3a(1)). In the 2016 law in Turkey, three of 11 members are appointed by the President (Article 10(2)), without further detail being given in the law. In such institutions if there were a high number of vacancies in the non-state members, it may be that an imbalance occurs with the majority of the board being state appointees, bringing the independence of the institution into question. Thus, and particularly noting that a number of members of the board are government appointees, the independent operation of the NHRI has the potential to be seriously undermined.

In other institutions, particularly commission-type, there is provision for the use of alternate members (for example, The Netherlands: Article 14(1) (2011)). This approach may reduce potential gaps in leadership and related problems. Where alternates are used, the same requirements should be in place for selection and appointment, as, for example, is set out in The Netherlands law (Article 16(3)). Care should be taken to ensure that provision is made for the situation of the absence of both the member and their alternate.

Multi-member institutions may experience problems with continuity where the institution does not have staggered appointments, leading to a situation where all positions become vacant at the same time. Just two out of the 38 commission-type institutions reviewed contained a clear staggered appointment provision. The Irish Human Rights and Equality Commission's 2014 enabling law has provision for this, as the terms of the initial

commission were staggered (seven being appointed for three years, eight for five years), meaning that there should only be half of the Commission being reappointed at any one time (section 12(6)). The OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Venice Commission appear to support such an approach, recommending in their comments on a Tunisian draft law on the Higher Committee for Human Rights that 'the first term may be extended for some of the Committee's members if its entire composition is renewed' (Venice Commission 2013). Several institutions provided for a recommended reappointment of a number of board members after the end of their first term. Staggered appointment provisions may be particularly important in ensuring leadership continuity because any appointment process can be subject to delays. They are also important to ensure continuity of the operation of the institution ('institutional memory').

What is clear from the above is that specific considerations are required for institutions that operate via multi-member boards that may differ from those needed for single-member-led bodies.

6.2 Role of executive directors

Finally, many institutions, in particular multi-member institutions—though by no means exclusively—are run on a day-to-day basis by an executive director (the title may vary). Provisions should also be in place to protect the continuity of the institution in the absence of this critical individual. Situations have arisen where an institution has been without an executive director for an extended period, such as for the Great Britain Equality and Human Rights Commission in 2009 and 2010 (GANHRI 2010: 8). The 2015 Norwegian law on the NHRI provided that its day-to-day activities were managed by a director and included a transitional provision for all the cases of his/her temporary or permanent absence (Norway 2015: section 7). However, the provision stipulates that the parliament 'may' temporarily appoint an acting director, leaving open the possibility of an operational leadership gap.

7. Conclusion and proposals

This article has shown significant and widespread deficiencies in NHRI legislation regarding the temporary exercise of institutional powers during a gap in leadership. Combined with an absence of immunity provisions that could protect temporary office holders, and unspecified timeframes for replacement, this represents a significant point of vulnerability for these institutions. The following section considers how this can be rectified, and some future avenues for research.

7.1 Preventing gaps: the features of comprehensive transitional provisions

As a result of the analysis in this article, the key features of comprehensive transitional provisions can be identified. Transitional provisions must be sufficient to take into account all circumstances that may arise resulting in a power gap in the institution. The range of potential scenarios transitional provisions need to cover are quite broad, but there are commonly five situations where the office can become vacant that must be covered by legislative provisions:

1. End of regular term of office (until the new office holder is appointed);
2. Extraordinary end to term of office due to death, illness or incapacity;
3. Extraordinary end to term of office due to resignation;
4. Dismissal pursuant to the law and following a due process procedure;
5. Temporary (short- or long-term) inability of the office holder to perform functions due to absence, illness, or suspension of powers (for example, in the event of a protracted legal case against an individual).

One standard element of transitional provisions should be the possibility that the incumbent remains in office until the new appointment. But it cannot be the sole transitional provision, as it may not be possible or desirable in all circumstances. Alternative provision must be provided to cover situations where the office holder cannot remain, until a replacement is appointed. Transitional provisions must cover all situations: resignation, death, permanent and temporary incapacity (actual inability to perform functions), or other absence. Temporary absences must also be provided for, including where the office holder is absent even for a relatively short period of time, in order to ensure that the institution can continue to function. These latter situations may be appropriately specified by the internal regulations of the institution. [8]

The starting point to ensure that the legislation will be adequate to secure the continued functioning of the institution in the absence of the office holder are three core requirements:

1. The law provides that an identified individual is assigned with the powers and functions of the institution *at all times* (covering all likely scenarios);
2. That all powers and functions of the institution are covered at all times; and
3. That the exercise of power is accompanied by functional immunity.

In the absence of any one of these elements, a leadership gap may occur either de jure or de facto, threatening the functioning of the institution. Further, transitional provisions should be self-activating under the law when a relevant situation arises; it is essential that an institution is not dependent on the state to initiate transitional provisions.

7.1.1 Appointment of new leaders

As noted above, when considering transitional arrangements in a law, it is insufficient to look only at the transitional provisions themselves. The entirety of the law (and any related laws) must be considered. This is because other provisions—particularly regarding the term of office, role of any deputies, and requirements for appointment and dismissal of leadership—are closely tied to the operation of transitional provisions. Two more elements can thus be added to the above three requirements.

First, a specified timeframe must be included for any new appointment (regular or extraordinary), to avoid transitional provisions continuing for an extended period. It is an essential feature of transitional provisions to ensure that the transitional period has a clear end. Enabling laws should explicitly provide a timeframe for new appointments that covers all situations provided for in the law where an office holder's position can become vacant. While the timeframe for extraordinary appointments may be shorter than the regular appointments process, it should not be overly short. The one-month appointment timeframe seen in some of the reviewed laws is clearly inappropriate for the head of important national bodies like ombudspersons and human rights commissions. The timeframe must be sufficient to guarantee that a Paris Principles compliant process can take place. No shorter than three and no longer than six months would appear appropriate in light of the SCA's previous findings on the length of the process (Langtry and Roberts Lyer 2021: ch. 4.4.6). Timeframes should also be specified for the appointment of any deputies and critical staff members—however, these may be regulated by the internal regulations of the institution rather than the enabling law.

Laws should also take into account situations where the election of a new office holder is delayed due to parliamentary processes. Thus, rather than a time limit on the temporary office holder, which could risk a leadership gap, a timeframe should be set for the new appointment process—as recommended by the Venice Commission (Venice Commission 2018).

8 Where this article uses the term 'internal regulations' this is intended to refer to properly adopted and publicly available instruments such as rules of procedure.

Second, transitional provisions must be clear about the appointment process. Ensuring that the new office holder is put in place expeditiously cannot come at the expense of the requirements for an open, transparent and participatory selection and appointment process for the heads of NHRIs in line with the UN Paris Principles.

7.1.2 Requirements for temporary leadership

One factor that may reduce the risk of a gap in leadership during a transitional period is where there are deputies, vice-chairs or other commissioners provided for in an enabling law who are then assigned with the duties of the head of the institution pending the new appointment.

The assignment of powers and functions must be clear. Any individual acting in place of the primary office holder should explicitly be given the rights, duties, responsibilities, powers and protections of the office holder they are replacing. This should be the case whether the assignment is a temporary absence, or longer-term (vacant position). The temporary office holder should preferably expressly be given the role of taking up the office holders position—that is, they are the 'acting ombudsperson' (or similar). Where deputies already hold specific powers or mandates in an institution, the temporary (re)assignment of these powers should also be provided for as needed. Overall, it is also important that the assignment of powers within the institution is properly identified, to ensure that all powers and functions in the enabling legislation are clearly connected to some form of transitional arrangements.

How the transitional office holder has been appointed becomes particularly important. In the enabling laws reviewed, this is especially relevant for deputies, who can be appointed by a range of different processes. Enabling laws should provide a clear merit-based selection and appointment for a deputy, whose powers are provided for in the law. This is vital for independence and legitimacy. Deputies should also have transitional provisions specified—including that they hold their offices until the new deputy is appointed. While important in all circumstances, it is particularly so for deputies who are assigned particular functions within the office (such as the NPM).

Where it is within the authority of the primary office holder to assign powers to a deputy, the internal regulations of the institution should specify what happens when a leadership gap occurs prior to such assignment being made.

Where no deputies are provided for in the legislative structure of the institution, and/or where staff are expressly indicated to take over in transitional situations, similarly clear provisions should be in place in the enabling law to ensure that they can continue the smooth operation of the institution, are protected via functional immunity, and have the legitimacy accorded to the office holder via their role being specified in the enabling law.

For multi-member institutions, the enabling law should provide that transitional provisions adequately cover their particular requirements to protect the continuity of the functioning of the institution. This should include provision for the absence of the chair, and provision for meetings/decision-making in the absence of members. Where there are vice-chairs and/or alternates, the same considerations as those listed above for deputies apply. For institutions with government representatives on the board, particular provision must be made in the law or regulations to ensure that decisions cannot be made where the board comprises a government majority due to absences. Transitional provisions should be in place to cover the absence of executive directors or other staff members with critical functions within the institution. These latter provisions may be appropriately specified by the internal regulations.

While it is beneficial to include specific immunity clauses in transitional provisions, a proper functional immunity provision within an enabling law that covers the office holder, deputies and staff would mean that an issue of a gap in protection for the

temporary office holder would not arise. Thus, clear immunity provisions for deputies and staff would already eliminate potential risks from imprecise transitional provisions.

7.2 Future directions

This article has identified a need for greater attention to be paid to the inclusion of transitional provisions in enabling laws of independent state-based institutions. International standards do not fully address the requirement for clear and well-defined transitional provisions that deal with the multitude of situations where a mandate becomes vacant. However, such an inclusion in enabling laws is in line with international standards on NHRIs and ombudspersons, particularly having regard to the necessity of independence through a stable mandate. There is certainly space for international standards to be elaborated on this point.

As noted at the outset of this article, while NHRI and ombudsperson laws have been used for the legislative analysis, the findings are relevant for a wide range of state-based institutions enabling laws. Indeed, similar issues have been identified in relation to such institutions. For example, a useful 2015 analysis on the situation of Anti-corruption Agencies ('ACA') found that:

> Most of the laws under examination here have such [transitional] provisions. For ACAs in Australia, Bhutan, Botswana, Cameroon, Madagascar, Malawi, Namibia, the Philippines, Sierra Leone, Spain, Swaziland, Yemen, and Zambia, the deputy chair or a member of the commission automatically replaces the chair. Laws in other countries call for reopening the appointment process, in some cases specifying time limits (Schütte 2015: 30).

The above analysis further noted that a set of professional standards had recommended inclusion of transitional provisions: 'The Jakarta Statement recommends: "Continuity: In the event of suspension, dismissal, resignation, retirement or end of tenure, all powers of the ACA head shall be delegated by law to an appropriate official in the ACA within a reasonable period of time until the appointment of the new ACA head"' (Schütte 2015:12, citing Jakarta Statement on Principles for Anti-Corruption Agencies 2012).

This article has shown that transitional provisions should be set in legislation and be sufficiently comprehensive to allow for a smooth change from one office holder to another, and ensure the transfer of power and continuity of the functioning of the institution during any interim period where there is an absence of the primary office holder. These provisions help to secure a stable mandate for the institution—giving clarity following the end of the mandate of the incumbent or in the event of unforeseen circumstances such as death, serious illness, or removal following due process, and ultimately protect the independence and functioning of the institution.

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Conflict of interest declaration

None

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