

# **Working Group on the Irish Human Rights and Equality Commission**

## **Report**

**to the Minister for Justice and Equality and Defence**

**19 April 2012**

## List of abbreviations

CRPD	Convention on the Rights of Persons with Disabilities
EA	Equality Authority
EU	European Union
FOI	Freedom of Information Act
FRA	EU Fundamental Rights Agency
ICC	International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights
IHREC	Irish Human Rights and Equality Commission
HRC	Human Rights Commission
NPM	National Preventive Mechanism (designated under OPCAT)
NHRI	National Human Rights Institutions (as recognised/accredited by the UN)
NIHRC	Northern Ireland Human Rights Commission
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
SPT	UN Subcommittee on the Prevention of Torture
UN	United Nations
WRC	Workplace Relations Commission

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## Foreword

The Group was established at the request of the Minister for Justice and Equality and Defence, Mr. Alan Shatter TD, to advise him on practical arrangements in relation to the Government's decision to merge the Human Rights Commission and the Equality Authority into a new Irish Human Rights and Equality Commission.

The Working Group was equally representative of both existing organisations and also included Department of Justice and Equality personnel. The Group met fifteen times in plenary session and, in addition, some members met three times as a subgroup to advance specific elements. We also had the benefit of a meeting with UN Deputy High Commissioner for Human Rights, Ms Kyung-wha Kang, with the President of the Human Rights Commission, Dr. Maurice Manning, the Chairperson of the Equality Authority, Dr. Angela Kerins, and also with the CEOs of each organisation, Éamonn Mac Aodha and Renee Dempsey. We are grateful for all the advice and assistance so freely given on issues relating to the Group's work.

Following a public invitation, the Group received a total of 69 submissions. These were considered carefully by the Group and informed our deliberations to a considerable extent.

In addition to the submissions, the Group reviewed a wide range of papers and literature on the work of human rights and equality bodies in Ireland, Great Britain and in other parts of the world, including documentation specifically provided by both the Human Rights Commission and the Equality Authority to assist the group in its work.

Thanks are also due to the Group members for the sourcing of papers and literature that further informed the Group's knowledge base and to those members who produced comprehensive and informative papers that either summarised the literature or shared with the Group further reflections on the way forward.

As Chairman I would like to express a big thanks to the Group for both their commitment and for the inclusive way this very important task was approached from the outset. I admire their work-rate, professionalism and great depth of knowledge of this complex area and I particularly want to pay tribute to the inclusive and consensual spirit in which the Group worked. Members wholeheartedly searched in a collaborative way for solutions to complex issues that would cater for both the human rights and equality dimensions. The package of recommendations we make is designed to meet the Minister's stated objective of creating a new and strengthened human rights and equality body, drawing from the strengths and best practices of both existing bodies and delivering a levelling up of powers and functions and

full compliance with the UN Paris Principles (which relate to the status of National Human Rights Institutions).

Thanks are also due to the Group's Secretary (Deaglán Ó Briain) and his team for their support.

We were very conscious throughout of the importance of the task we were given, the impact of the merger on those working in the existing organisations and the concerns of those externally who recognise the importance of a new independent and strong merged organisation that can fulfil its mandate.

It is our conviction that this Report addresses all of the above.

**Michael Whelan**

**Chairman**

19 April 2012

## Summary of report

### 1. The Work of the Group

The Working Group (the Group) was appointed on 6 October 2011 by the Minister for Justice and Equality and Defence, Mr Alan Shatter TD to advise on the establishment of the Irish Human Rights and Equality Commission (IHREC). The Group met on fifteen occasions. Following a public invitation, the Group received and considered a substantial number of submissions from the public. It also reviewed literature on human rights and equality from a wide range of national and international sources, submissions to the Group from other bodies, and also papers prepared from within the Group.

### 2. Independence, the Paris Principles, accountability

Coming through from almost every source was a recurring theme that the new organisation must be independent and must comply with the UN Paris Principles (which relate to the status of National Human Rights Institutions). The Act setting up the new IHREC should contain explicit provisions to ensure that the new organisation clearly and unambiguously meets both criteria.

At the same time, the IHREC must be fully accountable, both financially and as to its substantive work.

The Commission should report directly to the Oireachtas.

The IHREC should be funded through a separate Vote under the Department of Justice and Equality on a multi-annual basis to assist better planning and financial management.

The IHREC should meet the standard audit and corporate governance criteria for public bodies and should be subject to FOI legislation.

The statute setting up the IHREC should contain a similar provision to one recommended for the Northern Ireland Human Rights Commission: *'The Commission shall be provided with sufficient resources to ensure that it can carry out each of its functions effectively.'*

Assessing that the IHREC is actually delivering on its objectives will be a necessary part of evaluating its effectiveness. IHREC should regularly review its performance.

### 3. Overall function

The Group recommends a schema in relation to powers and functions for IHREC which is set out in paragraph 3.22 of the Report:

*The purpose of the IHREC is to protect and promote human rights and equality, to encourage the development of a culture of respect for human rights, equality and intercultural understanding in Ireland, to work towards the elimination of human rights abuses and*



*discrimination and other prohibited conduct, while respecting diversity and the freedom and dignity of the individual and, in that regard, to provide practical assistance to persons to help them vindicate their rights.*

#### **4. Key Features**

The IHREC should take on the *existing functions* of the Human Rights Commission<sup>1</sup> and the Equality Authority. It should take particular care to ensure that its resources are directed with clear strategic purposes. Its success will be measured, not by the number of legal cases taken, but by their impact in promoting its strategic goals.

The *definition of human rights* in the new IHREC Act should clarify that the IHREC is in a position to take account of new and emerging human rights.

There should be a general *statutory duty on public bodies* to have regard to equality and human rights.

The *Commissions of Investigation Act 2004* framework should be adapted and applied to IHREC so as to give it effective powers of inquiry.

The Group recommends that the IHREC's *compliance and enforcement powers* be drafted on a sliding scale. (See paragraph 3.25 of the full Report)

The IHREC should continue to work with the NIHRC in the Joint Committee set up under the Belfast/Good Friday Agreement and should continue the close working relationship developed by the Equality Authority with the Equality Commission for Northern Ireland.

The possibility of the IHREC taking over the management of activities and *funding streams* at present undertaken in-house by the Department of Justice and Equality in the migrant integration and gender equality areas should also be explored; this would make for greater coherence in the equality and human rights area.

Optional Protocol to *UN Convention Against Torture*: Given that the Government has committed to ratifying the Protocol, the IHREC would be well placed to take on the central co-ordinating role if desired.

The *Convention on the UN Rights of Persons with Disabilities* (CRPD): the report contains a draft text in relation to a relevant function for the IHREC in the context of Ireland's ratification of this Convention.

The Group makes recommendations regarding a definition of 'classes of persons' in the Human Rights Commission Act 2000.

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<sup>1</sup> This is the formal title, which we use in the Report. The Commission is also widely known as the *Irish* Human Rights Commission.

A number of wider policy and legislative issues in the human rights and equality area arose in the course of the Group's work and in submissions made to it. These are noted in this Report as matters that the IHREC and the Government could examine.

## **5. The Commission: Structure and Composition**

Consistent with the Paris Principles, the IHREC should have a pluralistic composition that represents the social profile of civil society. The Commissioners should be selected for their experience, expertise or qualifications in the field of human rights and equality, and to secure diversity in the membership, but not as formal representatives of specific organisations or interest groups. There should be a balanced representation of men and women. Appointments should be for a fixed term, renewable once.

The Minister has indicated the IHREC will have 12 members. The Group makes detailed recommendations for the appointment process for the Commissioners including the following: vacancies should be advertised; the selection criteria should be clear, objective and published; and an independent Selection Panel comprising five individuals of high standing should assess the applications and make recommendations.

The main full-time role at operational level should be that of a senior level Director. The Director would report to a part-time Chief Commissioner as Chairperson of the board.

## **6. Staffing, premises**

All vacancies that arise after the establishment of IHREC should be filled in a way that conforms to the Paris Principles. In future, new staff at senior level should be recruited by the IHREC directly through an open competition. All members of staff should be employed directly by the IHREC.

There should be three Divisions in the Commission's structure:

- Legal Claims;
- Human Rights and Equality Promotion;
- Evaluation and Research.

The IHREC should undertake a review of staffing needs within the first year of its establishment to compile a business case for any essential additional staff.

A change management process should begin as soon as the legislation is published so that the new IHREC can begin operations on as effective a basis as possible.

The IHREC should have a single office in Dublin in premises that are easily accessible to people travelling from outside the capital and to people with disabilities.

## Chapter 1 Introduction

### Terms of Reference

- 1.1 On 6 October 2011 the Minister for Justice, Equality and Defence, Mr Alan Shatter TD set up the Working Group to advise him on the establishment of a new and enhanced Irish Human Rights and Equality Commission (IHREC). This followed from a Government decision to merge the existing Human Rights Commission and the Equality Authority.
- 1.2 The Minister said that *'this new more streamlined body will be able to more effectively, efficiently and cohesively champion human rights and equality.'*<sup>2</sup> He also said that the new body must work to promote a culture that respects the human rights and equal status of everyone in our society. The Minister asked the Working Group to advise him on the mandate, structure, composition, functions, and performance of the new IHREC, as well as other matters. The terms of reference and membership of the Group are set out in **Appendix 1**.
- 1.3 The members had available to them a report prepared for the former Department of Community, Equality and Gaeltacht Affairs by PA Consulting on approaches to better integration in the equality, human rights and social inclusion areas and a Value for Money Review of the Equality Authority undertaken by the Department of Justice, Equality and Law Reform<sup>3</sup>. The question put in the PA Consulting report - *"[w]hat is it that as a society we want to achieve in terms of human rights and equality"* – was considered by some members to be important; another approach was to ask what we could build or dismantle which would allow, and indeed encourage, each person to flourish with the greatest degree of freedom and dignity without impinging on the worth of any other individual. The task of creating the IHREC is not a purely technical exercise; it is an essential part of the answer to this question.
- 1.4 The reshaping of this part of our human rights architecture, however, is also a technical and human task. The two existing organisations, the Equality Authority and the Irish Human Rights Commission, have each their own workflows and staff. This means that the IHREC will begin life depending on this dedicated staff to help it get off the ground. The Working Group was mindful, therefore, of the need to make practical recommendations, first, about how to integrate the two bodies so that

<sup>2</sup> Press Release, 9 September 2011 (<http://www.justice.ie/en/JELR/qsearch>)

<sup>3</sup> *Scoping Exercise on Better Integration of Equality, Human Rights and Social Inclusion Policy Formulation and Implementation: Department of Community, Equality and Gaeltacht Affairs: Final Report submitted to the Project Steering Group: 8 December 2010* prepared by PA Consulting Group.

the IHREC can begin work immediately, and, second, directed at underpinning the long-term credibility of the IHREC in relation to functions, financing and organisation.

- 1.5 The Group recognised the practical constraints on public sector staffing and on financing given the severe financial crisis facing the state and took these fully into account in its recommendations.

#### **Background to this Review – the planned merger**

- 1.6 The bedrock legal duty of states under international human rights law is to guarantee to all persons, without discrimination, their human rights, including their civil, political, economic, social, and cultural rights. The threefold duty of states is: to give formal and practical effect to human rights, including equality; to prevent human rights violations; and to provide an effective remedy to any person whose human rights have been violated. Independent and effective National Human Rights Institutions (NHRIs) set up by states have a crucial role in promoting and protecting human rights and holding governments and public bodies answerable for falling short of their international and domestic human rights obligations.
- 1.7 The 1993 Vienna Declaration of the UN World Conference on Human Rights affirmed the importance of NHRIs in mainstreaming human rights. NHRIs can help states to achieve a common culture of respect for dignity, freedom and equality. They are part of a preventive<sup>4</sup> and vindicatory strategy intended to mainstream respect for human rights in the public and private sectors of society and so prevent policies, process or practices that violate human rights. The United Nations,<sup>5</sup> the European Union<sup>6</sup>, the Council of Europe,<sup>7</sup> the Organisation of Security and Cooperation in Europe,<sup>8</sup> and the Commonwealth Secretariat, all endorse the creation of NHRIs.<sup>9</sup>

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<sup>4</sup> Mary Robinson, 'Human Rights: Challenges for the 21st Century', First Annual Dag Hammarskjöld Lecture (1 Oct 1998).

<sup>5</sup> General Assembly Resolution 48/134. National institutions for the promotion and protection of human rights.

<sup>6</sup> See for example Draft Equal Treatment Directive COM(2008) 426 final, 2 July 2008, recital 28: "In exercising their powers and fulfilling their responsibilities under this Directive, these bodies should operate in a manner consistent with the United Nations Paris Principles relating to the status and functioning of national institutions for the protection and promotion of human rights."

<sup>7</sup> Recommendation of the Committee of Ministers to Member States on the Establishment of Independent National Institutions for the Promotion and Protection of Human Rights, No R (97) 14 (30 Sept 1997).

<sup>8</sup> Focal Point on Human Rights Defenders: implementing OSCE and international commitments. Updated 25 January 2010. <http://www.fidh.org/Focal-Point-on-Human-Rights>

<sup>9</sup> Linda Rief, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection', 13 *Harv Hum Rts* 1, 4 (2000).

- 1.8 The 1993 UN **Paris Principles (Appendix 2)**, as augmented by the 2009 **General Observations** of the International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights (ICC) Subcommittee on Accreditation (**Appendix 3**), although not legally binding, set out minimum standards that must be complied with to ensure independent and effective NHRIs. The point of the standards is to ensure that NHRIs can operate free from government interference, actual or perceived, and have the mandate and resources to do their work effectively.

### **The Human Rights Commission**

- 1.9 The Human Rights Commission (HRC) is the recognised NHRI in the state. It was set up in 2001 as a direct result of the 1998 Belfast (Good Friday) Agreement. The Agreement provided for the creation of the HRC in the state and for the creation of the Northern Ireland Human Rights Commission (NIHRC) in Northern Ireland. According to the Agreement, the purpose of the Commissions is to promote and protect human rights in their own jurisdictions and cooperate to improve the protection of human rights on the island of Ireland.<sup>10</sup>
- 1.10 The HRC's powers and functions are set out in the Human Rights Commission Act 2000 and the European Convention on Human Rights Act 2003. These Acts give a broad mandate to the Commission to promote and protect human rights as defined both in the Constitution and in international agreements to which Ireland is a party. Section 2 of the Human Rights Commission Act 2000 defines the human rights that the HRC is mandated to promote. The definition is:
- the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and
  - the rights, liberties or freedoms conferred on, or guaranteed to persons by any agreement, treaty or convention to which the state is a party.<sup>11</sup>

### ***Promoting human rights***

- 1.11 To promote human rights, the HRC has the power:
- to promote understanding and awareness of the importance of human rights in the state and, for those purposes, to undertake,

<sup>10</sup> Chapter 6 of the 1998 Good Friday Agreement, 1998, sets out the roles of the HRC, the Northern Ireland Human Rights Commission and the Joint Committee of Representatives of the two Human Rights Commissions.

<sup>11</sup> This includes the rights, liberties and freedoms under the European Convention on Human Rights. See the Human Rights Commission Act 2000, s 11, as amended by the European Convention on Human Rights Act 2003, s 7.

sponsor or commission, or provide financial or other assistance for research and educational activities;<sup>12</sup>

- to consult with such national or international bodies or agencies having a knowledge or expertise in the field of human rights as it sees fit;<sup>13</sup>
- to take whatever action is necessary to participate in the Joint Committee of Representatives of members of the HRC and members of the Northern Ireland Human Rights Commission;<sup>14</sup>
- either of its own volition or on being requested to do so by the Government, to make such recommendations to the Government as it deems appropriate in relation to the measures which the Commission considers should be taken to strengthen, protect and uphold human rights in the state;<sup>15</sup>
- to keep under review the adequacy and effectiveness of law and practice in the state relating to the protection of human rights;<sup>16</sup>
- if requested by a Minister of the Government, to examine any legislative proposal and report its views on any implications of such proposal for human rights;<sup>17</sup> and
- to prepare and publish, in such manner as it thinks fit, reports on any research undertaken, sponsored, commissioned or assisted by it or in relation to enquiries it has conducted.<sup>18</sup>

### ***Protecting human rights***

1.12 To protect human rights, the HRC has the following functions:

- to conduct enquiries [1] of its own volition, if it considers it necessary or expedient to do so for the purpose of the performance of any of its functions, or [2] at the request of any

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<sup>12</sup> See s 8(e) of the Human Rights Commission Act 2000.

<sup>13</sup> See s 8(c) of the Human Rights Commission Act 2000.

<sup>14</sup> See s 8(i) of the Human Rights Commission Act 2000. Here 'the Agreement Reached in the Multi-Party Talks' means the agreement set out in Annex I to the Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland concluded at Belfast on the 10 of April, 1998. That is the Belfast (Good Friday) Agreement.

<sup>15</sup> See s 8(d) of the Human Rights Commission Act 2000.

<sup>16</sup> See s 8(a) of the Human Rights Commission Act 2000.

<sup>17</sup> See s 8(b) of the Human Rights Commission Act 2000.

<sup>18</sup> See s 8(g) of the Human Rights Commission Act 2000.

person who considers it necessary or expedient for the performance of any of those functions;<sup>19</sup>

- to apply to the High Court or the Supreme Court for liberty to appear before the High Court or the Supreme Court, as the case may be, as *amicus curiae* in proceedings before that court that involve or are concerned with the human rights of any person and to appear as an *amicus curiae* on foot of such liberty being granted by the court in its absolute discretion;<sup>20</sup>
- to provide assistance, including legal assistance, on any of the grounds specified in the Act, to a person who has instituted or wishes to institute legal proceedings that involve human rights law or practice;<sup>21</sup> and
- to institute proceedings in any court of competent jurisdiction for the purposes of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights of any person or class of persons; the declaratory relief the Commission may seek to obtain in such proceedings includes relief by way of declaration that a statute or a statutory provision is unconstitutional.<sup>22</sup>

1.13 The HRC in its most recent Strategic Plan, *Promoting and Protecting Human Rights in Ireland 2007-2011*, said that

*'The mission of the IHRC is to promote and sustain the realisation, protection, and awareness of human rights, equally, for all, in law, in policy and in practice.'*

1.14 The Human Rights Commission Acts, 2000 and 2001 provide that the HRC has 15 members, appointed by the Government for a period of 5 years. Its membership is pluralist in line with the statutory requirement that the Commission must broadly reflect the nature of Irish society. In accordance with the Acts, not fewer than 7 of the members of the Commission are female and not fewer than 7 are male.

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<sup>19</sup> See s 8(f) and s 9 of the Human Rights Commission Act 2000. Section 9 confines the power to conduct inquiries to four functions: reviewing the adequacy and effectiveness of law and practice in the state relating to the protection of human rights (s 8(a)); consulting with national or international human rights bodies or agencies (s 8(c)); recommending to the Government measures that should be taken to strengthen, protect and uphold human rights (s 8(d)); promoting understanding and awareness of the importance of human rights in the state (s 8(e)).

<sup>20</sup> See s 8(h) of the Human Rights Commission Act 2000. In effect, the HRC offers its expertise to the court in cases involving human rights issues.

<sup>21</sup> See s 8(j) and s 10 of the Human Rights Commission Act 2000.

<sup>22</sup> See s 8(k) and s 11 of the Human Rights Commission Act 2000.

- 1.15 It is recognised nationally and internationally that the provisions of the 1993 UN Paris Principles have been fulfilled in the case of the HRC. The HRC is a member of the European Coordinating Group of National Institutions and the International Coordinating Committee of National Institutions with which it has an “A” accreditation classification. It held the Chairmanship of the European Group of NHRIs in 2006 - 2011.

### **The Equality Authority**

- 1.16 The Equality Authority is an independent statutory body set up to work towards the elimination of discrimination and prohibited conduct under equality legislation and to promote equality of opportunity in relation to the matters to which the relevant equality legislation applies. Established in 1999, it replaced the Employment Equality Agency. The Equality Authority consists of not fewer than 12 and not more than 16 members appointed by the Minister for Justice and Equality.<sup>23</sup>

### ***Promoting equality***

- 1.17 The Equality Authority’s functions in relation to promoting equality are:<sup>24</sup>
- to work towards the elimination of discrimination in relation to the areas covered by the Employment Equality Acts 1998 to 2011 and the Equal Status Acts 2000 to 2011;<sup>25</sup>
  - to promote equality of opportunity in relation to employment and vocational training and in relation to the provision of goods and services, accommodation and education;<sup>26</sup>
  - to keep under review the workings of the Pensions Act 1990, Employment Equality Acts 1998 to 2011,<sup>27</sup> the Equal Status Acts 2000 to 2011,<sup>28</sup> the Maternity Protection Acts 1994 and 2004 and

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<sup>23</sup> See s 41 of the Employment Equality Act 1998, as amended by s 82 of the Civil Law (Miscellaneous Provisions) Act 2008.

<sup>24</sup> Under the Employment Equality Act 1998, the Equal Status Act 2000, the Equality Act 2004 and the Civil Law (Miscellaneous Provisions) Acts of 2008 and 2011. The Equality Authority has also been given functions under the Intoxicating Liquor Act 2003.

<sup>25</sup> See s 39(a) of the Employment Equality Act 1998; s 39(a) of the Equal Status Act 2000.

<sup>26</sup> See s 39(b) of the Employment Act 1998; s 39(b) of the Equal Status Act 2000.

<sup>27</sup> This legislation prohibits discrimination in the workplace, self-employment, and vocational training.

<sup>28</sup> This legislation prohibits discrimination in the provision of goods and services, facilities, accommodation, and education. It covers nine grounds: gender, civil status, family status, age, disability, sexual orientation, race, religion, and membership of the Traveller community. The Intoxicating Liquor Act 2003 governs claims relating to licensed premises.



Adoptive Leave Acts 1995 to 2005 and to make recommendations for necessary change to the relevant Minister;<sup>29</sup>

- to provide information to the public on the working of the Employment Equality Acts 1998 to 2011, the Equal Status Acts 2000 to 2011, the Maternity Protection Acts 1994 and 2004 and Adoptive Leave Acts 1995 to 2005, and under the Parental Leave Acts 1998 to 2006;<sup>30</sup> and
- to undertake or sponsor research, and to undertake or sponsor activities related to the dissemination of information.<sup>31</sup>

### ***Protecting equality***

1.18 The Equality Authority's functions in relation to protecting equality are:

- to conduct an inquiry for any purpose connected with its functions and to recommend actions on foot of this inquiry;<sup>32</sup>
- to provide assistance at its discretion to those who consider that they have been discriminated against if there is an important point of principle involved or if it is unreasonable to expect the person to represent themselves;<sup>33</sup>
- to prepare codes of practice for submission to the Minister for Justice and Equality which, when signed into law by the Minister, can be relied on in relevant legal proceedings;<sup>34</sup>
- to invite a business to carry out an equality review and prepare and implement an equality action plan or, where appropriate and where the business does not have less than fifty employees, to carry out such a review and prepare such an action plan on its own initiative;<sup>35</sup> and

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<sup>29</sup> See s39(d), s 39(f) & s 73 of the Employment Equality Act 1998; and s 39(c) of the Equal Status Act 2000.

<sup>30</sup> See s 39(c) of the Employment Equality Act 1998; s 39(c) of the Equal Status Act 2000. The Authority has suggested that this information service on the Maternity Protection, Parental Leave and Adoptive Leave Acts be transferred to the new Workplace Relations Commission (page 8 of its submission).

<sup>31</sup> See s 57 of the Employment Equality Act 1998.

<sup>32</sup> See ss 58 & 61 of the Employment Equality Act 1998.

<sup>33</sup> See s 67 of the Employment Equality Act 1998.

<sup>34</sup> See s 56 of the Employment Equality Act 1998, as amended by paragraph (g) of the Schedule to the Equal Status Act 2000. The Equality Authority has prepared a code of practice on sexual harassment and harassment at work that gives guidance on prevention and procedures for dealing with the problem. This was given statutory effect by the Minister.

<sup>35</sup> See ss 68, 69 & 70 of the Employment Equality Act 1998.

- to take cases on its own initiative.<sup>36</sup>

1.19 The Authority's most recent Strategic Plan for 2009-2011 – *Equality for All in a Time of Change* - describes its mission as follows: '*The Equality Authority works to promote equality of opportunity and to eliminate discrimination*'. Clearly, the Equality Authority also has the character of an NHRI.

### **Creating IHREC is consistent with principle and is feasible**

1.20 There is a considerable degree of commonality between the two organisations. The merger offers the opportunity to develop an integrated body that can be stronger than the sum of the two existing bodies. The broader mandate of the IHREC, established in line with the recommendations set out in this report, will be more closely aligned with international good practice. It can take a cohesive approach to promoting and protection of equality and freedom, the two values underpinning human dignity.

1.21 A recent report by the EU's Fundamental Rights Agency (FRA)<sup>37</sup> concludes that there is a need for a more comprehensive approach in Member States to the protection of human rights and equality and to institutional arrangements in that regard. It calls for an overarching body that can ensure that all issues are addressed by some entity, that gaps are covered and that human rights and fundamental rights are given due attention in their entirety.

1.22 While not prescribing that specialised bodies (such as equality bodies or data protection authorities) should inevitably be part of a single NHRI, the FRA report does determine that there is a need for a more comprehensive approach with efforts and resources focused on key institutions, such as a visible and effective NHRI in each Member State. The report notes that four of the sixteen accredited NHRIs in EU Member States (Belgium, The Netherlands, Slovakia and the UK) also serve as Equality Bodies as provided for by EU law.

### **Human rights and equality**

1.23 The idea of human rights turns on the core value of human dignity. Dignity has two dimensions:

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<sup>36</sup> The Equality Authority can take cases in its own right under Section 85 of the Employment Equality Act and Section 23 of the Equal Status Act similar to Section 11 of the Human Rights Act.

See also s 65 of the Employment Equality Act 1998.

<sup>37</sup> '*National Human Rights Institutions in the EU Member States: Strengthening the fundamental rights architecture in the EU*', Fundamental Rights Agency, Vienna, 2010

- a. The first principle holds that each human life has equal intrinsic value; it matters how each person's life goes. It is bad when a person's potential is not allowed to flourish.
- b. The second principle asserts that everyone should have the freedom to realise their potential as a human being, consistent with others having the same right.

These two dimensions reflect two values that are fundamental in constitutional democracies: equality and freedom.

### **Congruity between the functions of the existing bodies**

- 1.24 The structural congruity between the functions the HRC and the Equality Authority lends itself to integration. The institutional divide appears to have arisen because each of the existing organisations had its origin in a different international law context<sup>38</sup>, rather than for any reason of principle. The work of both bodies embraces the population as a whole. They both focus on rights under the Constitution, domestic legislation, EU law, and international human rights instruments. They have both focused on the exercise of functions by public bodies, and the Equality Authority in particular has focused on the duties of private and public employers towards individuals and groups. Both have focused on the status of vulnerable groups in our society, on promoting cultural change and the mainstreaming of equality and human rights principles. Both can review legislation and practice, make recommendations for reform, conduct inquiries, take part in legal proceedings, provide legal assistance, and provide information.
- 1.25 Merging the HRC and the Equality Authority is consistent with the Paris Principles. The Paris Principles on national institutions for protecting human rights implicitly accept that a single human rights institution can protect equality within the compass of its mission. According to the Principles, a human rights commission has responsibility, among other things:

*'To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.'*<sup>39</sup>

The new Commission must have these essential attributes.

<sup>38</sup> Ireland's equality legislation has its origins in campaigns dating from the early 1990s and became a model subsequently for measures at EU level and wider.

<sup>39</sup> *Principles relating to the status and functioning of national institutions for protection and promotion of human rights*, para 3(iv)(g). The recommendations in this document were endorsed by the UN Commission on Human Rights in March 1992 (resolution 1992/54) and by the UN General Assembly in its resolution A/RES/48/134 of 20 December 1993

- 1.26 The Working Group considers that adoption of the package of recommendations set out in this report will ensure that drawing all the strands of the human rights agenda together in a single body is done in a way that does not
- a. blunt the cutting edge of the specialised compliance work of the Equality Authority in tackling unjustifiable discrimination, or
  - b. undo the ‘arms-length’ independence of the HRC.

### **Initial challenges for new Commission**

- 1.27 It is prudent to be mindful, however, of the challenges merged human rights bodies face. To ensure that the merger is effective the IHREC and its Director must have an appropriate strategy. The gains of merging must be clear to Commissioners and staff. The objectives to be accomplished include: strengthening the voice and influence of the merged body; enabling questions that raise both equality and human rights issues to be effectively responded to; achieving appropriate cost reductions and enabling cost effectiveness; and providing a one-stop office for citizens who have issues to raise.
- 1.28 To make the merger feasible, four challenges must be squarely addressed:
- The new body will need adequate resources, including funding and staffing resources;
  - It will need adequate and coherent functions and powers to have a real effect on equality and human rights issues;
  - Unifying strategies must be put in place to ensure that the body does not become two bodies under one roof, and that the new organisation does not function in two separate silos;<sup>40</sup> and
  - Staff should have appropriate career and personal development paths.

### **Process of Review**

- 1.29 The Working Group carried out its work as follows:
- 1.30 The Working Group undertook a short, focused consultation process with NGOs and other interested parties. A notification in relation to the consultation process was issued on 2 November 2011 to all groups and individuals on the circulation lists maintained by the Department of Justice and Equality’s Diversity and Equality Law Division, the Equality Authority and the Human Rights Commission. To facilitate public involvement, details of the consultation process were also placed on

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<sup>40</sup> Equinet, *Equality Bodies and National Human Rights Institutions – Making the Link to Maximise Impact* (European Network of Equality Bodies, Brussels, November 2011).

relevant websites and a press release was issued. Persons interested in making a submission were asked to address the following key questions:

- What do people want the new body to do?
- What features and functions does it need to do these things?
- How should it be structured and what working methods should it use to achieve the above?

1.31 A total of 69 submissions were received in response and were considered by the Group. A list of the submissions received is set out in **Appendix 4**.

### **Working Group meetings**

1.32 The Working Group met on 15 occasions.

1.33 To enhance its understanding of the issues, the Working Group requested and received presentations from the CEOs of the Equality Authority and the Human Rights Commission. The Group also met with the President of the Commission and the Chairperson of the Authority. Both bodies provided a number of additional briefing papers on request and the members of the Working Group wish to record their appreciation of the valuable assistance provided to us by staff of both bodies.

1.34 Members also had the benefit of meeting UN Deputy High Commissioner for Human Rights, Ms Kyung-wha Kang and are grateful for her advice on issues relating to the Group's work.

### **Structure of the Report**

1.35 The structure of the remainder of the Report is as follows:

- Chapter 2 considers the question of good practice in relation to NHRIs. This analysis creates the normative basis for the recommendations of the Group.
- Chapter 3 describes the functions that the IHREC should have. This analysis involves proposing amendments to existing functions and adding new functions. The functions of IHREC should be set out in a statute that states the overall purpose or mission of the IHREC and recites the principles that should guide its operations.
- Chapter 4 considers the structure, composition and funding of the IHREC. The essential concern of this analysis is to preserve the independence of the IHREC and to ensure that it has the resources to do its work. This Chapter also points to a number of wider policy and legislative issues in the equality and human rights area that

were brought to the Working Group's attention and that might be considered by the new Commission and the Government.

- Chapter 5 brings together the recommendations in summary form.

## Chapter 2 Carrying Forward Good Practice

### Introduction to Chapter

- 2.1 National Human Rights Institutions (NHRIs) are independent, non-departmental public bodies set up and funded by government under constitutional or statute law to protect and promote human rights.<sup>41</sup> Comprising an important part of the human rights architecture of the state, they link civil society groups to governments,<sup>42</sup> the state's responsibilities to citizens' rights, and domestic laws to regional and international human rights systems. There is no standard model for NHRIs.<sup>43</sup> Whatever structure an NHRI has, its credibility as a human rights body flows more from what it does than from what it says it will do. What it does should reflect internationally recognised good practice.<sup>44</sup> This Chapter identifies good practice in relation to the structure of an NHRI and informs the recommendations of the Group in relation to IHREC in later chapters.

### Identifying good practice

- 2.2 There are international criteria for evaluating the formal structure, as well as the actual performance of NHRIs.

A. The 1993 Paris Principles (**Appendix 2**) are an essential part of the baseline<sup>45</sup>. Louise Arbour, the former United Nations High Commissioner for Human Rights, wrote that to earn international recognition and trust, NHRIs must be '*credible, legitimate, relevant and effective*'. She said that this can be achieved in part

<sup>41</sup> United Nations, National Human Rights Institutions, *A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (United Nations Professional Training Series No 4 1995) para 39; and Brice Dickson, 'The Contribution of Human Rights Commissions to the Protection of Human Rights', The Harry Street Lecture, delivered at the University of Manchester, 21 November 2002, p 1.

<sup>42</sup> Commonwealth Secretariat, *National Human Rights Institutions. Best Practice* (Commonwealth Secretariat London 2001) p 3.

<sup>43</sup> Office of the High Commissioner for Human Rights, *National Human Rights Institutions – History, Principles, Rules and Responsibilities* (United Nations New York & Geneva 2010) pp 13, 15. Human Rights commissions account for more than half of NHRIs while Ombudsman institutions account for about one third. In EU countries there are three main categories of NHRIs: Human Rights Commissions, Ombudsman institutions, and Institutes. See L C Reif, 'The Shifting Boundaries of NHRI Definition in the International System', in R Goodman & T Pogram (eds), *Human Rights, State Compliance, and Social Change* (Cambridge: Cambridge University Press, 2012) 52.

<sup>44</sup> International Council on Human Rights Policy, *Performance & Legitimacy: National Human Rights Institutions* (ICHRP Versoix, Switzerland 1st ed 2000; 2nd ed 2004) p 57.

<sup>45</sup> 'Principles Relating to the Status of national Institutions,' UNGA Res 48/134, UN Doc A/RES/48/134 (1993). It is worth noting that NHRIs themselves were the authors of the Paris Principles. This adds to their legitimacy. See C Sidoti, 'National Human Rights Institutions and the International Human Rights System' in R Goodman & T Pogram (eds), *Human Rights, State Compliance, and Social Change* (Cambridge: Cambridge University Press, 2012) 93

by ensuring that the Paris Principles guide the work of NHRIs.<sup>46</sup> The Paris Principles are divided into four parts as follows: the first specifies the competence and responsibilities that an NHRI should have; the second says what the composition of the NHRI should be and how its independence and pluralism should be guaranteed; the third provides for the methods of operation of the NHRI; and the fourth spells out additional principles for NHRIs with quasi-judicial competence, i.e. an authority to consider complaints in individual cases. The Principles seek to create independent NHRIs that have a constitutional or statutory basis, a pluralistic composition, a sufficiently broad competence, and state funding.

B. International and regional organisations and bodies have considered the issue of good practice for NHRIs. Relevant sources include:

- i. United Nations, *National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (United Nations Professional Training Series No 4 1995).
- ii. *National Human Rights Institutions in the EU Member States: strengthening the fundamental rights architecture in the EU I*, 7 May 2010.
- iii. International Coordinating Committee's Sub-Committee on Accreditation, 'General Observations' June 2009.
- iv. OHCHR (2009), *Survey on National Human Rights Institutions: Report on the Findings and Recommendations of a Questionnaire addressed to NHRIs worldwide*.
- v. International Council on Human Rights Policy *Performance and Legitimacy: National Human Rights Institutions*, ICHPR Versoix, Switzerland 2004.
- vi. International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions* ICHPR Versoix, Switzerland 2004.
- vii. Amnesty International, *National Human Rights Institutions: Recommendations on Effective Promotion and Protection of Human Rights* (2002, AI).
- viii. Commonwealth Secretariat, *National Human Rights Institutions. Best Practice* (Commonwealth Secretariat London 2001).

C. Also helpful are: General Policy Recommendation Nr 2, of the European Commission Against Racism and Intolerance (ECRI), and the 2008 report, *Between Impartiality and Responsiveness*:

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<sup>46</sup> R Carver, *Assessing the Effectiveness of National Human Rights Institutions* (Geneva, UNHRC ICHRP, 2005) p 3.



*Equality Bodies and Practices of Independence*, commissioned by Equinet.<sup>47</sup>

D. Best practice can also be articulated by reference to the experience of other NHRIs. The Commonwealth Secretariat and the International Council on Human Rights have set out useful points of reference from which to measure performance. In this regard, the International Council on Human Rights Policy's report, *Assessing the Effectiveness of National Human Rights Institutions*, is an essential source since it draws its benchmarks and indicators from the best practices of NHRIs based on a questionnaire sent out for the report.

### **Independence, powers, performance, and legitimacy**

- 2.3 To assess whether an NHRI is functioning effectively as the main standard-bearer for human rights within a country, it is necessary to move beyond the criteria set out in the Paris Principles<sup>48</sup>. Drawing on the research material referred to above, the Working Group considers that the criteria set out below are relevant. These provide the normative basis for the specific recommendations in Chapters 3 and 4.

### **Functional independence**

- 2.4 An NHRI cannot be absolutely independent of the democratic institutions of the state. The state establishes it and it is accountable in some way to the state. It must, however, be fully independent in carrying out its functions.

### **A clear legal basis**

- 2.5 An NHRI needs a clear constitutional or statutory basis for its work. The International Coordinating Committee's Sub-Committee on Accreditation, in its 'General Observations', observes that '*A National Institution must be established in a constitutional or legal text. Creation by an instrument of the Executive is not adequate to ensure permanency and independence.*'<sup>49</sup>
- 2.6 The Commonwealth Secretariat suggests that the 'most certain way of preserving the independence of an NHRI is to incorporate its establishment and vested powers into a national constitution'. It adds that when the constitution of a country does not provide for the creation of an NHRI, it is appropriate for the parliament to create an NHRI through statute.

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<sup>47</sup> Dr Kutsal Yesilkagit & Berend Snijders (University of Utrecht), *Between Impartiality and Responsiveness: Equality Bodies and Practices of Independence* (Equinet Brussels 2008).

<sup>48</sup> The EU Agency for Fundamental Rights says that 'The Paris Principles should be taken as the very minimum standard for National Institutions in the European Union.' FRA Report 2009 p. 9.

<sup>49</sup> Para 1.1. of the *General Observations*

### **Appointment of Commissioners**

- 2.7 The process for appointing Commissioners is important. The process should be designed to obtain the best Commissioners possible.<sup>50</sup> That process should give them independence from influence or interference from Government or non-governmental bodies. The process should be transparent and involve the legislature and civil society. It should involve wide consultation and include a process for public nomination of candidates.<sup>51</sup> It is not necessary that Commissioners be elected, but the process should ensure the 'pluralist representation of the social forces' in civil society 'that are involved in the protection and promotion of human rights'.<sup>52</sup>
- 2.8 The ICC Sub-Committee on Accreditation suggests that there are different ways of achieving pluralism through the composition of NHRIs:
- a. Members of the governing body represent different segments of society...;
  - b. Pluralism through the appointment procedures of the governing body of the National Institution, for example, where diverse societal groups suggest or recommend candidates;
  - c. Pluralism through procedure enabling effective cooperation with diverse societal groups, for example, advisory committees, networks, consultations or public forums; or
  - d. Pluralism through diverse staffing representing the different societal groups within society'.<sup>53</sup>
- 2.9 The qualities of the Commissioners should be related to the functions of the body.<sup>54</sup> They should have expertise, merit, integrity and credibility in the eyes of both the government and the public.
- 2.10 As to the process of appointing Commissioners, the ICC Sub-Committee on Accreditation, in particular, emphasises the following factors:
- a. A transparent process;

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<sup>50</sup> Commonwealth Secretariat, *National Human Rights Institutions. Best Practice* (Commonwealth Secretariat London 2001) p 5.

<sup>51</sup> Commonwealth Secretariat, *National Human Rights Institutions. Best Practice* (Commonwealth Secretariat London 2001).

<sup>52</sup> *Paris Principles*, para B1.

<sup>53</sup> *General Observations*, 2.1.

<sup>54</sup> Rachel Murray, 'National Human Rights Institutions. Criteria and Factors for Assessing Their Effectiveness' (2007) 25(2) *Netherlands Quarterly of Human Rights* 189, 203.

- b. Broad consultation throughout the selection and appointment process;
- c. Advertising vacancies broadly;
- d. Maximising the number of potential candidates from a wide range of societal groups;
- e. Selecting members to serve in their own individual capacity rather than on behalf of the organisation they represent.<sup>55</sup>

### **Staff recruitment and employment practices**

- 2.11 The staff of an NHRI should be suitably qualified. The level of staff should be sufficient to support the group of Commissioners in discharging the full mandate of the NHRI.<sup>56</sup> Employment policies should promote best employment practice in professionalism, equal-employment opportunities, and personal development. There must be fair pay for both Commissioners and staff for the work that they do.
- 2.12 The ICC Sub-Committee on Accreditation recommends that, to guarantee the independence of the NHRI:
- a. Senior level posts should not be filled with secondees; and
  - b. The number of seconded staff should not exceed 25% and never be more than 50% of the total workforce of the NHRI.

As a principle, NHRIs should be empowered to appoint their own staff.<sup>57</sup>

### **Funding**

- 2.13 An NHRI must have the funding to enable it to perform its role effectively. *'Not only must the resources be adequate, but they must ensure the NHRI's independence, as highlighted by the Paris Principles.'*<sup>58</sup> The International Coordinating Committee's Sub-Committee on Accreditation said that, 'In cases where the administration and expenditure of public funds by an NHRI is regulated by the Government, such regulation must not compromise the NHRI's ability to perform its role independently and effectively. For this reason, it is important that the relationship between the Government and the NHRI be clearly defined.'<sup>59</sup> The ICC emphasises that the provision of adequate funding by the state should, as a minimum include:

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<sup>55</sup> *General Observations*, para 2.2.

<sup>56</sup> Commonwealth Secretariat, *National Human Rights Institutions. Best Practice* (Commonwealth Secretariat London 2001) p 15.

<sup>57</sup> *General Observations*, para 2.7.

<sup>58</sup> Rachel Murray, 'National Human Rights Institutions. Criteria and Factors for Assessing Their Effectiveness' (2007) 25(2) *Netherlands Quarterly of Human Rights* 189, 202.

<sup>59</sup> International Coordinating Committee's Sub-Committee on Accreditation, 'General Observations' June 2009, para 2.10.

- a) the allocation of funds for adequate accommodation, at least its head office;
- b) salaries and benefits awarded to its staff comparable to public service salaries and conditions;
- c) remuneration of Commissioners (where appropriate); and
- d) the establishment of communications systems including telephone and internet.

2.14 The ICC also recommends that adequate funding should, to a reasonable degree, ensure the gradual and progressive realisation of the improvement of the NHRI's operations and the fulfilment of its mandate. Funding from external sources, such as from development partners, should not compromise the core funding of the NHRI as it is the responsibility of the state to ensure the NHRI's minimum activity budget in order to allow it to operate towards fulfilling its mandate. Financial systems should be such that the NHRI has complete financial autonomy. This should be a separate budget line over which it has absolute management and control.<sup>60</sup>

### **Sufficient functional power**

2.15 NHRIs should have adequate and manageable powers, defined precisely, under 'as broad a mandate as possible,'<sup>61</sup> to carry out their promotional and protective human rights functions.<sup>62</sup> They should have the power to deal with all rights, including economic, social and cultural rights.<sup>63</sup> These functions should include: giving advice to government or others, examining and making recommendations on legislation or policies, preparing reports on the situation of human rights in the country, promoting human rights standards, and encouraging compliance with international obligations, cooperating with UN and regional bodies, training, education and research and increasing public awareness. NHRIs may be given the power to hear and consider complaints.<sup>64</sup> The Working Group believes that it is important that an NHRI have the correct balance of promotional and protective powers and that there not be an over-emphasis on litigation-type powers.

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<sup>60</sup> *General Observations*, para 2.6.

<sup>61</sup> *Paris Principles*, A2.

<sup>62</sup> *Paris Principles*, para A1.

<sup>63</sup> The Commonwealth Secretariat, suggests that 'the ideal is for each of them to have the capacity to deal with the protection and promotion of all human rights recognised by international law as human rights.' See Commonwealth Secretariat, *National Human Rights Institutions. Best Practice* (Commonwealth Secretariat London 2001) p 4.

<sup>64</sup> *Paris Principles*, para D. However, it has been considered more appropriate here for complaints to be dealt with by separate quasi-judicial bodies, such as the Equality Tribunal.

### **Effective strategic performance**

- 2.16 A number of factors within an NHRI may contribute to its strategic effectiveness.
- 2.17 An NHRI needs a strategic view, with a sense of overall purpose or mission. It must have a clear strategy for the most effective use of its resources, budget and powers. Its strategy should specify the major aims and principal areas that relate to the needs of service users, with a particular focus on the most urgent human rights concerns and the interests of the most vulnerable groups in society.<sup>65</sup> It should state these aims in a way that gives the NHRI a specific sense of direction and enables it to know where it must allocate resources. It should specify the specific objectives that flow from these aims, and what must be accomplished to meet those objectives. It should state these objectives as clear outcomes that are measurable, verifiable, realistic, and adequate. The idea is to state the objectives with enough specificity to enable the NHRI to measure what it is accomplishing. The strategy should also indicate what programmes of work are needed to achieve these objectives. The strategy should also state what material resources are needed to accomplish the programmes of work.
- 2.18 An NHRI should make constructive use of its powers to become an active force for change. On the domestic plane, an NHRI should help to mainstream human rights in the activities of public authorities. It should develop a high public profile. It should follow up on its reports and recommendations to government. It should have a capacity to deal with the unplanned or crisis events.
- 2.19 Effective NHRIs can also act as agents of change on the international plane.<sup>66</sup> NHRIs have now begun to collaborate as a unified group in international negotiations.<sup>67</sup> Of the seven responsibilities that the Paris Principles say that NHRIs should perform, four of them have an international dimension. They are: assisting with the preparation of international treaties; urging its own state to ratify or incorporate such treaties into domestic law; assisting international treaty monitoring bodies by submitting reports that critically analyse the periodic reports examined by these bodies;<sup>68</sup> and interacting with other international

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<sup>65</sup>See P Rosenblum, 'Tainted Origins and Uncertain Outcomes' in R Goodman & T Pegram (eds), *Human Rights, State Compliance, and Social Change* (Cambridge: Cambridge University Press, 2012) 297.

<sup>66</sup> C Sidoti, 'National Human Rights Institutions and the International Human Rights System' in R Goodman & T Pegram (eds), *Human Rights, State Compliance, and Social Change* (Cambridge: Cambridge University Press, 2012) 93, 104-122.

<sup>67</sup> R Goodman & T Pegram, 'National Human Rights Institutions, State Conformity, and Social Change' in R Goodman & T Pegram (eds), *Human Rights, State Compliance, and Social Change* (Cambridge: Cambridge University Press, 2012) 8.

<sup>68</sup> If the body's rules of procedure allow, NHRIs can attend hearings and submit additional information.

bodies possessing a human rights focus, for example, the United Nations and Council of Europe monitoring bodies, and attending human rights conferences.

- 2.20 An NHRI should regularly review its performance against objectives. The focus in setting objectives and measurement of performance should be on assessing the effectiveness and impact of IHREC on improving people's lives. An NHRI should periodically measure the degree to which the public are aware of its existence and the degree to which the public supports its work.
- 2.21 In this connection, it is useful to note that the Equality and Human Rights Commission of England and Wales and the Scottish Human Rights Commission have commissioned a team from the Centre for Analysis of Social Exclusion (CASE) in partnership with the British Institute of Human Rights and the London School of Economics Centre for the Study of Human Rights to develop a Human Rights Measurement Framework (HRMF). The purposes of the HRMF are: to produce a credible and reliable methodology with which to measure compliance with and progress towards implementing a human rights and equality framework; to provide data against which to prioritise action on human rights and equality; and to meet the statutory obligations of an NHRI to monitor and report on progress in relation to equality and human rights. Building on international good practice, the project is developing a conceptual grid for the HRMF.<sup>69</sup>
- 2.22 The starting-point for international good practice is the conceptual and methodological framework developed by the Office of the High Commissioner for Human Rights (OHCHR), in consultation with a panel of experts, for identifying and using indicators to promote and monitor the implementation of human rights.<sup>70</sup> The framework recommends the development of structural, process and outcome indicators. This group of indicators is intended to help assess the steps being taken by states in responding to their human rights obligations. They cover commitments and acceptance of international human rights standards (structural indicators), actions being taken to meet the obligations that flow from the standards (process indicators), and the results of those actions (outcome indicators). The underlying aim is to assist states to develop relevant and feasible indicators in compliance with international human rights standards.

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<sup>69</sup> A *Background Project Briefing Paper* is available on the consultation website: [http://personal.lse.ac.uk/prechr/hrmf/HRMF\\_background.pdf](http://personal.lse.ac.uk/prechr/hrmf/HRMF_background.pdf). A list of indicators that are being used internationally for human rights monitoring purposes is also available on the website: [http://personal.lse.ac.uk/prechr/hrmf/HRMF\\_longlist\\_of\\_indicators\\_and\\_measures.pdf](http://personal.lse.ac.uk/prechr/hrmf/HRMF_longlist_of_indicators_and_measures.pdf).

<sup>70</sup> Human Rights Indicators - Indicators to promote and monitor the implementation of human rights <http://www.ohchr.org/EN/Issues/Indicators/Pages/HRIndicatorsIndex.aspx>.

### **Perceived legitimacy**

- 2.23 An NHRI that is performing effectively will enhance its legitimacy, both actual and perceived. Legitimacy has to be earned. NHRIs can take certain steps to build legitimacy.

#### **i. Ensuring accessibility**

An NHRI must be easily accessible to the general public, in particular to vulnerable or marginalised members of society. Its offices, communications, culture and public performance should transmit the message that it is accessible.

#### **ii. Achieving public credibility and respect**

To be effective, an NHRI must have a coherent media-and-communications strategy as set out in the Paris Principles.<sup>71</sup>

#### **iii. Reporting to Parliament**

A key requirement of an effective NHRI is that it should be accountable. The important question is: to whom should it be accountable? The best practice view is that an NHRI should have a duty to report to a committee of parliament. The reporting obligation should be an opportunity to engage with elected representatives. The NHRI should submit its publications to this committee.

#### **iv. Working with other statutory bodies**

NHRIs co-exist with other statutory bodies with a human rights focus. It is important that an NHRI develop a way of working constructively with these bodies.

#### **v. Fostering a constructive relationship with Government**

Although it should be independent of Government in carrying out its mandate, an effective NHRI must develop a constructive relationship with Government and with the public service. Public servants are well placed to support a human rights culture. NHRIs can assure public servants and elected representatives that they (NHRIs) are *'able to guarantee a certain expertise that is free from any politically partisan approach.'*<sup>72</sup>

#### **vi. Working with civil society**

NHRIs play a pivotal role in enabling civil society and the Government to interact. They can arrange meetings and training courses in which civil society and the Government engage with each other. Civil society organisations can play a role in providing communities with human rights education.

<sup>71</sup> Paris Principles, para A3(g).

<sup>72</sup> Brice Dickson, 'The Contribution of Human Rights Commissions to the Protection of Human Rights', The Harry Street Lecture, delivered at the University of Manchester, 21 November 2002, p 10.

### **Political support for the key role of NHRIs**

- 2.24 An NHRI cannot promote and protect human rights effectively on its own. The 1993 Vienna Declaration points out that an NHRI must be ‘an integral part of a democratic society’ that has other ‘basic institutions of democracy’, including an effective and accessible judicial system. The International Council on Human Rights Policy says that ‘there is little question that national human rights institutions work most effectively when they are part of a functioning democratic framework rather than a voice in the wilderness.’<sup>73</sup>
- 2.25 It is vital that an NHRI have the broad support of Government; it is almost inevitable that its work will sometimes entail criticising Government. The work of IHREC will involve pointing to public service failures and shortcomings in the area of human rights and equality and criticising some Government policies. In the same way that Government supports the role of the Comptroller and Auditor General in the expenditure area, Government should give broad support to the IHREC, its work and recommendations, particularly at a time when public sector reform together with significant cuts in public spending are on the agenda.

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<sup>73</sup> International Council on Human Rights Policy, *Performance & Legitimacy: National Human Rights Institutions* (ICHRP Versoix, Switzerland 1st ed 2000; 2nd ed 2004) p 106.



## Chapter 3 Powers and Functions

### Purpose of the Commission

- 3.1 The Working Group considers that the purpose, or ‘mission statement’, of the Commission should be drawn widely enough to underpin its independence and credibility and give it an active promotional and developmental role. For the purposes of the IHREC’s enforcement powers, the rights to be enforced must be stated clearly and with specificity in law. At the same time, however, the IHREC’s promotional and developmental role in relation to human rights and equality requires a definition of human rights and equality that goes beyond the list of specific rights contained in the Constitution, legislation, EU Directives and UN and other conventions to which the state is a party and which have the force of law in the state.
- 3.2 The Working Group considers that the purpose of the Commission should be set out in legislation as follows:

*The purpose of the IHREC is to protect and promote human rights and equality, to encourage the development of a culture of respect for human rights, equality and intercultural understanding in Ireland, to work towards the elimination of human rights abuses and discrimination and other prohibited conduct, while respecting diversity and the freedom and dignity of the individual and, in that regard, to provide practical assistance to persons to help them vindicate their rights.*

- 3.3 The definition of human rights and equality in the new legislation (other than specified enforcement provisions) should include the following provisions which are derived from the existing legislation:

*In this Act (other than the section dealing with taking of legal cases by IHREC) “human rights” means—*

*(a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution; and*

*(b) the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the state is a party or in any agreement, treaty or instruments binding on the state by virtue of membership of the European Union;<sup>74</sup>*

*“equality” means that all persons are equal in dignity, rights and responsibilities without regard to gender, civil status, family status, sexual orientation, religion or ultimate beliefs, age,*

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<sup>74</sup> Including the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and the EU Equality Directives (final two are EU instruments).

*disability, race (including colour, nationality, ethnic or national origin [these extra subcategories of race are found in the text in the 1998 Act]), or membership of the Traveller community.*

- 3.4 In addition, the Working Group recommends that the definition should clarify that the IHREC is in a position to take account of new and emerging issues as well as issues that are not limited to specific rights which have been incorporated in the law of the state or are contained in instruments to which the state is a party. In line with the Paris Principles, the IHREC must be free to set its own tasks. Such a provision might be drafted as follows:

*(c) the rights, liberties or freedoms that may reasonably be inferred as being inherent to persons in contemporary society and necessary to enable them to live their lives with dignity and develop their personal potential in political, social, cultural and economic life to the fullest possible extent.*

- 3.5 The Group considers that the following definition of 'dignity' should animate the work of the IHREC, and consideration should be given to including it in the legislation:

*'dignity' means that each person has*

*(a) equal intrinsic value and a fundamental interest in living a worthwhile life; and*

*(b) a special entitlement to realise a life that is worthwhile and authentic consistent with others having a similar entitlement.*

- 3.6 The Group considers that the new Act should contain – either in this section – or in the section that formally establishes it - an explicit statement that the IHREC is independent in the exercise of its functions, and that it shall be guided in its work by the Paris Principles.

#### **Legislation to be principles-based**

- 3.7 The Working Group recommends that the legislation establishing the IHREC should be principles-based. The Group notes that the Legal Services Bill and the Property Services Regulation Bill set out not only objectives and functions, but also principles.<sup>75</sup>
- 3.8 The Group recommends the following statement of principles be included in the Bill to establish IHREC:

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<sup>75</sup> Even if a statement of principles is not included in the Act, the new Commission might consider including such a statement of guiding principles in its Strategic Plan.

*The IHREC shall exercise its functions under this Act and under the Employment Equality and Equal Status Acts so as to promote the development of a society in which the following principles have the greatest possible effect:*

- (a) that human rights are indivisible and universal;*
- (b) that every person is free and equal in dignity, rights and responsibilities;*
- (c) that a person's ability to achieve his or her potential and conception of a worthwhile life must not be limited by prejudice, contempt, discrimination or neglect and a person has the right to be free from prohibited conduct;*
- (d) that each person's human rights must be respected and protected;*
- (e) that each person should have a fair and equal opportunity to participate in the economic, political, social and cultural life of society; and*
- (f) that mutual respect between and within groups, based on intercultural understanding and engagement, on the valuing of diversity within an inclusive and just society, on shared respect for equality and human rights,<sup>76</sup> promotes the overall well-being of society socially, economically and culturally.*

### **Functions of the Commission**

- 3.9 The IHREC should have a broad and clear mandate. NHRIs have 'a crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights.' For this reason, states should ensure that 'all human rights are appropriately reflected in the mandate of their NHRI'.<sup>77</sup> Encompassing economic, social and cultural rights as well as civil and political rights, the most effective national human rights institutions tend to have a broad mandate.<sup>78</sup> The Paris Principles identify a number of areas in respect of which NHRIs are expected to have functions.

### **Taking of legal action**

- 3.10 The new Commission needs to have the discretion to take legal actions – or to support individuals to take legal actions – where it considers it

<sup>76</sup> Some of this taken from s 3 of the Equality Act 2006 (UK).

<sup>77</sup> UN General Assembly (2006) National institutions for the promotion and protection of human rights, A/RES/60/154 (23.02.2006), paragraph 5.

<sup>78</sup> International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions*, (Office of the High Commissioner for Human Rights 2005) p 17.

appropriate, and needs to have the resources necessary to perform this function effectively. The IHREC should not be dependant on pro-bono work or philanthropic funds to undertake a core function. While there is clear merit in the view that the focus should be on strategic cases which are 'precedent-setting', the definition of what cases are sufficiently important to take or support and decisions to support individual applications or proposals must remain with the Commission (notwithstanding that a scheme of delegation within the IHREC might provide for certain other routine decisions to be taken by the Director or other nominated member of staff; the Working Group considers that a positive decision to take or support a legal action must be a matter for the Commission itself and should not be delegated).

- 3.11 Clearly cases that are seen to raise larger policy issues fall into the precedent-setting category, but it is also true that it may be necessary to take or support a number of individual cases on a single specific issue in sequence to ensure that there is sufficient awareness so as to change behaviour: this is also 'precedent-setting' and strategic.<sup>79</sup>
- 3.12 Nonetheless, the IHREC is not a legal aid service and should focus on priority areas in seeking to achieve the objectives to be set by the new Commission within its functions. The success of the new Commission will not be measured by the number of cases taken, but by their impact in promoting its strategic goals. At the same time the Working Group suggests that the Commission should seek to develop partnerships and memoranda of understanding with other bodies involved in investigating alleged abuses or providing legal advice or assistance to persons without representation, e.g. the Ombudsman, the Ombudsman for Children, the Garda Síochána Ombudsman Commission, the Legal Aid Board and the Citizens Information Centres. The new Commission could seek to build a partnership with the Clinical Legal Education Services in the Law Schools.
- 3.13 The Working Group understands that the detailed provisions in equality legislation for support of individuals to take cases to the Equality Tribunal and related functions of the Equality Authority will continue as functions of the new Commission, with necessary technical amendments to align nomenclature, etc., but are otherwise outside the scope of the IHREC Bill as envisaged; the Bill will focus on establishment provisions and generic powers and functions. While not restated in the new legislation, the functions of the Equality Authority in relation to Equality Tribunal cases will continue as is and will transfer to IHREC. The Working Group understands that the Equality Tribunal will become part of the Workplace Relations Commission (WRC).

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<sup>79</sup> Maternity protection legislation represents a category of cases that required repeated support initially for individuals who had been dismissed due to pregnancy until the general awareness was created in society that such dismissals were illegal and would attract significant penalties.

- 3.14 The parallel establishment of IHREC and the Workplace Relations Commission to take on the functions of the Equality Authority and the Equality Tribunal respectively may create an anomaly in that the IHREC will be able to provide assistance to persons appearing in equality cases before the WRC, but not in cases where a human rights transgression, other than in the area of equality, is alleged. The Working Group recommends that whether this perceived anomaly creates a practical difficulty should be the subject of further consultation with employee and employer representatives, other stakeholders and with the WRC itself.
- 3.15 The Working Group understands that the HRC considers that the absence of a definition of 'classes of persons' in the Human Rights Commission Act 2000 has made the taking of class actions by it problematical. As it happens, no such actions have been taken. This might be addressed in the new Bill, by creating a definition of 'classes of persons' or otherwise clarifying this power.

### **Powers of Inquiry**

- 3.16 The Equality Authority has not used the power of inquiry contained in its legislation.
- 3.17 The IHRC has conducted three inquiries. In none of those cases, however, did it find it necessary to use the full powers provided in the Human Rights Commission Act. They were conducted in a less formal manner; in each case it can be said that the parties were not overly antagonistic. The view has been expressed that use of the full powers provided in the legislation could prove quite difficult in circumstances where the parties were less cooperative.
- 3.18 The Group's Terms of Reference include
- "to advise on the best form of enquiry powers, and, in particular, to consider whether adopting the model used for Cloyne might be more effective than the current enquiry power".*
- 3.19 The Commissions of Investigation Act 2004 - under which the Cloyne investigation was conducted - has been described by the Law Reform Commission<sup>80</sup> as providing a framework within which low-key preliminary investigations can take place. It provides a mechanism for the establishment, from time to time, of commissions to investigate into and report on matters giving rise to significant public concern. It is in addition to other mechanisms such as Tribunals of Inquiry.
- 3.20 An investigation by a Commission (referred to as 'an Inquiry' hereafter in this Report to avoid confusion with the IHREC) is primarily a private investigation process designed to encourage cooperation with a lower

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<sup>80</sup> Report on Public Inquiries including Tribunals of Inquiry, 2005.

likelihood of a need for legal representation by reducing the adversarial approach that applies in Courts and Tribunals.

- 3.21 Any Inquiry established under this Act is required to be timely and cost effective. **Appendix 5** sets out a summary of the procedures that apply to Inquiries under the 2004 Act. This framework should be adapted and applied to IHREC so as to give it effective powers of inquiry.

**Schema of recommended powers and functions for IHREC**

- 3.22 The Working Group recommends the following schema in relation to powers and functions for IHREC:

**A. General functions**

Promoting equality and human rights and communicating the importance of equality and human rights:

**i. Overall function**

*The purpose of the IHREC is to protect and promote human rights and equality, to encourage the development of a culture of respect for human rights, equality and intercultural understanding in Ireland, to work towards the elimination of human rights abuses and discrimination and other prohibited conduct, while respecting diversity and the freedom and dignity of the individual and, in that regard, to provide practical assistance to persons to help them vindicate their rights.*

**ii. Promotion and communication**

*To promote understanding and awareness of the importance of human rights and equality and, for those purposes, to promote public debate and discussion of human rights and equality issues. To this end the Commission may undertake public consultations.*

*To provide or assist in the provision of education and training on human rights and equality issues.*

*To promote awareness and understanding of and respect for the multicultural character of Irish society and the diverse heritages of the island of Ireland.*

*To foster a society in which all individuals can participate and contribute to the cultural, social, economic and political life of Ireland.*

*To assist public bodies to take due note of equality and human rights in carrying out their functions and, where the Commission considers it appropriate in that regard, to recommend changes to (a) any area of relevant legislation, or (b) the policies or practices of a public body in the state.*

*To provide advice and resource materials on good practice and to develop sector-specific toolkits to tackle areas of particular challenge for equality and human rights in any or all of the private, not-for-profit, or public sectors.*

*The Commission may undertake or sponsor such research<sup>81</sup> and educational or informational activities<sup>82</sup> as it considers necessary and as appear appropriate and useful for the purpose of performing any of its functions.*

### **iii. Publication**

*To prepare and publish, in such manner as it thinks fit, reports on any research undertaken, sponsored, commissioned or assisted by it or in relation to enquiries or equality reviews it has conducted.<sup>83</sup>*

*To publish information in written and other forms on human rights and equality.*

### **iv. Programme and Project work**

*To promote and co-ordinate programmes and project work in relation to any of its functions, and to foster and assist, including by financial or material aid, such programmes and projects;*

*'financial aid' here includes management of EU funding.*

### **v. Policy and legislation**

*Either of its own volition or on being requested to do so by the Government, to make such recommendations to the Government as it deems appropriate in relation to the measures which the Commission considers should be taken to strengthen, protect and uphold human rights and equality in the state.<sup>84</sup>*

*To keep under review the adequacy and effectiveness of law and practice in the state relating to the protection of human rights and equality.<sup>85</sup>*

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<sup>81</sup> See s. 57 of Employment Equality Act 1998.

<sup>82</sup> See s 8(e) of the Human Rights Commission Act 2000.

<sup>83</sup> See s 8(g) of the Human Rights Commission Act 2000 and see also s 68 – 73 of the Employment Equality Act 1998

<sup>84</sup> See s 8(d) of the Human Rights Commission Act 2000.

<sup>85</sup> See s 8(a) of the Human Rights Commission Act 2000.

*To examine, of its own volition, or if requested by a Minister of the Government, any legislative proposal, including a proposal to sign any international instrument, and report its views on any implications of such proposal for equality or for human rights.*<sup>86</sup>

*To provide advice and assistance on human rights and equality issues to a [i.e. any] committee of the Oireachtas as may be requested by such committee and as the Commission may be in a position to provide and as may be useful and appropriate in assisting such Committee in its work.*

**B. Specific equality functions derived from EU law<sup>87</sup>**

*To work towards the elimination of discrimination in relation to the areas covered by the Employment Equality Acts 1998 to 2011 and the Equal Status Acts 2000 to 2011.*<sup>88</sup>

*To promote equality of opportunity in relation to employment and vocational training and in relation to the provision of goods and services, accommodation and education.*<sup>89</sup>

*To keep under review the workings of the Pensions Act 1990, Employment Equality Acts 1998 to 2011, the Equal Status Acts 2000 to 2011, the Maternity Protection Acts 1994 and 2004 and Adoptive Leave Acts 1995 to 2005 and to make*

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<sup>86</sup> See s 8((b) of the Human Rights Commission Act 2000.

<sup>87</sup> The relevant text, compiled from the applicable EU Directives, is as follows:

1. Member states shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
2. Member states shall ensure that the competences of these bodies include:
  - without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
  - conducting independent surveys concerning discrimination,
  - publishing independent reports and making recommendations on any issue relating to such discrimination.
- (d) at the appropriate level exchanging available information with corresponding European bodies such as any future European Institute for Gender Equality.

<sup>88</sup> See s 39(a) of the Employment Equality Act 1998; s 39 (a) of the Equal Status Act 2000.

<sup>89</sup> See s 39(b) of the Employment Act 1998; s 39(b) of the Equal Status Act 2000.



*recommendations for necessary change to the relevant Minister.*<sup>90</sup>

*To keep under review – as provided for in section 73 of the Employment Equality Act 1998 - the provisions specified in section 17 of that Act, and where in the opinion of the Commission the operation of a specified provision is likely to affect or impede the elimination of discrimination in relation to employment or the promotion of equality of opportunity in relation to employment, or at the request of a Minister, to carry out a review of that enactment or provision or of its working or effect. A report by the Commission may contain recommendations for amending any enactment or provision reviewed.*

*To undertake equality reviews as provided for in sections 68 to 72 inclusive of the Employment Equality Act 1998.*

*To serve and enforce non-discrimination notices in situation where the Commission is satisfied following an inquiry that a person has been or is discriminating.*<sup>91</sup>

*To refer cases of discrimination to the Director of the Equality Tribunal (being replaced with the Workplace Relations Commission), including to take such cases in its own name, and to seek an injunction in the Circuit or High Court to prevent continuing discrimination.*<sup>92</sup>

### **C. Specific ‘social cohesion’ functions**

*To promote the integration of migrants and other minorities, in Irish society, to encourage good practice in intercultural relations and to promote tolerance, acceptance of diversity, and an inclusive society with positive relations between members of different groups.*

### **D. Northern Ireland**

*To take part in the Joint Committee with the Northern Ireland Human Rights Commission which is provided for in the Belfast/Good Friday Agreement and continue the work already*

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<sup>90</sup> See s39(d), s 39(f) & s 73 of the Employment Equality Act 1998; and s 39(c) of the Equal Status Act 2000.

<sup>91</sup> See sections 62 to 67 of the Employment Equality Act 1998. This refers to issuing and subsequent enforcement of non-discrimination notices following an inquiry. As the inquiry power has not been used, these provisions have not been operable, but could be of value in the event that a revised inquiry power of the Commission of Investigations Act type is created for IHREC.

<sup>92</sup> See sections 85 and 85A of the Employment Equality Act 1998 and section 23 of the Equal Status Act 2000.

*done by that body, and to work closely with the Equality Commission for Northern Ireland, as the Equality Authority has done in the past.*

#### **E. International**

*To consult with such national or international bodies or agencies having a knowledge or expertise in the field of human rights and in the field of equality as it sees fit,<sup>93</sup> including the provision of advice and commentaries on the situation with regard to human rights and equality in Ireland.*

*And without prejudice to the generality of the foregoing, to liaise and consult and engage in joint work in particular with equality bodies (within meaning of relevant EU Directives) of member states of the European Union, with other accredited National Human Rights Institutions, with the EU's Fundamental Rights Agency, with the Council of Europe and with relevant UN bodies.*

#### **Cooperation with Northern Ireland Human Rights Commission**

- 3.23 Given the importance of the Joint Committee, whose establishment is specifically provided for in the Belfast/Good Friday Agreement, and participation in which is mandated by the Human Rights Commission Act 2000, the Working Group recommends that the new Commission consider, in conjunction with the Northern Ireland Human Rights Commission (NIHRC), the appointment of a dedicated worker to service the Joint Committee as was successfully done by the HRC and the NIHRC for a period in the past. The position could be co-funded by the two Commissions and the Working Group suggests that the importance of this role be taken into account by the Government when deciding on the budget for the IHREC. Subject to agreement with the NIHRC, the Joint Committee worker could also play a part in facilitating cooperation between the IHREC and the Equality Commission for Northern Ireland (ECNI) to continue the valuable work done jointly by the Equality Authority and the ECNI in the past.

#### **Compliance and enforcement powers**

- 3.24 The IHREC will have a role in enforcement of, and supporting compliance with, legislation and good practice. The initial emphasis in any situation requiring intervention should, where appropriate, be on advice and assistance to improve practices and redress wrongs. That said, the Commission also needs strong powers to act in situations where human rights and rights to equal treatment are being infringed, especially where there is a systemic or sectoral manifestation of prohibited conduct. These powers must include the credible threat of legal action where human rights or equality violations continue and cannot be resolved by earlier, 'softer' interventions.

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<sup>93</sup> See s 8(c) of the Human Rights Commission Act 2000.

3.25 The Group recommends that the Commission's compliance and enforcement powers be drafted on a sliding scale, as set out below. These proposed provisions have been derived from the existing legislation, but with some important additions to strengthen the work of the Commission in promoting equality and human rights.

*i. To provide information and assistance to persons on equality and human rights issues, including advice to persons who consider that their human rights or rights to equal treatment have been infringed;*

*ii. To prepare, in consultation with relevant stakeholders, guidelines for promotion of best practice in human rights and equality for specific businesses, groups, sectors or geographical areas;*

*iii. The Commission may, or if requested to do so by the Minister,<sup>94</sup> shall, prepare for submission to the Minister draft codes of practice<sup>95</sup> in furtherance of one or more of the following aims:*

*(a) the elimination of discrimination;*

*(b) the promotion of equality of opportunity in employment and in relation to the matters to which the Equal Status Act 2000 applies, and;*

*(c) the protection of human rights;*

*iv. Where the Minister by Order declares that the draft<sup>96</sup> is an approved code of practice for the purposes of this Act, it shall be admissible in evidence and, if any provision of the code appears to be relevant to any question arising in any criminal or other proceedings, it shall be taken into account in determining that question;*

*v. To request a business to carry out an equality review and prepare and implement an equality action plan or, where appropriate and where the business does not have fewer than fifty employees, to carry out such a review and prepare such an action plan on its own initiative;<sup>97</sup> [this power is also referenced separately above]*

*vi. To provide assistance at its discretion, including legal assistance or representation, to*

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<sup>94</sup> Minister for Justice and Equality.

<sup>95</sup> See s 56 of the Employment Equality Act 1998.

<sup>96</sup> With or without amendment.

<sup>97</sup> See ss 68,69 & 70 of the Employment Equality Act 1998.

*a person who has instituted or wishes to institute legal proceedings that involve human rights law or practice,<sup>98</sup> or*

*to a person who considers that he or she has been discriminated against (within the meaning of the Equality Acts);*

*in either case if there is an important point of principle involved or if it is unreasonable to expect the person to represent themselves;<sup>99</sup>*

*vii. To conduct an examination into any act or practice that may be inconsistent with or contrary to any human rights or equality legislation, and, where the Commission considers it appropriate to do so, to endeavour, by mediation or conciliation, to effect a settlement of the matters that gave rise to the examination;<sup>100</sup>*

*To issue a reasoned opinion following such an examination and require the body to whom the opinion is addressed to respond in writing;*

*viii. To institute proceedings in any court of competent jurisdiction for the purposes of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights including equality rights of any person or class of persons; the declaratory relief the Commission may seek to obtain in such proceedings includes relief by way of declaration that a statute or a statutory provision is unconstitutional;<sup>101</sup>*

*ix. To apply to the High Court or the Supreme Court for liberty to appear before the High Court or the Supreme Court, as the case may be, as amicus curiae in proceedings before that court that involve the human rights including equality rights of any person and to appear as such an amicus curiae on foot of such liberty being granted (which liberty each of the said courts is hereby empowered to grant in its absolute discretion), or to accept an invitation from either such Court to so appear;<sup>102</sup>*

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<sup>98</sup> See s 8(j) and s 10 of the Human Rights Commission Act 2000.

<sup>99</sup> See s 67 of the Employment Equality Act 1998.

<sup>100</sup> The legislation should allow for use of external mediators/conciliators here.

<sup>101</sup> See s 8(k) and s 11 of the Human Rights Commission Act 2000. In principle there should be a similar power in relation to equality matters. The different legal basis for equality law means that this will need careful consideration and drafting.

<sup>102</sup> See s 8(h) of the Human Rights Commission Act 2000.

*x. To conduct inquiries of its own volition, if it considers it necessary or appropriate to do so for the purpose of the performance of any of its functions; or if it considers it appropriate, at the request of any person who claims that a breach of human rights or equality legislation may have occurred;*<sup>103 104</sup>

*including where a conciliated settlement following an examination of any act or practice under subsection X above has not proved possible.*

### **Optional Protocol: Convention Against Torture**

3.26 The Optional Protocol to the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is being considered at present for ratification by Ireland. Under the Optional Protocol, states are required to establish a National Preventive Mechanism (NPM). See **Appendix 6** for a summary of the role of an NPM.

3.27 Having regard to the requirements for NPMs set out in OPCAT, it is interesting to note the following:

- The HRC currently has a legislative referral function under section 8(b) of the Human Rights Commission Act 2000 which is one of the powers that an NPM is required to have under Article 19(c) of the Protocol.
- In addition, the Commission is mandated to make recommendations to Government as it deems appropriate in relation to measures that should be taken to strengthen, protect and uphold human rights in the State – a requirement of Article 19(b) of the Protocol.
- The Commission is also required to consult with both national and international bodies or agencies that have knowledge or expertise in the field of human rights as it sees fit – a function of obvious relevance to the necessary interaction between the UN Subcommittee on the Prevention of Torture (SPT) and the NPM in the Protocol.

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<sup>103</sup> See s 8(f) and s 9 of the Human Rights Commission Act 2000. Section 9 confines the power to conduct inquiries to four functions: reviewing the adequacy and effectiveness of law and practice in the state relating to the protection of human rights (s 8(a)); consulting with national or international human rights bodies or agencies (s 8(c)); recommending to the Government measures that should be taken to strengthen, protect and uphold human rights (s 8(d)); promoting understanding and awareness of the importance of human rights in the State (s 8(e)).

<sup>104</sup> See ss 58 & 61 of the Employment Equality Act 1998. This power has not proved operable.

- The Commission has been created with regard to the Paris Principles as provided for in Article 18(4).
- With regard to Article 18(2) of the Protocol, the Commission is independent in the performance of its functions subject to the provisions of the Human Rights Commission Act 2000.

3.28 The existing HRC does and the IHREC – once established in line with the recommendations in this report will – satisfy many of the functional criteria for an NPM.

3.29 An example that may be useful in the Irish context is the approach adopted in New Zealand. New Zealand intends to implement the OPCAT by designating a number of existing visiting mechanisms which will include an Ombudsman, the Police Complaints Authority, and the Children's Commissioner. The New Zealand Human Rights Commission will be designated the central NPM and will coordinate the activities of the other NPMs. The Commission must consult and liaise with the NPMs, review the reports prepared by them, and coordinate the submission of those reports to the SPT. Flowing from these tasks, the Commission is also responsible for making relevant recommendations to Government.

3.30 Looking at the current inspection mechanisms in Ireland when assessed against the criteria of the OPCAT, it is clear that they are quite diverse. In this context it may well be more appropriate to establish a new mechanism which inspects all places of detention and satisfies the criteria of the OPCAT. On the other hand it may be more realistic to recommend that the mandate, composition and independence of existing bodies should be strengthened and brought into compliance with OPCAT, and that some form of central coordinating mechanism should be established. In this latter scenario, IHREC would be well placed to take on the central co-ordinating role.

3.31 Such a function, if assigned to IHREC, might be drafted as follows:

*With reference to the Optional Protocol to the Convention Against Torture, to co-ordinate the inspection of, or inspect as may be appropriate, all places of detention for the purposes of examining the treatment of persons deprived of their liberty and making recommendations on how to improve their protection from torture, cruel, inhuman or degrading treatment or punishment;*

*For the avoidance of doubt, 'places of detention' is not limited to penal institutions but includes Garda stations, psychiatric centres, care centres for children and elderly people, airports, ports, and places of detention in the area of immigration.*

*In that regard, to report to and meet with the UN Subcommittee on the Prevention of Torture.*

### **Convention on the Rights of Persons with Disabilities**

3.32 The Group also understands that the UN *Convention on the Rights of Persons with Disabilities* (CRPD) will be ratified by Ireland as soon as the necessary Mental Capacity legislation and other measures are in place. The Convention requires States, in accordance with their legal and administrative systems, *‘to maintain, strengthen, designate or establish a framework to promote, protect and monitor implementation of the Convention’*. In other jurisdictions the NHRI undertakes this role. In Ireland, the National Disability Authority could equally discharge this function.

3.33 It will be a matter for Government to decide on the appropriate agency to undertake this role, but the legislative function might be drafted as follows:

*To promote and monitor implementation of the Convention on the Rights of Persons with Disabilities;*

*To review legislation, policy and practice, disseminate information, conduct inquiries, conduct or assist research or educational activities, and engage in advocacy with the aim of monitoring and improving the protection of the human rights of persons with disabilities;*

*To liaise with disability activist groups and with Government departments and services providers in the area of services for people with disabilities;*

*To make recommendations to the Government for the purpose of improving the protection of the human rights of persons with disabilities;*

*To report to the CRPD Committee.*

### **An equality and human rights duty for public bodies**

3.34 The Government’s Programme for National Recovery 2011-2016 pledges as follows:

*‘We will require all public bodies to take due note of equality and human rights in carrying out their functions.’<sup>105</sup>*

To take due note of specified considerations is to have regard to them in making decisions. The Working Group recommends a general statutory duty on public bodies to have regard to equality and human

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<sup>105</sup> Programme for National Recovery 2011-2016, p 54.

rights. The purpose of the public sector equality and human rights duty is to ensure that public bodies reflect on and take action on these core values as part of their mainstream service.

- 3.35 The Working Group notes that the EU Fundamental Rights Agency and the Council of Europe Commissioner for Human Rights recommend as best practice the adoption of a positive duty on public bodies to have due regard to the need to prevent discrimination and promote equality and human rights. The Group notes as well that such positive duties have been adopted in Northern Ireland and Great Britain and we are mindful of the commitment under the Good Friday Agreement to ensure equivalent protection of human rights in this jurisdiction to that which obtains in Northern Ireland. However, the Group does not regard the positive duty model in Northern Ireland as being suitable for replication in this state, because it was designed with the specific situation in Northern Ireland in mind and because it is resource intensive. The Group recommends instead mainstreaming a human rights and equality duty by fixing responsibility in this regard on management in public bodies, rather than emphasising external monitoring and enforcement. The Group is mindful of the need to fashion a positive duty in terms that would not impose undue financial or administrative burdens on the state.
- 3.36 It might be argued that such a duty on public bodies would impose a burden on them for no beneficial purpose and create an excessive financial burden that the state cannot afford. The Working Group's recommendation below is crafted so as to avoid creating any requirement for additional resources within public bodies in its adoption and implementation. It is critically important in the current economic climate that an important reform being introduced in the public sector – which is the context in which the Working Group views the matter – should lead to a more effective public sector and should not lead to increased administrative costs.

#### **Justification for positive duty**

- 3.37 The Working Group takes the view that imposing a positive duty would be an articulate fit with a 'smart' approach to economic reform and reconstruction. Creating a fairer and more equal society would reap economic and political gains.
- a) There is the *good-for-business* argument. This state has a stake in attracting internationally mobile businesses and start-up entrepreneurs into the country in order to foster economic growth and create new jobs. A more effective and responsive public sector creates a better climate for business to flourish.

The modern business mindset also recognises that integrating human rights and equal opportunity into business practices is good for employees and good for business. It can help to create a positive work environment, increase productivity, sharpen



competitiveness, and enhance the recruitment and retention of the best employees.

- b) There is a *quality of service* argument. The duty could help public bodies to avoid discriminatory practices and integrate equality and respect for human rights into their core activities. Creating a self-sustaining human rights culture in the public sector would benefit service-users.
- c) There is a *positive outcome* argument. The duty would allow public bodies to contribute positively to the Government's wider social policies. Compliance with the duty should produce better informed decision-making and policy development, and better policy outcomes. Promoting human rights and responsibilities as core values could contribute to the development of cohesion in an increasingly diverse society.
- d) There is the broader *public service reform* argument. Mainstreaming human rights and equality in the public sector's policies, procedures and practices makes good economic sense. First, providing services that are more appropriate to the service user would mean providing services that are more efficient and cost-effective. Second, it would also contribute to reducing avoidable legal claims against public bodies. It is much more cost-effective to implement good practice that prevents discrimination or human rights violations than it is to remedy discrimination or violations after they have happened.
- e) There are important *political* arguments. As mentioned earlier, the EU Fundamental Rights Agency and the Council of Europe Commissioner for Human Rights recommend a positive duty on public bodies to have due regard to the need to prevent discrimination and promote equality and human rights. Furthermore, there is a requirement in the Good Friday Agreement for 'equivalence' in human rights protection between the state and Northern Ireland. The Agreement says that '*The measures brought forward should ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland.*' It is arguable that the Agreement creates an obligation to put in place a similar positive duty in this jurisdiction, though one more adapted to the position here. Moreover, section 3 of the European Convention on Human Rights Act 2003 imposes an obligation upon every organ of the State to perform its functions "*in a manner compatible with the state's obligations under the Convention provisions*".

#### **A proportionate positive duty, not imposing an undue burden**

- 3.38 The Working Group has considered how a mainstreaming of human rights and equality proofing might best be achieved without imposing an undue administrative burden and in a way that is proportionate to the functions of the public body concerned and to the resources

available to it. Essentially what is required is that public bodies would consider the human rights and equality environment in which they operate and take steps on the basis of this analysis to resolve existing problem areas and address potential difficulties before they arise. The starting point to mainstreaming is to acknowledge that at an operational level, the key leadership role in embedding good practice within public sector organisations rests with senior management in individual bodies. The second step is to identify existing management mechanisms and processes that can be adapted to meet a positive duty task, rather than creation of new mechanisms that would require additional resources.

- 3.39 Human Rights are defined in legislation (see section 2 of the Human Rights Commission Act 2000. Equality is likewise defined in legislation (Equal Status and Employment Equality Acts) as well as in relevant EU Directives. The imposition of a public duty to have regard to human rights and equality is distinct from the creation of new rights; instead it involves the creation of a formalised mechanism by which public bodies can assess or proof their compliance with what are existing statutory obligations.
- 3.40 In looking at how this might be put in place, the Working Group notes that comprehensive reporting mechanisms have been put in place across the public sector by which individual organisations set out in a 3 to 5-year Strategic Plan how they propose to pursue their statutory mandate and manage the financial resources entrusted to them and report in each year's annual report on how they have discharged these responsibilities. The audit role of the Comptroller and Auditor General has been extended beyond purely financial accounting to include assessment of the efficiency and effectiveness by which bodies discharge their functions and evaluate their performance. Bodies are obliged as part of their annual accounts to certify compliance with all statutory obligations.
- 3.41 The Working Group recommends the adoption of the principle of a positive duty on public bodies to have due regard to human rights and equality. Such a provision might be drafted on the basis of the following:

*A public body shall in the exercise of its functions have due regard to the need to eliminate prohibited discrimination, promote equality of opportunity and treatment and protect the human rights of its staff and the persons to whom it provides services. Due regard for the purposes of this section shall mean giving consideration to these matters in the planning and execution of the body's policies and actions and reporting annually on its implementation of this obligation in its annual report or otherwise. This obligation shall not create a cause of action for any individual or legal person. In determining the extent of this obligation in relation to a particular public body*

*consideration shall be given to the size and resources of the body and the nature of the services it provides.*

- 3.42 The Working Group is aware that its recommendation will need to be examined carefully by Government and that a consultation process with other Government Departments and public bodies will form part of this assessment process. Subject to this further assessment of its impact, the Working Group recommends the Bill should provide that each relevant public body should address human rights and equality issues relevant to the body in its Strategic Plan and to report on issues and achievements in its annual report. The provision should be drafted in such a way that the public body can absorb the administration of this responsibility within its existing budgets.
- 3.43 IHREC's role in the initial years should be that of facilitation and provision of supports, including guidelines for assessment of the human rights and equality issues that face public sector organisations and training for staff. This role builds on the work undertaken by Development Officers within the Equality Authority and the public sector training work undertaken by the Human Rights Commission and could incorporate learning from the experience of the positive duty in Northern Ireland and Great Britain. IHREC's role will fall to be met from within whatever staffing and financial resources are ultimately allocated to it by Government or can be obtained from other sources (e.g. EU or philanthropic funding).
- 3.44 The Group recommends that a formal review be undertaken by Government in consultation with IHREC after a period of three or five years. The review should assess the effectiveness of the public sector duty in securing improved human rights and equality outcomes and in assisting public bodies to pre-empt problems on an evidential basis. The evidence could be gathered by way of an independent evaluation commissioned jointly by IHREC and the Department of Justice and Equality. The review should also assess whether there is a need to modify or develop these recommended arrangements - including whether there is a need to institute a formal review and monitoring mechanism and the question of integration with other regulatory assessment procedures – on the basis of the evidence.

**Possible specific features of IHREC's role**

- 3.45 Specific interventions and functions for IHREC might include:

*To give guidance to, and promote good practice in public authorities in relation to human rights and equality;*

*To develop performance measures and operational standards for the purposes of assisting public bodies in the auditing of their policies, practices and processes;*

*To encourage public authorities to develop, in consultation with their employees and their service users, written preventive strategies aimed at reducing discrimination in the public sector workplace and in the provision of goods and services to the general public.*

*To prepare codes of practice setting out operational standards and performance measurement tools for public authorities to help them to integrate human rights and equality into their policies, practices and process, promote a diverse and respectful workplace internally and enhance frontline delivery of services;*

**Application of the positive duty – definition of ‘public body’**

3.46 The proposed provision should apply to public authorities, including bodies that are not Government agencies but which exercises public functions, in the exercise of those functions. The Act should define ‘public body’<sup>106</sup>.

3.47 A sample definition is as follows:

*“public body” means—*

*(a) a Department of State,*

*(b) An Garda Síochána,*

*(c) a local authority,*

*(d) a university or institute of technology*

*(e) the Health Services Executive,*

*(f) a vocational education committee,*

*(g) a person, body or organisation (other than the Defence Forces) established—*

*(i) by or under any enactment (other than the Companies Acts 1963 to 2009), or*

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<sup>106</sup> There are essentially two ways of doing this. The first is to list all the bodies that should be covered. This is cumbersome as the list needs to be amended periodically by statutory instrument to keep it up to date. The second is to set out details of categories of public bodies that should be covered in a way that does not require updating by statutory instrument. The term public body has been defined in this latter way in a number of Acts, including the Ethics in Public Office Act 1995, the Public Service (Recruitment and Appointments) Act 2004, and the Consumer Protection Act 2007.

*(ii) under the Companies Acts 1963 to 2009, in pursuance of powers conferred by or under another enactment, and financed wholly or partly, whether directly or indirectly, by means of moneys provided, or loans made or guaranteed, by a Minister of the Government or shares held by or on behalf of a Minister of the Government*

*(h) a company (within the meaning of the Companies Act 1963) a majority of the shares in which are held by*

*(i) the Government, a Minister of the Government, or directors appointed by a Minister of the Government, or*

*(ii) a body or a number of bodies referred to in paragraphs (a) to (g) or directors appointed by or on behalf of such a body or bodies,*

*(i) any other body, organisation or group appointed by the Government or a Minister of the Government, and*

*(j) any other body, organisation or group financed wholly or partly out of moneys provided by the Oireachtas, or exercising functions on behalf of a body referred to in paragraphs (a) to (i), whether under statute or not, that stands prescribed for the time being (being a body, organisation or group that, in the opinion of the Minister, ought in the public interest and having regard to the provisions and spirit of this Act, to be prescribed).*

*A body referred to in this definition is a public body whether it is established before or after the enactment of this Act.*

*The powers and functions of and services provided by a body referred to in this definition are subject to this Act whether they are undertaken or provided, as the case may be, directly by the body or by another entity under contract or service level agreement.*

## Chapter 4 Structure, Composition and Funding

### Introduction to chapter

- 4.1 The essential purpose of NHRIs is to promote and protect human rights as an integral part of good governance under the rule of law. The United Nations Development Programme defines governance as ‘the exercise of economic, political and administrative authority to manage a country’s affairs at all levels. It comprises mechanisms, processes, and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.’<sup>107</sup> The effectiveness of NHRIs in promoting good governance depends on many factors, including the institutional structure of the body, the process for appointing Commissioners, the level of independence, the availability of funding and staff, and the integrity and suitability of its Commissioners. The IHREC should be independent, participative, accountable, and transparent.<sup>108</sup>

### Ensuring the independence of the IHREC

- 4.2 The quality of independence is an essential requirement. An NHRI must enjoy formal and real independence. But what ‘independence’ means in this context is far from simple.<sup>109</sup> In general, having independence means being free from outside control or influence. So an NHRI must be independent from the branches of Government and the civil society groups that can exert pressure on it. But this abstract logical formulation is only the starting point of an analysis.
- 4.3 Independence is required to ensure that the IHREC can perform its broad mandate of promoting and protecting human rights and equality. It is fundamental not only to enable the IHREC to exercise its functions and powers impartially, objectively and faithfully, but also to secure individual and public confidence in the institution. Without that public confidence the IHREC cannot earn the respect and acceptance in a pluralist society that are vital to its efficacy.
- 4.4 Independence is not only an outlook or attitude, but also a status or relationship to others, particularly to the Government and to civil society groups. Since the independence of an NHRI involves both personal and institutional relationships, the quality must find clear expression on two fronts: the personal independence of

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<sup>107</sup> As noted by Sakiko Fukuda-Parr & Richard Ponzio, ‘Governance: Past, Present, Future – Setting the Governance Agenda for the Millennium Declaration’, UN Development Programme Paper, p 2.

<sup>108</sup> See Philip Alston, ‘Towards a Human Rights Accountability Index’, 1 Hum Dev J 249, 250 (2000).

<sup>109</sup> Dr Kutsal Yesilkagit & Berend Snijders (University of Utrecht), ‘Between Impartiality and Responsiveness: Equality Bodies and Practices of Independence’ (Equinet Brussels 2008) p 13.

Commissioners and the institutional independence of the body itself. The two aspects of independence are connected. An individual member of an NHRI may enjoy the basic guarantees of independence, for example, security of tenure, but if the NHRI of which he or she is a member is not free from the pressure of the executive, in what is essential to its core function of promoting and projecting human rights, he or she cannot be said to be really independent.

- 4.5 The core elements of institutional independence are as follows: [1] structural integrity; [2] operational and administrative autonomy; [3] security of tenure; and [4] financial security. These elements of independence may have both a personal and an institutional application.

#### **Five principal requirements for structural integrity of IHREC**

- 4.6 There are five principal requirements for the structural integrity of the IHREC:

- It must have a separate legal basis in legislation. The United Nations advises that an NHRI should have '*a separate and distinct legal personality of a nature which will permit it to exercise independent decision-making power.*'<sup>110</sup> Ideally, an NHRI should be the creature of the national constitution. The proposed Constitutional Convention should consider this step. It is appropriate, however, for the Government to recommend setting up the IHREC through statute.
- The process for appointing Commissioners should help ensure that the IHREC is actually and manifestly independent.
- The IHREC should have a form of governance that supports its independence. Structural independence tends to be high when an NHRI is governed by a commission or board. The 2000 Act as amended says that '*The Commission shall consist of a President and fourteen other members.*'<sup>111</sup> Moreover, the Act provides that the Commission is a 'body corporate' possessing power to litigate in its own name.
- Consistent with the Paris Principles, the IHREC should have a pluralistic composition that represents the social profile of civil society.<sup>112</sup> There should be a balanced representation of men and

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<sup>110</sup> United Nations, *National Human Rights Institutions, A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (United Nations Professional Training Series No 4 1995), para 70.

<sup>111</sup> The Human Rights Commission Act, s 5(1), as amended by the Human Rights Commission (Amendment) Act 2001, s 1(a).

<sup>112</sup> Gauthier de Beco, 'National Human Rights Institutions in Europe' 7(2) Human Rights Law Review (2007) 331, 343. OHCHR Professional Training Series N 4, P 12.

women. The legislation provides that '*Of the members of the Commission, not less than 7 of them shall be men and not less than 7 of them shall be women.*' Because the IHREC will have twelve members, the new statute setting up the IHREC will have to adjust the figures here accordingly.

- The IHREC must have an adequate permanent full-time core staff, with in-house human rights and equality expertise.

### **Co-operation with social partners and civil society groups**

- 4.7 According to the Paris Principles, the composition of an NHRI should guarantee 'the pluralistic representation of social forces' in civil society who promote and protect human rights [1] by powers that will enable effective cooperation to be established with, or [2] through the presence of, representatives of civil society.<sup>113</sup> The representatives in question include NGOs, trade unions, social and professional organisations, trends in philosophical or religious thought, universities, parliament, or Government Departments<sup>114</sup>. States can choose between creating an NHRI that directly cooperates with the representatives of civil society groups involved in promoting and protecting human rights, or an NHRI on which these groups have their representatives; but in either case, the state must ensure the effective participation of these civil society groups in the activities of the NHRI.
- 4.8 The Working Group recommends that the IHREC, like the Human Rights Commission and the Equality Authority, should be an NHRI that cooperates with representative civil society groups that promote or protect human rights. Commissioners should be selected for their experience, expertise or qualifications in the field of human rights and equality, and to secure diversity in the membership, but not as formal representatives of specific organisations or interest groups. Members noted the historical development of the Equality Authority from a body focused purely on employment issues with representation from the employer and employee interests. The Working Group considers that with the development of the wider remit for the new IHREC, representation of any corporate body or sectoral interest as of right on the new Commission is not appropriate. The legislation should allow IHREC to establish subcommittees of the Commission to enable representatives of a wide range of interests to contribute in an advisory capacity.
- 4.9 It is important that the new Commission have a large 'footprint' in the public consciousness. Maintaining the links that the Equality Authority has built up with employer and employee bodies and its focus on rights in relation to employment and provision of goods and services in the private sector, in addition to a focus on the activities of Government, is

<sup>113</sup> Principle 1, Composition and Guarantees of Independence and Pluralism, *Paris Principles*.

<sup>114</sup> The Paris Principles say that if representatives of government departments are included, they should participate in the deliberations only in an advisory capacity.



important. Trade unions and employer / business organisations have a wealth of expertise, practical experience and information from which the Irish Human Rights and Equality Commission could benefit through building on the already existing and valued strong and effective links.

#### **Administrative and operational autonomy**

- 4.10 The IHREC should have operational and administrative autonomy. The provision in section 4(2) of the Human Rights Commission Act provides that '*The Commission shall, subject to the provisions of this Act, be independent in the performance of its functions.*' The implication is that the Commission may not be subject to pressure or the threat of sanctions for exercising its functions.
- 4.11 The IHREC must have control over the administrative decisions that bear directly and immediately on the exercise of its statutory function. These can be defined in narrow terms as assignment of Commissioners to tasks, the fixing of meetings of the Commission, and setting the agenda for meetings — as well as the related matter of the direction of the staff. It must be free to decide whether or not to undertake projects, to determine the methodology of its work and to make such recommendations as it sees fit. But it must also maintain constructive links with Government, to work most effectively with the public sector, and must be fully accountable, both financially and as to its substantive work. There is an inherent tension in its role. The essential point is, however, that the independence of the IHREC should be of a level that allows it to perform its functions without interference or obstruction from any branch of Government or any public or private entity.
- 4.12 The IHREC should also have the option of commissioning outside research, and bringing in outside specialists for training or inquiries, and for funding to cover these activities. The IHREC should have the capacity to form working groups and expert panels composed of members of the Commission and outside experts to advise on particular issues. This would allow for some flexibility in the use of resources. It would also help the Commission to keep up constructive links with civil society and with legal and other professional communities.

#### **Security of tenure for Commissioners**

- 4.13 Appointments should be for a fixed term, renewable once. Commissioners should be appointed for a sufficient period of time to allow them to gain experience of the role and to develop and implement a worthwhile programme of work.<sup>115</sup> Commissioners should only be removed for due cause, and after a proper hearing.

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<sup>115</sup> United Nations, *National Human Rights Institutions, A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (United Nations Professional Training Series No 4 1995), para 79.

### **Financial security**

- 4.14 The Working Group is concerned that the IHREC should be properly funded to perform its functions and exercise its powers. The Group notes that the HRC and the EA both claim that their funding has been inadequate. This has been recognised by the current Government. The Working Group also notes that the Comptroller and Auditor General (C&AG) has raised issues about the ability of the HRC to continue as a going concern under the present funding constraints. The Northern Ireland Human Rights Commission argued, in the face of inadequate funding, for a new statutory provision in its legislation on the issue of funding. The proposed statutory provision reads: '*The Commission shall be provided with sufficient resources to ensure that it can carry out each of its functions effectively.*' The Group recommends that the statute setting up the IHREC contain a similar provision.
- 4.15 The Working Group considered the several means through which public funds could be voted to the IHREC:
- At present the Human Rights Commission and the Equality Authority are funded through a subhead within the Justice Vote.
  - It would be inappropriate to fund it through the Central Fund (which is responsible for such matters as the National Debt).
  - The IHREC would be in a vulnerable position were it simply to be funded through a line in the Finance Act without the interest of any sponsoring Department.
  - A Vote under the Department of the Taoiseach was considered by the Working Group. As that Department has moved to disburden itself of the operational responsibilities it acquired from other Departments since the 1980s, this was not seen as a realistic option.
- 4.16 Therefore, the Working Group recommends that the IHREC should be funded through a separate Vote under the Department of Justice. The Commission should be funded on a multi-annual basis to assist better planning and financial management. Members noted that the Minister for Public Expenditure and Reform has announced a move towards multi-annual management of public expenditure allocations over the medium term.
- 4.17 The IHREC should not be constrained from accepting funding from other sources, so long as this does not compromise its independence, unduly influence its deliberations, or distort its work. It should also be able to raise income from fees for training, conferences, or the sale of publications. The charges imposed should not be at a level that impedes access by the general public to help from the Commission.

### **Method of appointment of Commissioners**

4.18 The Minister for Justice and Equality has indicated that the new Commission should have a total of 12 members. Such a number would enable a balanced, broadly-based membership that will meet the requirements of the Paris Principles.

4.19 It is important that there be a robust and objective process for appointment of Commissioners. It is desirable in principle to avoid an *ad hoc*, opaque or politicised process of selection that easily allows political patronage or undue influence by civil society groups. The objective should be to formalise the selection process for the IHREC by reference to the principles of transparency, merit, diversity, accountability, independence, and good practice on the international plane in relation to NHRIs. There is also need for a formal oversight mechanism to ensure that these principles are given effect. The Group favours an appointment process for the Commissioners that has the following elements:

- a) The vacancies should be advertised on appropriate Government websites and in the media.
- b) The selection criteria should be clear, objective and published. The criteria so as to comply with the Paris Principles should aim for a Commission that is balanced, in terms of broadly representing Irish society, including but not limited to socio-economic and other groups that need the protection of IHREC, and that has a spread of necessary and useful expertise.
- c) No application or appointment outside the prescribed process should be allowed.
- d) An independent Selection Panel comprising 5 individuals of high standing who are knowledgeable in the field of human rights and equality and who are pluralist and representative of different strands in society should assess the applications. There should be no representative from a Government Department on the panel. A code of practice should set out the process that the panel must follow.

The Working Group considered two other options: the appointment of a Selection Panel by the Public Appointments Service, or by a group configured on a similar basis to the Referendum Commission<sup>116</sup>. Either of these models would give an independent body with credibility and objectivity primacy in appointing Commissioners. The disadvantage would be to remove an important element of democratic accountability from the decision-making.

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<sup>116</sup> Which comprises the Clerks of the Dáil and Seanad, the Ombudsman, the Comptroller and Auditor General, and a High Court judge who chairs it.

- e) The Selection Panel should nominate only sufficient names to fill the vacancies that exist at any time. It should present its list of nominees to the Government. The Government should have the power to decline to accept any proposed candidate but only on the basis of stated legitimate reasons. If the Selection Panel agrees that the Government's objection has a sustainable factual basis, it should be able to propose another candidate for the slate, as well as maintaining a reserve panel from which casual vacancies can be filled.
  - f) The President should have the power to appoint the Commissioners on the nomination of the Government, and following the passage of resolutions by Dáil Éireann and Seanad Éireann recommending their appointment. The Houses should be able to accept or reject the slate of nominees. The resolutions should be presented on this basis rather than having separate resolutions for each nominee.
  - g) The Chief Commissioner should be recruited at the same time as the other members and the selection process should take account of the separate requirements for this role.
  - h) Commissioners should be appointed for a sufficient period of time to allow them to gain experience of the role and to develop and implement a worthwhile programme of work.<sup>117</sup> The Working Group considers that a term of office of five years is appropriate, with the possibility of one further term of not more than five years.
- 4.20 The Working Group considers that a formalised schema with the elements set out above would enhance transparency and be likely to increase diversity among applicants. It should increase public confidence in the process of selection.

#### **Director and Chief Commissioner roles**

- 4.21 The Working Group looked at two different models: A full-time Chief Commissioner, with responsibility for chairing the board of Commissioners, running the organisation and acting as its public voice, supported by an Office Manager/Chief Operating Officer; and a part-time Chair of the board (Commission), with a Director responsible for running the organisation on a day-to-day basis under the supervision and direction of the board.
- 4.22 The preferred model in corporate governance terms, both in the public and private sector, requires a separation of the role of CEO and of Chairperson of the board, to ensure effective accountability of the Chief

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<sup>117</sup> 'United Nations, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*' (United Nations Professional Training Series No 4 1995), para 79.

Officer to the board. The Group recommends that the main full-time role at operational level should be that of a senior-level Director with responsibility for day-to-day running of the organisation and assisting in setting and delivering a policy agenda in collaboration with and under the supervision of the board. The Director would report to a part-time Chief Commissioner as Chairperson of the board. While not in the Group's view being a full-time role, this will require an experienced, highly-qualified individual. The board and the Chief Commissioner will have a critical role in the accountability of the Director, including setting of performance targets and indicators and providing overall policy direction and guidance. The relationship between Director and Chief Commissioner is also critical. It is important that there is clarity of roles with regard to public pronouncements. This is a matter for the Chief Commissioner and the board in the first instance, but can be delegated for day-to-day items to the Director, subject to protocols to ensure effective communication between the board and staff in this area.

- 4.23 At the start-up stage, a considerably greater time commitment will be required from the Chief Commissioner of IHREC. This can be expected to reduce to a more normal requirement over a period of 18 months to two years. Commissioners will require an ongoing commitment above that of normal state boards, given the personal contribution they are expected to make to policy development.
- 4.24 The Group recommends that responsibility for recruiting the Director at the appropriate time be at the discretion of the Commission and that IHREC should not be obliged to avail of the services of the Public Appointments Service in that regard.

#### **Change management**

- 4.25 This has proved a difficult issue in other jurisdictions and requires careful attention. This will be a key task for the Commission and Director over the initial 12 to 18 months.
- 4.26 A change management process should commence as soon the legislation is published so that the new IHREC can begin operations on as effective a basis as possible.

#### **Location of headquarters of new body**

- 4.27 The bulk of staff of the two existing bodies are based (in two separate premises) in Dublin. Dublin therefore is the most cost-effective location, as well as being the most accessible location for people in other regions. The IHREC should have a single office in Dublin in a premises that is accessible to people travelling from outside the capital and to people with disabilities. The new body should have a high profile building, ideally with a street-level presence, and facilities for meetings, launches etc.

### **Equality Authority office in Roscrea**

- 4.28 The Equality Authority has a decentralised office located in Roscrea. The operation of this office imposes an extra administrative cost and burden. Having staff of such a small organisation split between separate premises would undoubtedly make the task of integrating the two existing organisations more difficult. It is also the case, however, that the staff in this office have given a commitment to the organisation and this commitment and their interests should be taken into account.
- 4.29 Having considered all the options carefully, and while being conscious of the contribution that staff in Roscrea have made to the Equality Authority, the Working Group recommends that the Roscrea office be closed. The Group acknowledges that there are complex HR issues that need to be managed proactively by management in the new Commission and by the Department over a period of time and that appropriate transition arrangements should be put in place to ensure that the interests of the Roscrea-based staff are protected in the transition.

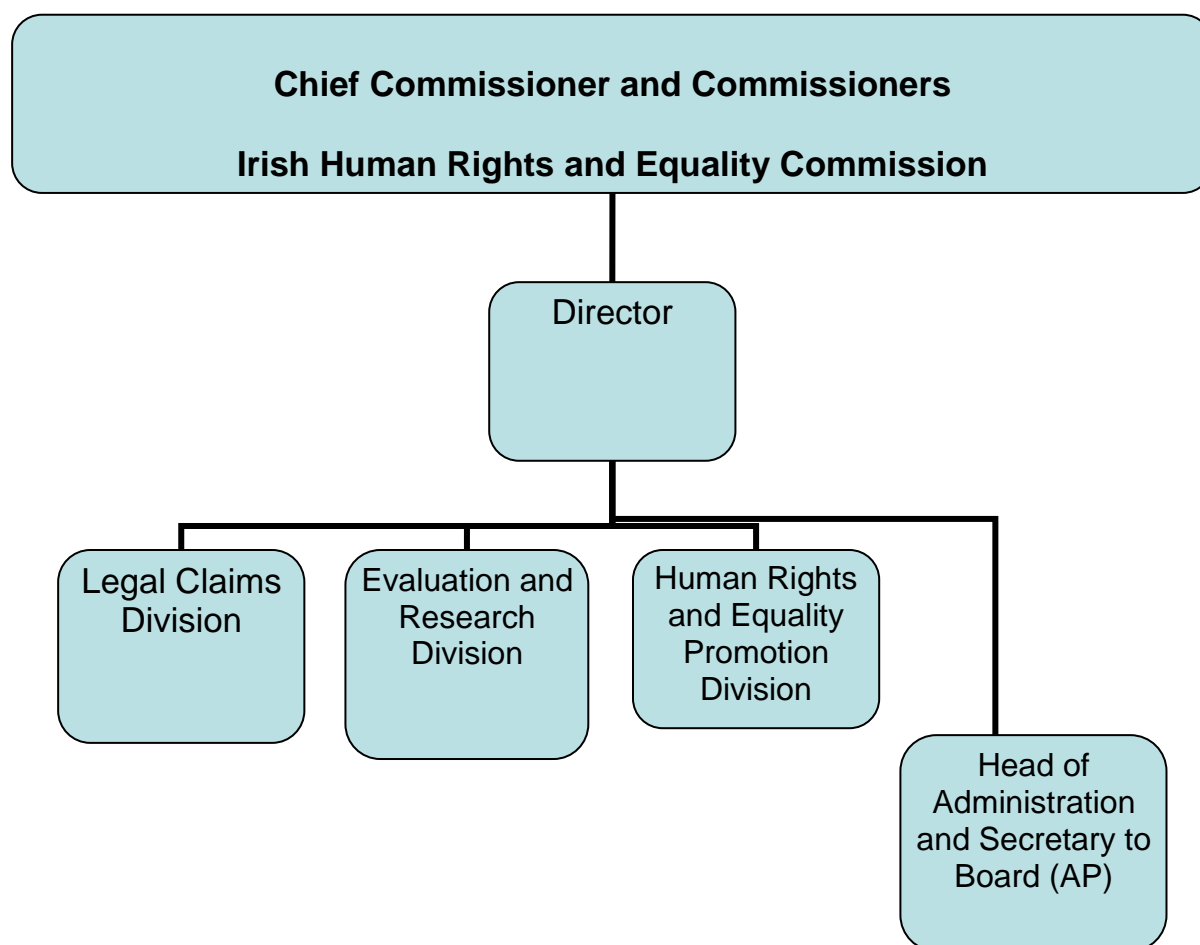
### **Staff recruitment issues**

- 4.30 The new Commission should be the employer of all its staff. It is critically important that the IHREC be able to achieve 'A' status accreditation under the Paris Principles as soon as possible. To this end the Group emphasises the importance of the legislation providing that IHREC have control over the recruitment of its own staff. While IHREC is being established by merging two existing organisations, all vacancies that arise after the establishment of IHREC should be filled in a way that conforms to the Paris Principles. In future, new staff at senior level should be recruited by the IHREC directly through an open competition (public servants who are successful in such competitions being given leave-of-absence, rather than use of assignment arrangements).
- 4.31 There is also a need to ensure mobility and career paths for staff, both within the organisation and the wider public service, the law, NGOs and academia. The IHREC should have the flexibility to offer short-term contracts and leave-of-absence arrangements to secure expertise on specific issues on which it may wish to work, including the option of engaging experts from other public sector organisations in this way.
- 4.32 At junior levels, there are personal and organisational advantages if staff are linked to a wider pool for career development and mobility purposes. In pragmatic terms, this suggests an ongoing link with the staff pool of the funding Department might be valuable, subject to IHREC managing the selection process and to it being the employer during the period of leave of absence. Aside from the personal benefit to individuals, regular staff renewal can have a reinvigorating effect on any organisation.

### Initial internal organisational configuration

- 4.33 The Working Group considers that it would be inappropriate to undertake the level of analysis needed to draw up a detailed organisational chart for IHREC. However, the Group did complete an analysis of how the IHREC might be structured at a functional level, on the basis of what it sees as the core functional divisions of IHREC and its priority work areas. The results of this analysis are presented in the table below:

TABLE



- 4.34 This table attempts to bring the two organisations together in a way that is coherent with the functions of the amalgamated body and with the objective of identifying synergies and efficiencies arising from the merger. It does not attempt to show staff assignments. While IHREC must have an internal organisational structure, it is important to its effectiveness that these functional areas do not operate as independent silos. There should be a strong ethos of cooperating across functional boundaries within the organisation; the management team will have a key role in fostering this ethos and in ensuring that the staff of the new organisation works together as an effective unit.

4.35 The following are specific points to which we wish to draw attention:

**Legal Claims Division**

This Division should bring together the existing functions of the HRC and the Equality Authority in taking or supporting individuals in taking legal action and cases to the WRC. It should also be responsible for the IHREC's inquiry function.

**Equality Authority Public Information Centre**

The Centre does more than provide information on entitlements; the bulk of callers make contact with individual problems and seek advice on how to progress a complaint. The Centre reports into the Legal section with details of cases that may be suitable for assistance/representation. On that basis, it would appear sensible for it to report to the Head of Legal Claims Division.

**Evaluation and Research Division**

The staff resources here should be augmented by the development of links with 3<sup>rd</sup> level institutions, including contracting out research projects. This Division should also manage IHREC's public relations function.

**Human Rights and Equality Promotion Division**

This Division will bring together the training and awareness-raising work of the existing bodies, including provision of human rights and equality training for public servants, work with the social partners and project (including EU-funded) work of the Equality Authority.

**Administration**

A relatively light unit headed at Assistant Principal level with responsibilities for supporting the board, accounts and administration is appropriate.

Financial Services, including payroll, and IT services should be outsourced. The Group notes that some such services are currently provided to the Equality Authority by the Department of Justice's Financial Shared Services in Killarney. Such services are likewise provided by the office in Killarney to other independent statutory bodies with sensitive information protection needs, including the office of the Data Protection Commissioner and the Garda Síochána Ombudsman Commission. The Group has been advised that appropriate protocols are in place to ensure confidentiality of records and information.



### **Overall staff numbers**

- 4.36 The table represents a recommended initial configuration to allow the combined organisation to function as one with immediate effect. It will be a matter for the new Commission to assign staff to roles and to review this configuration in the light of experience. In addition, it is clear that the staff numbers available to the two existing bodies are not adequate to meet the existing obligations and particularly in the context of new functions that are being recommended and the Minister's commitment to strengthen the human rights and equality infrastructure of the state. It is of critical importance that the IHREC will have an adequate number of staff to fulfil its remit. The Group recommends that the new Commission undertake a review of staffing needs within the first year of its establishment to compile the evidence for a business case for any essential additional staff.
- 4.37 This has clear funding implications. The Working Group does not lightly make a recommendation for increased staffing levels in the current fiscal crisis, but it is clear that existing resources are not adequate to fulfil the mandate proposed for the IHREC. The Working Group recommends accordingly that it is appropriate to reverse the disproportionate cuts imposed in the past, as soon as this is possible, so as to allow the new Commission to engage an adequate staff complement.

### **Accountability of the IHREC**

- 4.38 NHRIs must be accountable for what they do, but it is vital that accountability not collapse into interference by those the NHRI itself is trying to hold to account.
- 4.39 Making the Commission accountable to an Oireachtas committee would help in assuring its independence and would also assist in developing a close working relationship between the two bodies. The IHREC should submit its annual report to the committee and be examined by it. The Working Group notes that it is necessary for the Oireachtas to agree to such a reporting arrangement and to designate an appropriate committee to which the Commission would report. The Working Group accordingly recommends that the IHREC should report directly to a committee of the Oireachtas and notes that the Minister has indicated that he intends a strengthening of the role and independence of the IHREC through the putting in place of enhanced arrangements to this effect.
- 4.40 It is not envisaged that the Oireachtas committee would oversee the day-to-day work of the Commission, but that it would discuss the annual report and the strategic plan. This should lead to greater awareness of the Commission and its work and greater public interest in human rights and equality generally.
- 4.41 The IHREC should meet the standard audit criteria for public bodies. As a minimum standard, it should: publish annual reports, publish

annual accounts, be fully audited by an external body, be accountable to a parliamentary committee, have its own complaints procedure, observe a code of practice on transparent administration, possess a register of members' interests, allow public inspection of the register, release public reports of meetings, publish agendas and minutes of meetings, hold public meetings, maintain an internet website, and be subject to review every five years.

- 4.42 IHREC should be subject to FOI legislation.

**Performance evaluation**

- 4.43 Performance indicators – whether at the level of the individual, the section or the organisation – are an important management tool. Their purpose is to assist the organisation in monitoring and improving performance. As such they need to be reasonably meaningful so that patterns in the indicators can be usefully interpreted to guide the ongoing management of the activity of the organisation and to inform both business and strategic planning.
- 4.44 They also need to be feasible and proportionate. In effect they should be as simple to collect and to interpret as possible, relative to the nature and scale of the activities of concern. This latter point is particularly important to emphasise because the potential value of performance indicators is usually only realised over time, where indicators can be reported consistently over an extended series of observations. In many or even most cases this will only be feasible if the indicators are derived from the counting of routine activity or more or less routine data collection.
- 4.45 As with any tool, the value of performance indicators depends on how they are used. Thus while the definition of the indicators to be used is obviously important, defining and implementing the procedures or practices whereby performance indicators actually feed into the management of performance is equally important.
- 4.46 A core theme of public sector modernisation over the last two decades has been the need for the public sector to think of its performance in terms of outputs rather than inputs. What is important is not (or not only) what is being spent on any particular function but what is being produced with that resource.
- 4.47 More recently there has been a growing recognition that it is also important to look beyond the measurement of the 'product' of the public sector to whether that product is having the desired impact on society. While in principle this is important, clarity is required about how and when this insight can be meaningfully applied.
- 4.48 In many programme areas it is feasible to measure immediate impact on a target group or objective. Such measures of proximate impact are sometimes referred to as 'results indicators'. However measurement of

broader societal impact in any formal sense – net of dead weight and sustained over time - can be difficult and is typically resource intensive. As such it is usually addressed through periodic formal evaluation rather than through ongoing performance measurement and monitoring. Output and impact indicators are complements rather than alternatives. Knowing whether IHREC is actually delivering on its work objectives will be a necessary part of assessing its effectiveness.

4.49 Paragraph 2.20 discussed the importance of an NHRI regularly reviewing its performance against objectives and two international models for good practice in this regard were mentioned in paragraphs 2.21 and 2.22. The IHREC should regularly review its performance against objectives. The focus in setting objectives and measurement of performance should be on assessing the impact of the IHREC on improving people's lives, rather than on how good the organisation appears to be, but an important measure will be the degree to which the public are aware of its existence and the degree to which the public supports its work, which should be gauged periodically.

4.50 Key questions from which an evaluation framework for IHREC might flow are:

- What kind of society are we trying to achieve?
- How do vulnerable and marginalised groups regard the Commission?
- How has it improved people's lives and what has it done to eliminate discrimination and promote equality and inclusion?
- What has the Commission put in place or removed to allow, and indeed encourage, each person to flourish with the greatest degree of freedom without impinging on the dignity and worth of any other individual?
- What impact has the Commission had on public opinion, in terms both of public awareness of its work and support for human rights and equality?
- Has the Commission had sufficient regard for individual liberty in its decision making?

#### **Constructive working relationship with public service**

4.51 The relationship must be an 'arms-length' one to ensure preservation of the IHREC's independence. The Human Rights training provided by the HRC is an example of a very positive engagement that should be continued. The Human Rights Commission has been regularly asked for advice on new legislative proposals by the Department of Justice and Equality. The Working Group considers that early engagement by

IHREC can be valuable in putting human rights and equality dimensions to legislative proposals on the agenda of those working on them from the outset.

- 4.52 Management of EU and other funding for specific project work has been a feature of the Equality Authority's operations and the Human Rights Commission has received philanthropic funding. Such funding arrangements may be subject to Service Level Agreements in relation to delivery of agreed objectives, while acknowledging the independence of IHREC.
- 4.53 IHREC will be well placed to undertake the management of publicly-funded programmes that focus on promoting equality and human rights. The possibility of the new Commission taking over the management of activities and funding streams at present undertaken in-house by the Department of Justice and Equality in the migration and gender equality area should also be explored: this would make for greater coherence in the equality and human rights area.

**Recommendations on certain policy and legislative issues**

- 4.54 In the course of meetings of the Working Group – and in submissions received - a number of wider policy and legislative issues in the human rights and equality area arose. These are noted in this Report as matters that the new Commission could examine. The issues involved are: recognition of gender identity issues as a discrimination ground; ethnic group status for Travellers; limitation on the power of the Equality Authority in cases where different treatment is authorised by statute as provided for under section 14 of the Equal Status Act 2000 and where the IHRC would otherwise be empowered to take action; and the operation of section 37 of the Employment Equality Act 1998.
- 4.55 In addition, the Group recommends to Government the extension of the grounds in discrimination legislation; ratification of Protocol 12 of the ECHR; and that the equal status expertise of, informality and ease of access to the Equality Tribunal be preserved in the proposed re-organisation of the state's employment protection agencies<sup>118</sup>.

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<sup>118</sup> In which, as indicated earlier, the Equality Tribunal is being replaced by a new Workplace Relations Commission.

## Chapter 5 Recommendations

5.1 The Working Group considers that adoption of the package of recommendations set out in this report will ensure that drawing all the strands of the human rights and equality agenda together in a single body is done in a way that does not

- a. blunt the cutting edge of the specialised compliance work of the Equality Authority in tackling unjustifiable discrimination, or
- b. undo the ‘arms-length’ independence of the HRC.

### Summary of recommendations

5.2. The following section brings together the recommendations of the Group:

#### 1. Purpose of the Commission (paragraph 3.1)

The purpose of the Commission should be set out in legislation as follows:

*The purpose of the IHREC is to protect and promote human rights and equality, to encourage the development of a culture of respect for human rights, equality and intercultural understanding in Ireland, to work towards the elimination of human rights abuses and discrimination and other prohibited conduct, while respecting diversity and the freedom and dignity of the individual and, in that regard, to provide practical assistance to persons to help them vindicate their rights.*

#### 2. Definition of human rights (paragraph 3.3)

The definition of human rights and equality in the new legislation (other than specified enforcement provisions) should include the following:

*In this Act (other than the section dealing with taking of legal cases by IHREC) “human rights” means—*

*(a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution; and*

*(b) the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the state is a party or in any agreement, treaty or instruments binding on the state by virtue of membership of the European Union;*

### **3. New and emerging human rights issues (paragraph 3.4)**

In addition the definition should clarify that the IHREC is in a position to take account of new and emerging issues. Such a provision might be drafted as follows:

*(c) the rights, liberties or freedoms that may reasonably be inferred as being inherent to persons in contemporary society and necessary to enable them to live their lives with dignity and develop their personal potential in political, social, cultural and economic life to the fullest possible extent.*

### **4. Definition of ‘dignity’ (paragraph 3.5)**

The Group considers that the following definition of ‘dignity’ should animate the work of the IHREC, and consideration should be given to including it in the legislation:

*‘dignity’ means that each person has*

*(a) equal intrinsic value and a fundamental interest in living a worthwhile life; and*

*(b) a special entitlement to realise a life that is worthwhile and authentic consistent with others having a similar entitlement.*

### **5. Explicit statement on independence of IHREC (paragraph 3.6)**

The new Act should contain – either in this section – or in the section that formally establishes it – an explicit statement that the IHREC is independent in the exercise of its functions, and that it shall be guided in its work by the Paris Principles.

### **6. Legislation to be principles-based (paragraphs 3.7 – 3.8)**

The legislation establishing the IHREC should be principles-based. The Group recommends the following statement of principles:

*The IHREC shall exercise its functions under this Act and under the Employment Equality and Equal Status Acts so as to promote the development of a society in which the following principles have the greatest possible effect:*

*(a) that human rights are indivisible and universal;*

*(b) that every person is free and equal in dignity, rights and responsibilities;*

*(c) that a person’s ability to achieve his or her potential and conception of a worthwhile life must*

*not be limited by prejudice, contempt, discrimination or neglect and a person has the right to be free from prohibited conduct;*

*(d) that each person's human rights must be respected and protected;*

*(e) that each person should have a fair and equal opportunity to participate in the economic, political, social and cultural life of society; and*

*(f) that mutual respect between and within groups, based on intercultural understanding and engagement, on the valuing of diversity within an inclusive and just society, on shared respect for equality and human rights, promotes the overall well-being of society socially, economically and culturally.*

#### **7. Functions of the Commission** *(paragraph 3.9)*

The IHREC should have a broad and clear mandate. All human rights should be appropriately reflected in its mandate.

#### **8. Taking of legal actions** *(paragraphs 3.10 – 3.13)*

The IHREC needs to have the discretion to take legal actions – or to support individuals to take legal actions – where it considers it appropriate, and needs to have the resources necessary to perform this function effectively. A positive decision to take or support a legal action should be a matter for the Commission itself and should not be delegated.

The IHREC is not a legal aid service and should focus on priority areas. The Commission should develop partnerships and memoranda of understanding with other bodies having relevant roles and should build a partnership with the Clinical Legal Education Services in the Law Schools.

#### **9. Establishment of Workplace Relations Commission** *(paragraph 3.14)*

The parallel establishment of IHREC and the Workplace Relations Commission may create an anomaly in cases where a human rights transgression, other than in the area of equality, is alleged. Whether this creates a practical difficulty should be the subject of further consultation with employee and employer representatives, other stakeholders and with the WRC itself.

#### **10. Definition of 'classes of persons'** *(paragraphs 3.15)*

The Bill should contain a definition of 'classes of persons' or otherwise clarify the power to take cases on behalf of a class or classes of persons.

### **11. Powers of Inquiry (paragraphs 3.16 – 3.21)**

The Commissions of Investigation Act 2004 provides a framework which should be applied to IHREC so as to give it effective powers of inquiry.

### **12. Schema of recommended powers and functions for IHREC (paragraph 3.22)**

The powers and functions of IHREC should be as follows:

#### **A. General functions**

Promoting equality and human rights and communicating the importance of equality and human rights:

##### **i. Overall function**

*The purpose of the IHREC is to protect and promote human rights and equality, to encourage the development of a culture of respect for human rights, equality and intercultural understanding in Ireland, to work towards the elimination of human rights abuses and discrimination and other prohibited conduct, while respecting diversity and the freedom and dignity of the individual and, in that regard, to provide practical assistance to persons to help them vindicate their rights.*

##### **ii. Promotion and communication**

*To promote understanding and awareness of the importance of human rights and equality and, for those purposes, to promote public debate and discussion of human rights and equality issues. To this end the Commission may undertake public consultations.*

*To provide or assist in the provision of education and training on human rights and equality issues.*

*To promote awareness and understanding of and respect for the multicultural character of Irish society and the diverse heritages of the island of Ireland.*

*To foster a society in which all individuals can participate and contribute to the cultural, social, economic and political life of Ireland.*

*To assist public bodies to take due note of equality and human rights in carrying out their functions and where the Commission considers it appropriate in that regard to recommend changes*



*to (a) any area of relevant legislation, or (b) the policies or practices of a public body in the state.*

*To provide advice and resource materials on good practice and to develop sector-specific toolkits to tackle areas of particular challenge for equality and human rights in any or all of the private, not-for-profit, or public sectors.*

*The Commission may undertake or sponsor such research and educational or informational activities as it considers necessary and as appear appropriate and useful for the purpose of performing any of its functions.*

### **iii. Publication**

*To prepare and publish, in such manner as it thinks fit, reports on any research undertaken, sponsored, commissioned or assisted by it or in relation to enquiries or equality reviews it has conducted.*

*To publish information in written and other forms on human rights and equality.*

### **iv Programme and Project work**

*To promote and co-ordinate programmes and project work in relation to any of its functions, and to foster and assist, including by financial or material aid, such programmes and projects.*

*‘financial aid’ here includes management of EU funding.*

### **v. Policy and legislation**

*Either of its own volition or on being requested to do so by the Government, to make such recommendations to the Government as it deems appropriate in relation to the measures which the Commission considers should be taken to strengthen, protect and uphold human rights and equality in the state.*

*To keep under review the adequacy and effectiveness of law and practice in the state relating to the protection of human rights and equality.*

*Of its own volition, or if requested by a Minister of the Government, to examine any legislative*

*proposal, including a proposal to sign any international instrument, and report its views on any implications of such proposal for equality or for human rights.*

*To provide advice and assistance on human rights and equality issues to a [i.e. any] committee of the Oireachtas as may be requested by such committee and as the Commission may be in a position to provide and as may be useful and appropriate in assisting such Committee in its work.*

**B. Specific equality functions derived from EU law**

*To work towards the elimination of discrimination in relation to the areas covered by the Employment Equality Acts 1998 to 2011 and the Equal Status Acts 2000 to 2011.*

*To promote equality of opportunity in relation to employment and vocational training and in relation to the provision of goods and services, accommodation and education.*

*To keep under review the workings of the Pensions Act 1990, Employment Equality Acts 1998 to 2011, the Equal Status Acts 2000 to 2011, the Maternity Protection Acts 1994 and 2004 and Adoptive Leave Acts 1995 to 2005 and to make recommendations for necessary change to the relevant Minister.*

*To keep under review – as provided for in section 73 of the Employment Equality Act 1998 - the provisions specified in section 17 of that Act, and where in the opinion of the Commission the operation of a specified provision is likely to affect or impede the elimination of discrimination in relation to employment or the promotion of equality of opportunity in relation to employment, or at the request of a Minister, to carry out a review of that enactment or provision or of its working or effect. A report by the Commission may contain recommendations for amending any enactment or provision reviewed.*

*To undertake equality reviews as provided for in sections 68 to 72 inclusive of the Employment Equality Act 1998.*

*To serve and enforce non-discrimination notices in situations where the Commission is satisfied following an inquiry that a person has been or is discriminating.*

*To refer cases of discrimination to the Director of the Equality Tribunal (being replaced with the Workplace Relations Commission) including to take such cases in its own name, and to seek an injunction in the Circuit or High Court to prevent continuing discrimination.*

**C. Specific ‘social cohesion’ functions**

*To promote the integration of migrants and other minorities, in Irish society, to encourage good practice in intercultural relations and to promote tolerance, acceptance of diversity, and an inclusive society with positive relations between members of different groups.*

**D. Northern Ireland**

*To take part in the Joint Committee with the Northern Ireland Human Rights Commission which is provided for in the Belfast/Good Friday Agreement and continue the work already done by that body, and to work closely with the Equality Commission for Northern Ireland, as the Equality Authority has done in the past.*

**E. International**

*To consult with such national or international bodies or agencies having a knowledge or expertise in the field of human rights and in the field of equality as it sees fit, including the provision of advice and commentaries on the situation with regard to human rights and equality in Ireland.*

*And without prejudice to the generality of the foregoing, to liaise and consult and engage in joint work in particular with equality bodies (within meaning of relevant EU Directives) of member states of the European Union, with other accredited National Human Rights Institutions, with the EU’s Fundamental Rights Agency, with the Council of Europe and with relevant UN bodies.*

**13. Cooperation with NI Human Rights Commission**  
(paragraph 3.23)

The new Commission should consider, in conjunction with the Northern Ireland Human Rights Commission (NIHRC), the appointment of a dedicated worker to service the Joint Committee. The importance of this role should be taken into account by the Government when deciding on the budget for the IHREC. The Joint Committee worker could also play a part in facilitating cooperation between the IHREC and the Equality Commission for Northern Ireland (ECNI).

**14. Compliance and enforcement powers** (paragraphs 3.24 – 3.25)

The initial emphasis in any situation requiring intervention should, where appropriate, be on advice and assistance to improve practices and redress wrongs. However, IHREC also needs strong compliance and enforcement powers and these should be drafted on a sliding scale, as set out below.

*i. To provide information and assistance to persons on equality and human rights issues, including advice to persons who consider that their human rights or rights to equal treatment have been infringed.*

*ii. To prepare, in consultation with relevant stakeholders, guidelines for promotion of best practice in human rights and equality for specific businesses, groups, sectors or geographical areas.*

*iii. The Commission may, or if requested to do so by the Minister, shall, prepare for submission to the Minister draft codes of practice in furtherance of one or more of the following aims:*

- (a) the elimination of discrimination;*
- (b) the promotion of equality of opportunity in employment and in relation to the matters to which the Equal Status Act 2000 applies, and;*
- (c) the protection of human rights;*

*iv. Where the Minister by Order declares that the draft is an approved code of practice for the purposes of this Act, it shall be admissible in evidence and, if any provision of the code appears to be relevant to any question arising in any criminal or other proceedings, it shall be taken into account in determining that question;*

*v. To request a business to carry out an equality review and prepare and implement an equality action plan or, where appropriate and where the business does not have*

*fewer than fifty employees, to carry out such a review and prepare such an action plan on its own initiative.*

*vi. To provide assistance at its discretion, including legal assistance or representation, to*

*a person who has instituted or wishes to institute legal proceedings that involve human rights law or practice; or*

*to a person who considers that he or she has been discriminated against (within the meaning of the Equality Acts).*

*in either case if there is an important point of principle involved or if it is unreasonable to expect the person to represent him or herself.*

*vii. To conduct an examination into any act or practice that may be inconsistent with or contrary to any human rights or equality legislation, and, where the Commission considers it appropriate to do so, to endeavour, by mediation or conciliation, to effect a settlement of the matters that gave rise to the examination.*

*To issue a reasoned opinion following such an examination and require the body to whom the opinion is addressed to respond in writing.*

*viii. To institute proceedings in any court of competent jurisdiction for the purposes of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights including equality rights of any person or class of persons; the declaratory relief the Commission may seek to obtain in such proceedings includes relief by way of declaration that a statute or a statutory provision is unconstitutional.*

*ix. To apply to the High Court or the Supreme Court for liberty to appear before the High Court or the Supreme Court, as the case may be, as amicus curiae in proceedings before that court that involve the human rights including equality rights of any person and to appear as such an amicus curiae on foot of such liberty being granted (which liberty each of the said courts is hereby empowered to grant in its absolute discretion), or to accept an invitation from either such Court to so appear;*

*x. To conduct inquiries of its own volition, if it considers it necessary or appropriate to do so for the purpose of the performance of any of its functions; or if it considers it appropriate, at the request of any person who claims that a breach of human rights or equality legislation may have occurred.*

*including where a conciliated settlement following an examination of any act or practice under subsection X above has not proved possible.*

#### **15. Optional Protocol: Convention Against Torture** (paragraphs 3.26 – 3.31)

There are different options in relation to establishment of a National Preventive Mechanism under the Protocol, including establishment of some form of central coordinating mechanism. IHREC would be well placed to take on the central co-ordinating role. Such a function, if assigned to IHREC, might be drafted as follows:

*With reference to the Optional Protocol to the Convention Against Torture, to co-ordinate the inspection of, or inspect as may be appropriate, all places of detention for the purposes of examining the treatment of persons deprived of their liberty and making recommendations on how to improve their protection from torture, cruel, inhuman or degrading treatment or punishment;*

*For the avoidance of doubt, ‘places of detention’ is not limited to penal institutions but includes Garda stations, psychiatric centres, care centres for children and elderly people, airports, ports, and places of detention in the area of immigration.*

*In that regard, to report to and meet with the UN Subcommittee on the Prevention of Torture.*

#### **16. Convention on the Rights of Persons with Disabilities (CPRD)** (paragraphs 3.32 - 3.33)

It will be a matter for Government to decide on the appropriate agency to undertake the role of promoting and improving the protection of persons with disabilities, and monitoring implementation of the Convention in Ireland, but the legislative function might be drafted as follows:

*To promote and monitor implementation of the Convention on the Rights of Persons with Disabilities;*

*To review legislation, policy and practice, disseminate information, conduct inquiries, conduct or assist research*

*or educational activities, and engage in advocacy with the aim of monitoring and improving the protection of the human rights of persons with disabilities;*

*To liaise with disability activist groups and with Government departments and services providers in the area of services for people with disabilities;*

*To make recommendations to the Government for the purpose of improving the protection of the human rights of persons with disabilities;*

*To report to the CRPD Committee.*

#### **17. An equality and human rights duty for public bodies (paragraphs 3.34 – 3.47)**

The principle of a positive duty on public bodies to have due regard to human rights and equality should be adopted. Such a provision might be drafted on the basis of the following:

*A public body shall in the exercise of its functions have due regard to the need to eliminate prohibited discrimination, promote equality of opportunity and treatment and protect the human rights of its staff and the persons to whom it provides services. Due regard for the purposes of this section shall mean giving consideration to these matters in the planning and execution of the body's policies and actions and reporting annually on its implementation of this obligation in its annual report or otherwise. This obligation shall not create a cause of action for any individual or legal person. In determining the extent of this obligation in relation to a particular public body consideration shall be given to the size and resources of the body and the nature of the services it provides.*

Each relevant public body should address human rights and equality issues relevant to the body in its Strategic Plan and report on issues and achievements in its annual report. The provision should be drafted in such a way that the public body can absorb the administration of this responsibility within its existing budgets. IHREC's role in the initial years should be that of facilitation and provision of supports, including guidelines for assessment of the human rights and equality issues that face public sector organisations and training for staff.

A formal review to assess the effectiveness of the public sector duty in securing improved human rights and equality outcomes and in assisting public bodies to pre-empt problems on an

evidential basis should be undertaken by Government in consultation with IHREC after a period of three or five years.

**18. Possible specific features of IHREC's role (paragraph 3.45)**

Specific interventions and functions for IHREC might include:

*To give guidance to, and promote good practice in public authorities in relation to human rights and equality;*

*To develop performance measures and operational standards for the purposes of assisting public bodies in the auditing of their policies, practices and processes;*

*To encourage public authorities to develop, in consultation with their employees and their service users, written preventive strategies aimed at reducing discrimination in the public sector workplace and in the provision of goods and services to the general public.*

*To prepare codes of practice setting out operational standards and performance measurement tools for public authorities to help them to integrate human rights and equality into their policies, practices and process, promote a diverse and respectful workplace internally and enhance frontline delivery of services;*

The duty should apply to public authorities, including bodies that are not Government agencies but which exercise public functions, in the exercise of those functions. The Act should define 'public body'.

**19. Five principal requirements for structural integrity of IHREC (paragraph 4.6)**

There are five principal requirements for the integrity of the IHREC:

- It must have a separate legal basis in legislation. Ideally, it should be provided for in the Constitution. The Constitutional Convention should be asked to consider the question of how the revised Constitution might provide for the recognition as a constitutional office of the IHREC in due course. It is appropriate, however, for the Government to recommend setting up the IHREC through statute.
- The process for appointing Commissioners should help ensure that the IHREC is actually and manifestly independent.



- The IHREC should have a form of governance that supports its independence.
- Consistent with the Paris Principles, the IHREC should have a pluralistic composition that represents the social profile of civil society. There should be a balanced representation of men and women.
- The IHREC must have an adequate permanent full-time core staff, with in-house human rights and equality expertise.

## **20. Co-operation with social partners and civil society groups** *(paragraphs 4.7 – 4.9)*

The IHREC, like the HRC and the Equality Authority, should cooperate with representative civil society groups that promote or protect human rights. Commissioners should be selected for their experience, expertise or qualifications and to secure diversity in the membership, but not as formal representatives of specific organisations or interest groups. With the development of the wider remit for the new IHREC, representation of any corporate body or sectoral interest as of right on the new Commission is not appropriate. The legislation should allow IHREC to establish subcommittees of the Commission to enable representatives of a wide range of interests to contribute in an advisory capacity.

Trade unions and employer / business organisations have a wealth of expertise, practical experience and information from which the Irish Human Rights and Equality Commission could benefit through building on the already existing and valued strong and effective links.

## **21. Administrative and operational autonomy** *(paragraphs 4.10 – 4.12)*

The IHREC should have operational and administrative autonomy. It must have control over the administrative decisions that bear directly and immediately on the exercise of its statutory function. It must be free to decide whether or not to undertake projects, to determine the methodology of its work and to make such recommendations as it sees fit. The essential point is, however, that the independence of the IHREC should be of a level that allows it to perform its functions without interference or obstruction from any branch of Government or any public or private entity.

The IHREC should also have the option of commissioning outside research, and bringing in outside specialists for training or inquiries, and for funding to cover these activities.

## **22. Security of tenure for Commissioners (paragraph 4.13)**

Appointments should be for a fixed term, renewable once. Commissioners should be appointed for a sufficient period of time to allow them to gain experience of the role and to develop and implement a worthwhile programme of work. Commissioners should only be removed for due cause, and after a proper hearing.

## **23. Financial security (paragraphs 4.14 – 4.17)**

The IHREC should be properly funded to perform its functions and exercise its powers. The Group notes that the HRC and the EA both claim that their funding has been inadequate. This has been recognised by the current Government. The Northern Ireland Human Rights Commission argued, in the face of inadequate funding, for a new statutory provision in its legislation on the issue of funding. The proposed statutory provision reads: *'The Commission shall be provided with sufficient resources to ensure that it can carry out each of its functions effectively.'* The statute setting up the IHREC should contain a similar provision.

The IHREC should be funded on a multi-annual basis to assist better planning and financial management through a separate Vote under the Department of Justice. The IHREC should not be constrained from accepting funding from other sources, so long as this does not compromise its independence, unduly influence its deliberations, or distort its work.

## **24. Method of appointment of Commissioners (paragraphs 4.18 – 4.20)**

The appointment process for the Commissioners should have the following elements:

- a) The vacancies should be advertised on appropriate Government websites and in the media.
- b) The selection criteria should be clear, objective and published. The criteria should aim for a Commission that is balanced, in terms of broadly representing Irish society, including but not limited to socio-economic and other groups that need the protection of IHREC, and that has a spread of necessary and useful expertise.
- c) No application or appointment outside the prescribed process should be allowed.
- d) An independent Selection Panel comprising 5 individuals of high standing who are knowledgeable in the field of human rights and equality and who are pluralist and representative of different strands in society should assess the applications.

There should be no representative from a Government Department on the panel. A code of practice should set out the process that the panel must follow.

- e) The Selection Panel should nominate only sufficient names to fill the vacancies that exist at any time. It should present its list of nominees to the Government. The Government should have the power to decline to accept any proposed candidate but only on the basis of stated legitimate reasons. If the Selection Panel agrees that the Government's objection has a sustainable factual basis, it should be able to propose another candidate for the slate, as well as maintaining a reserve panel from which casual vacancies can be filled.
- f) The President should have the power to appoint the Commissioners on the nomination of the Government, and following the passage of resolutions by Dáil Éireann and Seanad Éireann recommending their appointment. The Houses should be able to accept or reject the slate of nominees. The resolutions should be presented on this basis rather than having separate resolutions for each nominee.
- g) The Chief Commissioner should be recruited at the same time as the other members and the selection process should take account of the separate requirements for this role.
- h) Commissioners should be appointed for a sufficient period of time to allow them to gain experience of the role and to develop and implement a worthwhile programme of work. The Working Group considers that a term of office of five years is appropriate, with the possibility of one further term or not more than five years.

## **25. Director and Chief Commissioner roles** *(paragraphs 4.21 – 4.24)*

The main full-time role at operational level should be that of a senior level Director with responsibility for day-to-day running of the organisation and assisting in setting and delivering a policy agenda in collaboration with and under the supervision of the board. The Director would report to a part-time Chief Commissioner as Chairperson of the board.

At the start-up stage, a considerably greater time commitment will be required from the Chief Commissioner of IHREC. This can be expected to reduce to a more normal requirement over a period of 18 months to two years.

Responsibility for recruiting the Director at the appropriate time should be at the discretion of the Commission and the IHREC

should not be obliged to avail of the services of the Public Appointments Service in that regard.

**26. Change management** (*paragraph 4.25*)

This will be a key task for the Commission and Director over the initial 12 to 18 months. A change management process should commence as soon the legislation is published so that the new IHREC can begin operations on as effective a basis as possible.

**27. Location of headquarters of new body** (*paragraph 4.27*)

The IHREC should have a single office in Dublin in a premises that is accessible to people travelling from outside the capital and to people with disabilities.

**28. Equality Authority office in Roscrea** (*paragraphs 4.28 – 4.29*)

Having considered all the options carefully, and while being conscious of the contribution that staff in Roscrea have made to the Equality Authority, the Working Group recommends that the Roscrea office be closed. There are complex HR issues that need to be managed proactively by management in the new Commission and by the Department over a period of time and appropriate transition arrangements should be put in place to ensure that the interests of the Roscrea-based staff are protected in the transition.

**29. Staff recruitment issues** (*paragraphs 4.30 – 4.32*)

The new Commission should be the employer of all its staff. All vacancies that arise after the establishment of IHREC should be filled in a way that conforms to the Paris Principles. In future, new staff at senior level should be recruited by the IHREC directly through an open competition (public servants who are successful in such competitions being given leave-of-absence, rather than use of assignment arrangements).

There is a need to ensure mobility and career paths for staff, both within the organisation and the wider public service, the law, NGOs and academia. The IHREC should have the flexibility to offer short-term contracts and leave-of-absence arrangements to secure expertise on specific issues on which it may wish to work, including the option of engaging experts from other public sector organisations in this way.

At junior levels, there are personal and organisational advantages if staff are linked to a wider pool for career development and mobility purposes. This suggests an ongoing link with the staff pool of the funding Department, subject to IHREC managing the selection process and to it being the employer during the period of leave of absence.

**30. Initial internal organisational configuration** (*paragraphs 4.33 – 4.34*)

The Table at page 63 presents a recommended initial configuration to allow the combined organisation to function as one with immediate effect. It is important that these functional areas do not operate as independent silos. There should be a strong ethos of cooperating across functional boundaries within the organisation; the management team will have a key role in fostering this ethos and in ensuring that the new organisation works together as an effective unit.

**31. Legal Claims Division** (*paragraph 4.35*)

This Division should bring together the existing functions of the Human Rights Commission and the Equality Authority in taking or supporting individuals in taking legal action and cases to the WRC. It should also be responsible for the IHREC's inquiry function.

**32. Equality Authority Public Information Centre** (*paragraph 4.35*)

The Centre currently reports into the Equality Authority's Legal section with details of cases that may be suitable for assistance/representation. On that basis, it would appear sensible for it to report to the Head of the Legal Claims Division.

**33. Evaluation and Research Division** (*paragraph 4.35*)

The staff resources here should be augmented by the development of links with 3<sup>rd</sup> level institutions, including contracting out research projects. This Division should also manage IHREC's public relations function.

**34. Human Rights and Equality Promotion Division** (*paragraph 4.35*)

This Division should bring together the training and awareness-raising work of the existing bodies, including provision of human rights and equality training for public servants, work with the social partners and project, including EU-funded projects, work of the Equality Authority.

**35. Administration** (*paragraph 4.35*)

A relatively light unit headed at Assistant Principal level with responsibilities for supporting the board, accounts and administration is appropriate.

**36. Financial and IT services** (*paragraph 4.35*)

Financial Services, including payroll, and IT services should be outsourced. Some such services are currently provided to the Equality Authority by the Department of Justice's Financial Shared Services in Killarney and the Group has been advised

that appropriate protocols are in place to ensure confidentiality of records and information.

**37. Overall staff numbers** (*paragraphs 4.36 – 4.37*)

The staff numbers available to the two existing bodies are not adequate to meet the existing obligations, particularly in the context of new functions that are being recommended and the Minister's commitment to strengthen the human rights and equality infrastructure of the state. It is of critical importance that the IHREC will have an adequate number of staff to fulfil its remit. The new Commission should undertake a review of staffing needs within the first year of its establishment to compile the evidence for a business case for any essential additional staff.

This recommendation has clear funding implications. The Working Group does not lightly make a recommendation for increased staffing levels in the current fiscal crisis, but it is clear that existing resources are not adequate to fulfil the mandate proposed for the IHREC. The disproportionate cuts imposed in the past should be reversed, as soon as this is possible, so as to allow the new Commission to engage an adequate staff complement.

**38. Accountability of the IHREC** (*paragraphs 4.38 – 4.42*)

The IHREC should report directly to a committee of the Oireachtas. The IHREC should submit its annual report to the committee and be examined by it. It is not envisaged that the Oireachtas committee would oversee the day-to-day work of the Commission, but that it would discuss the annual report and the strategic plan.

The IHREC should meet the standard audit and corporate governance criteria for public bodies. As a minimum standard, it should: publish annual reports, publish annual accounts, be fully audited by an external body, be accountable to a parliamentary committee, have its own complaints procedure, observe a code of practice on transparent administration, possess a register of members' interests, allow public inspection of the register, release public reports of meetings, publish agendas and minutes of meetings, hold public meetings, maintain an internet website, and be subject to review every five years.

IHREC should be subject to FOI legislation.

**39. Performance evaluation** (*paragraphs 4.43 – 4.50*)

IHREC should regularly review its performance against objectives. The focus in setting objectives and measurement of performance should be on assessing the impact of the IHREC on improving people's lives, rather than on how good the

organisation appears to be, but an important measure will be the degree to which the public are aware of its existence and supports its work, which should be gauged periodically.

Key questions from which an evaluation framework for IHREC might flow are:

- What kind of society are we trying to achieve?
- How do vulnerable and marginalised groups regard the Commission?
- How has it improved people's lives and what has it done to eliminate discrimination and promote equality and inclusion?
- What has the Commission put in place or removed to allow, and indeed encourage, each person to flourish with the greatest degree of freedom without impinging on the dignity and worth of any other individual?
- What impact has the Commission had on public opinion, in terms both of public awareness of its work and support for human rights and equality?
- Has the Commission had sufficient regard for individual liberty in its decision making?

#### **40. Constructive working relationship with public service** (*paragraphs 4.51 – 4.53*)

The Human Rights training provided by the HRC is an example of a very positive engagement that should be continued. The Human Rights Commission has been asked regularly for advice on new legislative proposals by the Department of Justice and Equality. Early engagement by IHREC can be valuable in putting human rights and equality dimensions to legislative proposals on the agenda of those working on them from the outset.

IHREC will be well placed to undertake the management of publicly-funded programmes that focus on promoting equality and human rights. Management of EU and other funding for specific project work has been a feature of the Equality Authority's operations and the HRC has received philanthropic funding. Such funding arrangements may be subject to Service Level Agreements in relation to delivery of agreed objectives, while acknowledging the independence of IHREC.

The possibility of the new Commission taking over the management of activities and funding streams at present undertaken in-house by the Department of Justice and Equality in the migration and gender equality area should also be explored: this would make for greater coherence in the equality and human rights area.

#### **41. Issues for examination by new Commission**

*(paragraph 4.54)*

The new Commission could examine the following issues that arose in the Group's work: recognition of gender identity issues as a discrimination ground; ethnic group status for Travellers; limitation on the power of the Equality Authority in cases where different treatment is authorised by statute as provided for under section 14 of the Equal Status Act 2000 and where the IHRC would otherwise be empowered to take action; and the operation of section 37 of the Employment Equality Act 1998.

#### **42. Issues for examination by Government *(paragraph 4.55)***

The Group recommends to Government the extension of the grounds in discrimination legislation; ratification of Protocol 12 of the ECHR; and that the equal status expertise of, informality and ease of access to the Equality Tribunal be preserved in the proposed re-organisation of the state's employment protection agencies.



## **Appendix 1 Terms of Reference and Membership of Group**

*The Government has decided that setting up a new, integrated and independent Human Rights and Equality Commission (IHREC) is the most effective way of achieving the shared aim of bringing about a culture of respect for human rights and equality. The IHREC will retain the statutory powers and duties of the existing bodies, for example, the power to examine legislative proposals.*

*The purpose of this group is:*

- 1. To identify best practice in each organisation and the structure and process through which the IHREC can ensure respect for human rights, equality, diversity and the freedom and dignity of the individual and the practices in each organisation, if any, that require change and the recommended changes.*
- 2. To identify the functions and areas of work of the existing bodies to be merged; what new functions should be added and the functions, if any, that should cease.*
- 3. To outline how the existing bodies consult with service users; the actions, if any, to be taken to broaden the base of service users; how such processes have fed into the work planning of each organisation and to recommend how these arrangements can be improved for the purposes of the HREC.*
- 4. To advise on what new methods the IHREC might employ in carrying out its functions of providing information, education and so forth in the light of the experience gained by both organisations, bearing in mind the overall economic position and the costs of campaigns run to date.*
- 5. To examine the existing internal structures of both bodies and identify what changes are necessary in the IHREC.*
- 6. To recommend the best location for the IHREC.*
- 7. To advise on the best staffing arrangements bearing in mind:*
  - the Paris Principles;*
  - the need to ensure continuity of staff service;*
  - the need to ensure that the skills available to the Commission are appropriate and sufficiently flexible for the Commission to respond to new challenges while at the same time providing career development opportunities for staff;*

*· the overall current economic position and the limited resources of Government.*

*8. To advise on what would be the best practice for the IHREC in devising specific objectives and what performance indicators should be used to measure the attainment of the objectives.*

*9. To advise on the best approaches or means to achieving change - for example making greater use of codes of practice or of strategic cases to achieve changes. Is there a view on which might achieve the greater outcome. Court cases tend to involve the State in one way or another. Would greater use of codes of practice be effective in wider society?*

*10. To advise on the best form of enquiry powers, and, in particular, to consider whether adopting the model used for Cloyne might be more effective than the current enquiry power.*

## Membership of Working Group

Michael Whelan	(Independent Chairperson)
Michael Farrell	Irish Human Rights Commission
Lia O Hegarty	Irish Human Rights Commission
Tom O Higgins	Irish Human Rights Commission
Helen O Neill	Irish Human Rights Commission
Betty O Leary	Equality Authority
Ellen Mongan	Equality Authority
Kieran Rose	Equality Authority
Peter White	Equality Authority
Diarmuid Cole	Department of Justice and Equality
Tom Cooney	Special Adviser to Minister Shatter

Deaglán Ó Briain acted as Secretary to the Working Group.

## **Appendix 2     The Paris Principles**

### **Principles relating to the Status of National Institutions (The Paris Principles)**

Adopted by UN General Assembly resolution 48/134 of 20 December 1993

#### **Competence and responsibilities**

1. A national institution shall be vested with competence to promote and protect human rights.
2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.
3. A national institution shall, inter alia, have the following responsibilities:
  - (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
    - (i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
    - (ii) Any situation of violation of human rights which it decides to take up;
    - (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;
    - (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;

(b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

(c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

(d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;

(e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights;

(f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

(g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

### **Composition and guarantees of independence and pluralism**

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

(a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;

( ) Trends in philosophical or religious thought;

(c) Universities and qualified experts;

(d) Parliament;

(e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected 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.

### **Methods of operation**

Within the framework of its operation, the national institution shall:

- (a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner,
- (b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
- (c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;
- (d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly concerned;
- (e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;
- (f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular, ombudsmen, mediators and similar institutions);
- (g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

### **Additional principles concerning the status of commissions with quasi-jurisdictional competence**

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

- (a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;

(b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;

(c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;

(d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

## Appendix 3

### ICC SUBCOMMITTEE ON ACCREDITATION GENERAL OBSERVATIONS

#### 1. Competence and responsibilities

**1.1 Establishment of national institutions:** An NHRI must be established in a constitutional or legal text. Creation by an instrument of the Executive is not adequate to ensure permanency and independence.

**1.2 Human rights mandate:** All NHRIs should be mandated with specific functions to both protect and promote human rights, such as those listed in the Paris Principles.

**1.3 Encouraging ratification or accession to international human rights instruments:** The Sub-Committee interprets that the function of encouraging ratification or accession to international human rights instruments, set out in the Paris Principles, is a key function of a National Institution. The Sub-Committee therefore encourages the entrenchment of this function in the enabling legislation of the National Institution to ensure the best protection of human rights within that country.

**1.4 Interaction with the International Human Rights System:** The Sub-Committee would like to highlight the importance for NHRIs to engage with the international human rights system, in particular the Human Rights Council and its mechanisms (Special Procedures Mandate Holders) and the United Nations Human Rights Treaty Bodies. This means generally NHRIs making an input to, participating in these human rights mechanisms and following up at the national level to the recommendations resulting from the international human rights system. In addition, NHRIs should also actively engage with the ICC and its Sub-Committee on Accreditation, Bureau as well as regional coordinating bodies of NHRIs.

**1.5 Cooperation with other human rights institutions:** NHRIs should closely cooperate and share information with statutory institutions established also for the promotion and protection of human rights, for example at the state level or on thematic issues, as well as other organizations, such as NGOs, working in the field of human rights and should demonstrate that this occurs in their application to the ICC Sub-Committee.

#### **1.6 Recommendations by NHRIs**

NHRI recommendations contained in annual, special or thematic human rights reports should normally be discussed within a reasonable amount of time, not to exceed six months, by the relevant government ministries as well as the competent parliamentary committees. These discussions should be held especially in order to determine the necessary follow up action, as appropriate in any given situation. NHRIs as part of their mandate to promote and protect human rights should ensure follow up action to recommendations contained in their reports.

## 2. Composition and guarantees of independence and pluralism

**2.1 Ensuring pluralism:** The Sub-Committee notes there are diverse models of ensuring the requirement of pluralism set out in the Paris Principles. However, the Sub-Committee emphasizes the importance of National Institutions to maintain consistent relationships with civil society and notes that this will be taken into consideration in the assessment of accreditation applications.

The Sub-Committee observes that there are different ways in which pluralism may be achieved through the composition of the National Institution, for example:

- a) Members of the governing body represent different segments of society as referred to in the Paris Principles;
- b) Pluralism through the appointment procedures of the governing body of the National Institution, for example, where diverse societal groups suggest or recommend candidates;
- c) Pluralism through procedures enabling effective cooperation with diverse societal groups, for example advisory committees, networks, consultations or public forums; or
- d) Pluralism through diverse staff representing the different societal groups within the society.

The Sub-Committee further emphasizes that the principle of pluralism includes ensuring the meaningful participation of women in the National Institution.

**2.2 Selection and appointment of the governing body:** The Sub-Committee notes the critical importance of the selection and appointment process of the governing body in ensuring the pluralism and independence of the National Institution. In particular, the Sub-Committee emphasizes the following factors:

- a) A transparent process
- b) Broad consultation throughout the selection and appointment process
- c) Advertising vacancies broadly
- d) Maximizing the number of potential candidates from a wide range of societal groups
- e) Selecting members to serve in their own individual capacity rather than on behalf of the organization they represent.

**2.3 Government representatives on National Institutions:** The Sub-Committee understands that the Paris Principles require that Government representatives on governing or advisory bodies of National Institutions do not have decision making or voting capacity.



**2.4 Staffing by secondment:**

In order to guarantee the independence of the NHRI, the Sub-Committee notes, as a matter of good practice, the following:

- a) Senior level posts should not be filled with secondees;
- b) The number of seconded should not exceed 25% and never be more than 50% of the total workforce of the NHRI.

**2.5 Immunity:** It is strongly recommended that provisions be included in national law to protect legal liability for actions undertaken in the official capacity of the NHRI.

**2.6 Adequate Funding:** Provision of adequate funding by the state should, as a minimum include:

- a) the allocation of funds for adequate accommodation, at least its head office;
- b) salaries and benefits awarded to its staff comparable to public service salaries and conditions;
- c) remuneration of Commissioners (where appropriate); and
- d) the establishment of communications systems including telephone and internet.

Adequate funding should, to a reasonable degree, ensure the gradual and progressive realization of the improvement of the organization's operations and the fulfillment of their mandate.

Funding from external sources, such as from development partners, should not compose the core funding of the NHRI as it is the responsibility of the state to ensure the NHRI's minimum activity budget in order to allow it to operate towards fulfilling its mandate.

Financial systems should be such that the NHRI has complete financial autonomy. This should be a separate budget line over which it has absolute management and control.

**2.7 Staff of an NHRI:** As a principle, NHRIs should be empowered to appoint their own staff.

**2.8 Full-time Members:**

Members of the NHRIs should include full-time remunerated members to:

- a) Ensure the independence of the NHRI free from actual or perceived conflict of interests;
- b) Ensure a stable mandate for the members;
- c) Ensure the ongoing and effective fulfillment of the mandate of the NHRI.

## **2.9 Guarantee of tenure for members of governing bodies**

Provisions for the dismissal of members of governing bodies in conformity with the Paris Principles should be included in the enabling laws for NHRIs.

- a) The dismissal or forced resignation of any member may result in a special review of the accreditation status of the NHRI;
- b) Dismissal should be made in strict conformity with all the substantive and procedural requirements as prescribed by law;
- c) Dismissal should not be allowed based on solely the discretion of appointing authorities.

## **2.10 Administrative regulation**

The classification of an NHRI as a public body has important implications for the regulation of its accountability, funding, and reporting arrangements.

In cases where the administration and expenditure of public funds by an NHRI is regulated by the Government, such regulation must not compromise the NHRI's ability to perform its role independently and effectively. For this reason, it is important that the relationship between the Government and the NHRI be clearly defined.

## **3. Methods of operation**

## **4. Additional principles concerning the status of commissions with quasi-jurisdictional competence**

## **5. Additional issues**

**5.1 NHRIs during the situation of a coup d'état or a state of emergency:** As a principle, the Sub-Committee expects that, in the situation of a coup d'état or a state of emergency, an NHRI will conduct itself with a heightened level of vigilance and independence in the exercise of their mandate.

**5.2 Limitation of power of National Institutions due to national security:** The Sub-Committee notes that the scope of the mandate of many National Institutions is restricted for national security reasons. While this tendency is not inherently contrary to the Paris Principles, it is noted that consideration must be given to ensuring that such restriction is not unreasonably or arbitrarily applied and is exercised under due process.

**5.3 Functioning of an NHRI in a volatile context:** The Sub-Committee acknowledges that the context in which an NHRI operates may be so volatile that the NHRI cannot reasonably be expected to be in full conformity with all the provisions of the Paris Principles. When formulating its recommendation on the accreditation status in such cases, the Sub-Committee will give due consideration to factors such as: political instability; conflict or unrest; lack of state infrastructure, including excessive dependency on donor funding; and the NHRI's execution of its mandate in practice.

## 6. Procedural issues

**6.1 Application processes:** With the growing interest in establishing National Institutions, and the introduction of the five-yearly re-accreditation process, the volume of applications to be considered by the Sub-Committee has increased dramatically. In the interest of ensuring an efficient and effective accreditation process, the Sub-Committee emphasizes the following requirements:

- a) Deadlines for applications will be strictly enforced;
- b) Where the deadline for a re-accreditation application is not met, the Sub-Committee will recommend that the accreditation status of the National Institution be suspended until the application is considered at the next meeting;
- c) The Sub-Committee will make assessments on the basis of the documentation provided. Incomplete applications may affect the recommendation on the accreditation status of the National Institution;
- d) Applicants should provide documentation in its official or published form (for example, published laws and published annual reports) and not secondary analytical documents;
- e) Documents must be submitted in both hard copy and electronically;
- f) All application related documentation should be sent to the ICC Secretariat at OHCHR at the following address: National Institutions Unit, OHCHR, CH-1211 Geneva 10, Switzerland and by email to: [nationalinstitutions@ohchr.org](mailto:nationalinstitutions@ohchr.org); and
- g) It is the responsibility of the applicant to ensure that correspondence and application materials have been received by the ICC Secretariat.

**6.2 Deferral of re-accreditation applications:** The Sub-Committee will apply the following policy on the deferral of re-accreditation applications:

- a) In the event that an institution seeks a deferral of consideration of its re-accreditation application, a decision to grant the deferral can be taken only if written justifications for the deferral have been provided and these are, in the view of the ICC Chairperson, compelling and exceptional;
- b) Re-accreditation applications may be deferred for a maximum of one year, after this time the status of the NHRI will lapse; and
- c) For NHRIs whose re-accreditation applications are received after the due date or who have failed to submit their applications, their accreditation status will be suspended. This suspension can be in place for up to one year during which time the NHRI may submit its application for re-accreditation. If the application is not submitted during this time, the accreditation status will lapse.

**6.3 NHRIs under review:** Pursuant to Article 16 of the ICC Statute<sup>119</sup>, the ICC Chair or the Sub-Committee may initiate a review of a NHRI's accreditation

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<sup>119</sup> Formerly article 3(g) of the ICC Rules of Procedure

status if it appears that the circumstances of that NHRI may have changed in any way which affects its compliance with the Paris Principles. Such a review is triggered by an exceptional set of circumstances considered to be temporary in nature. As a consequence, the regular re-accreditation process will be deferred until the review is completed.

In its consideration of NHRIs under review, the Sub-Committee will apply the following process:

- a) a NHRI can be under review for a maximum of one and a half years only, during which time it may bring information to the Sub-Committee to demonstrate that, in the areas under review, the NHRI is fully compliant with the Paris Principles;
- b) During the period of review, all privileges associated with the existing accreditation status of the NHRI will remain in place;
- c) If at the end of the period of review, the concerns of the Sub-Committee have not been satisfied, then the accreditation status of the NHRI will lapse

**6.4 Suspension of Accreditation:** The Sub-Committee notes that the status of suspension means that the accreditation status of the Commission is temporarily suspended until information is brought before the Sub-Committee to demonstrate that, in the areas under review, the Commission is fully compliant with the Paris Principles. An NHRI with a suspended A status is not entitled to the benefits of an A status accreditation, including voting in the ICC and participation rights before the Human Rights Council, until the suspension is lifted or the accreditation status of the NHRI is changed.

**6.5 Submission of information:** Submissions will only be accepted if they are in paper or electronic format. The Statement of Compliance with the Paris Principles is the core component of the application. Original materials should be submitted to support or substantiate assertions made in this Statement so that the assertions can be validated and confirmed by the Sub-Committee. No assertion will be accepted without material to support it.

Further, where an application follows a previous recommendation of the Sub-Committee, the application should directly address the comments made and should not be submitted unless all concerns can be addressed.

**6.6 More than one national institution in a State:** The Sub-Committee acknowledges and encourages the trend towards a strong national human rights protection system in a State by having one consolidated and comprehensive national human rights institution.

In very exceptional circumstances, should more than one national institution seek accreditation by the ICC, it should be noted that Article 39 of the ICC Statute<sup>120</sup> provides that the State shall have one speaking right, one voting right and, if elected, only one ICC Bureau member.

In those circumstances the conditions precedent for consideration of the application by the Sub-Committee are the following:

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<sup>120</sup> Formerly Rule 3(b) of the ICC Rules of procedure.

1) Written consent of the State Government (which itself must be a member of the United Nations).

2) Written agreement between all concerned national human rights institutions on the rights and duties as an ICC member including the exercise of the one voting and the one speaking right. This agreement shall also include arrangements for participation in the international human rights system, including the Human Rights Council and the Treaty Bodies.

The Sub-Committee stresses the above requirements are mandatory for the application to be considered.

#### **6.7 NHRI annual report**

The Sub-Committee finds it difficult to review the status of an NHRI in the absence of a current annual report, that is, a report dated not earlier than one year before the time it is scheduled to undergo review by the Sub-Committee. The Sub-Committee stresses the importance for an NHRI to prepare and publicize an annual report on its national situation with regard to human rights in general, and on more specific matters. This report should include an account of the activities undertaken by the NHRI to further its mandate during that year and should state its opinions, recommendations and proposals to address any human rights issues of concern.

*Adopted by the International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights (ICC) by email after the SCA meeting of March 2009.*

Geneva, June 2009

## **Appendix 4      List of submissions received**

Alessandra Fantini  
 Alice Leahy, Trust Ireland  
 Amnesty International Ireland  
 Aoife Campbell  
 Atheist Ireland  
 Autism Rights Equality Alliance (AREA)  
 Bahá'í Community of Ireland  
 Bar Council of Ireland  
 Bernadette Flood  
 Brendan Tarrant  
 Carol Coulter  
 Centre for Disability Law and Policy (CDLP), NUI Galway  
 Church in Society Forum  
 Comhar Críostaí, Christian Solidarity Party  
 Committee on the Administration of Justice (CAJ)  
 Council for the Status of the Family  
 Deirdre Morgan  
 Department of Applied Social Studies, NUIM  
 Disability Federation of Ireland  
 ENAR Ireland  
 Equality and Diversity Network  
 Equality and Rights Alliance  
 Equality Authority  
 European Anti-Poverty Network (EAPN) Ireland  
 European Union Agency for Fundamental Rights (FRA)  
 Frank Cahill  
 Free Legal Advice Centres (FLAC)  
 Galway Refugee Support Group  
 Gay and Lesbian Equality Network (GLEN)  
 Genetic and Rare Disorders Organisation  
 Gerard Ellis  
 Gillian Normile  
 Hanna's House  
 HSE National Elder Abuse Steering Committee  
 HSE Social Inclusion Unit  
 Human Rights Commission  
 Huntington's Disease Association of Ireland  
 Inclusion Ireland  
 Irish Advocacy Network  
 Irish Business and Employers Confederation (IBEC)  
 Irish Congress of Trade Unions (ICTU)  
 Irish Council for Civil Liberties (ICCL)  
 Irish Heart Foundation  
 Irish Human Rights Commission staff  
 Irish Traveller Movement  
 James and Anne Maher  
 Law Society of Ireland

Marriage Equality  
Mayo Intercultural Action  
Mothers' Alliance Ireland  
NASC Ireland  
National Centre for Medical Genetics  
National Disability Authority  
National Traveller Women's Forum  
National Women's Council of Ireland  
Northern Ireland Human Rights Commission  
Office of the Ombudsman  
Older and Bolder  
Pavee Point  
Pobal  
Private Individual 1  
Private Individual 2  
Pro Life Campaign  
Scottish Human Rights Commission  
Seamus Taylor, NUIM  
St. John of God Community Services Ltd.  
TASC  
The Life Institute  
UN Deputy High Commissioner for Human Rights, Kyung-wha Kang

## Appendix 5, Inquiry Functions

Summary of the procedures that apply to Inquiries under the Commission of Investigation Act 2004 that are relevant when looking at how inquiry powers for the IHREC might be framed.

- In conducting an investigation, an Inquiry shall, to the greatest possible extent consistent with its duties under this Act seek the voluntary co-operation of persons whose evidence is desired and shall facilitate such co-operation.
- Investigations shall be conducted in private, unless (a) a witness requests that all or part of his or her evidence be heard in public and the commission grants the request, or (b) the Inquiry is satisfied that it is desirable in the interests of both the investigation and fair procedures to hear all or part of the evidence of a witness in public.
- Where evidence is heard in private, the Inquiry decides who else may be present and a witness may only be cross examined if the Commission so directs.
- Evidence given or any document produced by a witness may not be published (save where directed by a Court or required in the interests of fair procedure). This provision does not operate to prohibit publication of a report of facts established by the Inquiry.
- The Inquiry shall disclose to a person giving evidence, or against whom evidence is given, the substance of any evidence it has in its possession that may be relevant to that person in his or her giving evidence.
- Evidence may be given in different ways (orally in person, video link, affidavit, etc.) as the Inquiry may see fit.
- An Inquiry has power to compel witnesses to attend and give evidence, produce or disclose documents, and to seek a court order to compel a person to comply with such directions. The Act provides for offences and allows an Inquiry to direct payment of his or her legal costs to a person. Where a person incurs additional costs by reason of the refusal of another person to co-operate with an Inquiry, the Inquiry may recommend to a court that the first person's costs be met by the second.
- A person may be legally represented and the Inquiry has a duty to inform a relevant person of its powers and of that person's rights. A witness or a person who produces documents as directed by an Inquiry has the same immunities and privileges as a witness in a Court.



- An Inquiry has powers to enter into and/or secure premises, inspect, copy or remove documents and direct that any person on a relevant premises co-operate with it. In the case of a private dwelling, the power may only be exercised on foot of a court warrant.
- On the conclusion of its investigation, an Inquiry shall prepare a written report, based on the evidence received by it, setting out the facts it established in relation to the matters referred to it for investigation.
- A draft report (or relevant extracts) is to be provided to any relevant person and such person has the right to object (by written statement) on the basis that fair procedures have not been observed.
- An Inquiry must consider such statement and may make amendments to its report, seek guidance from a court, or submit its report without amendments. Where amendments are made, the person concerned has a right to be informed of them.
- There is a similar right to make a submission to an Inquiry where a person considers that material in a draft report is not relevant, or is commercially sensitive.
- In general, a report of an Inquiry shall be published by the relevant Minister, with a savor for pending criminal proceedings.
- A report of an Inquiry enjoys absolute privilege.

## Appendix 6, Role of National Preventive Mechanism under OPCAT

Under the OPCAT, state parties agree to international inspections of places of detention by the United Nations Subcommittee on the Prevention of Torture (SPT). State parties are also required to establish an independent National Preventive Mechanism (NPM) to conduct inspections of all places of detention. These would include prisons, juvenile detention, any immigration detention facilities and other places where people are deprived of their liberty.

The NPM can be a new national body created specifically for this purpose, or an existing body. The following are essential elements of a NPM as set out under Part IV (Articles 17 – 23) of the Protocol:

- a mandate to undertake regular preventive visits
- independence (functional independence, independence of personnel)
- expertise (required capabilities and professional knowledge)
- necessary resources
- access (to all places of detention; to all relevant information; the rights to conduct private interviews)
- appropriate privileges and immunities
- dialogue with competent authorities regarding recommendations
- power to submit proposals and observations concerning existing or proposed legislation.

One of the key questions arising in the creation or designation of an effective NPM is whether a new body should be created or whether existing bodies should be mandated to carry out the function. There are potential advantages and disadvantages associated with each approach, and likewise with the use of a single unified mechanism for the whole country or several mechanisms for different types of places of detention.

The Optional Protocol specifically provides that contracting states should have due consideration for the Paris Principles in establishing NPMs.<sup>121</sup> In countries, such as Ireland, where the mandate of the NHRI is broad, the institution may not be an appropriate body to be designated as a **sole** NPM. On the other hand, an all-purpose NHRI can be very well placed, precisely because of its broad mandate and specific expertise in human rights protection, to play an overarching or coordinating role within a structure of several NPMs. In this regard, the added value that a general purpose NHRI can bring is in its human rights-centred approach.

A further consideration is that where an NHRI has competence to adjudicate on individual complaints involving *inter alia* places of detention, issues may arise as regards its suitability to act as an NPM under the Protocol.

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<sup>121</sup> Article 18(4).