Observations on the

Irish Human Rights and Equality Commission Bill 2014

29 April 2014

1. Introduction

The Irish Council for Civil Liberties (ICCL) is Ireland's independent human rights watchdog which monitors, educates and campaigns for the full enjoyment of human rights for everyone. Since the announcement of the proposed merger of the Irish Human Rights Commission (IHRC) and the Equality Authority (EA), the ICCL has consistently campaigned for the establishment of an independent and effective National Human Rights Institution to promote and protect human rights including equality issues in Ireland. The ICCL has previously recommended that the new body sufficient independence in the selection and appointment of personnel, adequate resources and budgetary independence; the need for Ireland's NHRI to comply with the criteria on the UN Paris Principles set out by the International Coordinating Committee of National Human Rights Institutions Sub Committee on Accreditation, General Observations; the need to comply with commitments under the 1998 Good Friday Agreement and the need to introduce effective measures to comply with Council Directives 2000/78/EC (Gender Equality) and 2000/43/EC (Racial Equality).

1. Publication of the Irish Human Rights and Equality Commission Bill 2014

The ICCL welcomes the publication of the Irish Human Rights and Equality Commission Bill 2014 (hereinafter 'the Bill').

> **The ICCL recommends that adequate resources be made available to facilitate the work of the new body upon establishment in relation to funding and staffing requirements to ensure an effective and independent Commission in compliance with international standards and norms.**

In June 2012, the ICCL made a submission to the Joint Committee on Justice, Defence and Equality on the General Scheme of the Human Rights and Equality Commission Bill 2012.[1] On that occasion, the Minister for Justice, Equality and Defence requested that "the Oireachtas Committee on Justice, Defence and Equality examine the Heads and undertake a further focused consultation process with civil society and other interested parties on the content of the General Scheme." It was and remains the Council's view that the time afforded to civil society groups and other interested parties to meaningfully engage in consultation on the General Scheme of the Bill was extremely limited given the nature and scope of the proposed legislation. This in turn precluded the type of robust consultation and scrutiny required by legislation likely to be of interest to civil society and other interested parties including those

[1] Submission to the Joint Committee on Justice, Defence and Equality by the Irish Council for Civil Liberties (ICCL) on the General Scheme of the Human Rights and Equality Commission June 2012 Bill 2012. Available at: http://iccl.ie/attachments/download/261/ICCL_Justice_Committee_Observations_on_Heads_of_IHREC_Bill_29_June_2012.pdf

representing many marginalised and vulnerable groups with a considerable stake in the establishment of an effective and independent national human rights and institution. It is disappointing that no further formal consultation appears to be planned with civil society and other interested parties before the Committee concludes its scrutiny of the Bill.

> **The ICCL recommends that the Committee invite submissions on the Bill from interested stakeholders prior to the passage of the Bill through Committee stage and, where possible, afford stakeholders an opportunity to voice their concerns directly to the Committee.**

2. Definitions of 'Equality' and 'Human Rights'

Section 2

Equality

Having previously expressed reservations in relation to the definition of equality included in the General Scheme of the Bill, the ICCL welcomes the fact that the Bill as published no longer seeks to define the term 'equality'. Defining 'equality' with any precision in legislative instruments is a difficult task, because equality is an overarching value or principle, which underpins the entire human rights scheme, and an individual human right (e.g. the right to equality before the law under Article 40.1). For that reason, the ICCL believes that the approach adopted in the current Bill is preferable (the proposed definition set out under the Heads of Bill conflated 'equality' and 'discrimination' and did not correlate with the conceptions of equality or discrimination that underpin EU social law and international human rights instruments ratified by Ireland).

Human Rights

The ICCL welcomes the wide definition of human rights employed in section 2 of the Bill. The ICCL notes that the Bill continues to employ a second, narrower definition of human rights in Section 29 of the Bill for the enforcement purposes contained in Part 3 of the Bill. This second definition defines human rights as those rights "which have been given force of law in the state". In its previous submission on the General Scheme of the Bill the ICCL recommended that a uniform definition of human rights should be employed throughout the document based on the rights, liberties and freedoms conferred on the individual under the Constitution and any agreement treaty or convention to which the State is a party.

> **The ICCL reiterates its recommendation that one unified definition of human rights apply throughout the Bill.**

3. Definition of Religion and Belief

Section 2

The ICCL notes that, under existing equality legislation, the definition of religious belief does not adequately accord with the Framework Directive (Directive 2000/78/EC)[2], which prohibits discrimination on the grounds of religion or belief. The current definition of religious belief appears from the wording of the section 6(2) (e) of the EEA and indicates that the belief in question must be a religious one. It is the view of the ICCL that an opportunity exists to amend this definition to ensure that the definition of religion or belief in Irish equality law adequately meets the requirements of the Framework Directive.

> **The ICCL recommends that provision be made in section 2 to amend existing equality law to embrace 'religion or belief' as opposed to only 'religious belief'.**

4. Providing assistance to courts and other tribunals

Section 10

IHREC should be expressly empowered to intervene in any court or tribunal proceedings and not only before the High Court or Supreme Court as suggested in section 10. Several significant human rights and equality law cases come before courts of local and limited jurisdiction, as well as the Tribunal and the Labour Court (Walsh 2012; Bolger, Bruton and Kimber 2012).

Section 10(2) (e) should be considered in conjunction with the proposed establishment of a Workplace Relations Commission (WRC) and revised Labour Court. Under current legislation, if the Director of the Equality Tribunal acting in the course of an investigation under the Employment Equality Acts 1998-2011 (EEA) or Equal Status Acts 2000-2011 (ESA) considers it appropriate, she or he may 'hear persons appearing to the Director to be interested'.[3] It is understood that the Equality Authority never made an application to the Director to intervene in a hearing, perhaps because of (1) uncertainty as to whether it was empowered to do so under the applicable statutes and (2) not being put on notice of such proceedings. It should also be noted that, in this regard, the UK's Equality and Human Rights Commission (EHRC) is routinely notified of discrimination law proceedings before the county courts (or Sheriff Court in the case of Scotland).[4] Consideration should therefore be paid to similar provisions in the current Bill, which would enable IHREC to intervene in proceedings before the WRC or Labour Court.

> **The ICCL recommends that IHREC be granted a specific power to bring relevant specialist expertise and research data to the attention of the Tribunal/WRC and the Courts in appropriate cases.**

[2] Council Directive 2000/78/EC

[3] Section 25(1) ESA; Section 79(1) EEA.

[4] Section 114 of the Equality Act 2010: http://www.justice.gov.uk/courts/procedure-rules/civil/rules/proceedings_under_enactments_equality#id6513032

Section 10(3) (d)

The ICCL considers that the word 'fair' is superfluous to the meaning of the provision and is, therefore, open to misinterpretation.

The ICCL recommends that the word 'fair' be deleted from section 10(3)(d)

5. Budgetary independence and control

Section 26

A similar provision to that provided in Section 26 is found in the UK Equality Act 2006, which stipulates that the EHRC should have such funds "as appear to the Secretary of State reasonably sufficient for the purpose of enabling [it] to perform its functions".[5] It was included to comply with the applicable Paris Principles (Rorive 2009: 147). The provision has not prevented substantial cuts to the funding of the Commission over the past three years but did at least require the production of a review to ensure that the Commission could carry out its core functions (Department for Culture, Media and Sport 2013).[6]

According to the Council of Europe's Commissioner for Human Rights (2011: 14-15) any: "assessment of sufficient resources needs to be evidence based and to take account of a range of factors including:

- Population size and economic circumstances.
- The nature and levels of reported and estimated un-reported discrimination.
- The range and roles of other stakeholders involved in promoting equality and combating discrimination.
- The resources required to enable the body to implement all of its functions in a strategic manner and to a scale and standard to make an impact."

The Commissioner (2011: 19) recommends that: "Member states should develop an evidence based approach to the assessment of sufficient resources. In particular, member states should put in place measures to ensure that there can be no arbitrary or disproportionate reduction in the resources of the bodies." If the proposed clause is to be meaningful in practice, it is submitted that the Commission's sponsor department undertake such an assessment in tandem with the enactment of the IHREC legislation.

The ICCL notes that, in its current form, the Bill subjects the funding of IHREC to substantial Ministerial and Departmental control. While it is possible that control may not be exercised in practice or only minimally exercised, sufficient safeguards are required to ensure protection

[5]Equality Act 2006, paragraph 38, schedule 1. An allied provision stipulates that the Secretary of State shall have regard to the desirability of ensuring that the Commission is under as few constraints as reasonably possible in determining its activities, timetables and priorities (Equality Act 2006, paragraph 42(3) schedule 1).

[6]See further the terms of reference for the budget review: http://www.homeoffice.gov.uk/publications/equalities/government-equality/budget-review-tor?view=Standard&pubID=1028056 [accessed 10th July 2013]

against interference or preclude control altogether. The EU Agency for Fundamental Rights (2012a: 16) has highlighted that while concerns about the financial and organisational independence of NHRIs "may not affect the independence of these bodies in practice, they can give rise to unfavourable perceptions, undermining individuals' confidence in approaching them."

One proposal, as recommended by the IHRC, is that funding be granted by the Oireachtas and negotiated directly by the new body with the relevant Committee of the Oireachtas. This would tie in with the existing accountability of the IHRC and the Equality Authority, through their chief executives, to the Committee of Public Accounts of the Oireachtas[7] and the accountability to the same Committee of IHREC for financial matters under the Bill (section 22). Such an arrangement would not be unique. For example, in 2004, a Houses of the Oireachtas Commission was established to provide for the running of the Houses of the Oireachtas and to administer and manage the Office of the Houses.[8] Among the tasks entrusted to it are the preparation of an annual statement of estimates, the keeping of accounts and oversight of the ongoing expenditure of the Houses.[9] The statement of estimates is presented to Dáil Eireann, and the statement is 'taken note of' by the Dáil.[10] The expenditure incurred by the Commission in the performance of its functions is charged on and paid out of the Central Fund for periods of three years,[11] and there is a legislative cap on the sum which shall be charged and paid out.[12]

If a similar process of funding were to be agreed in respect of IHREC it would mean that the body would not be directly subordinate to the Government or to a Government Minister. This would remove two of the three elements of public control over funding which constrained both the Authority and the IHRC[13], but leave the element of Oireachtas authorisation. This, it is believed, would accord most fully with the Paris Principles requirement of complete financial autonomy, allowing the institution to manage and control its own budget.

It is the view of the ICCL that if the Government is to enjoy control over funding then, at the very least, the new body should negotiate its budget directly with a Department which has overall responsibility for the business of Government and/or Government spending. This suggests that the sponsoring Department should be either that of the Taoiseach, Finance or Public Expenditure and Reform. Moreover, the funding should be by way of a grant-in-aid voted on

[7]Section 14(1) of the Human Rights Commission Act, 2000; and s. 49(1) of the Employment Equality Act, 1998.
[8]Section 4(1) of the Houses of the Oireachtas Commission Act 2003.
[9]2003 Act, ss. 4(2)(j), 13 & 14.
[10]2003 Act, s. 13(3).
[11] Section 5(1) of the 2003 Act
[12]Section 5(2) of the 2003 Act. The Working Group regarded it as inappropriate that the proposed IHREC be funded through the Central Fund, but the grounds on which it came to this view are not clear. All that is stated by way of elucidation is that the Fund is responsible for such matters as the National Debt (2012: Chapter 4.15). Other examples of public expenditure paid directly from the Central Fund under specific legislation without annual reference to the Dáil are the salaries and pensions of the Comptroller and Auditor General, judges and the President and contributions to the European Union. See section A.1.10 of *Public Financial Procedures*, Department of Finance, November 2008.
[13] Authorisation by the Oireachtas; sanctioning of the amount by the Minister for Justice; and consent to the amount by the Minister for Finance.

separately by the Dáil and administered by the new body itself, not as part of the departmental accounts. An example of an analogous public body which is funded in this manner is the Office of the Ombudsman. The Ombudsman is independent in the performance of his or her functions,[14] and "may investigate any action taken by or on behalf of a Department of State".[15] The estimates are presented to the Dáil by the Minister for Public Expenditure and a separate Vote is taken on them.[16] Another example of the funding of an independent body which is approved by separate Vote but channelled through a Department is the Office of the Attorney General. The Taoiseach presents the estimates of the Office to the relevant Dáil Sub-Committee for approval and, in doing so, has emphasised that the Office operates independently of his Department. [17]

In the past, the IHRC (2003: 9-13) advocated that, if a link were to be retained between it and a Government Department, the most appropriate link would be with that of the Department of An Taoiseach. However, at the time, the Department of An Taoiseach rejected such a link, on the ground that it was downsizing and did not wish to assume additional responsibilities. More recently, the Working Group (2012: Chapter 4.15) has again cited this ground for regarding funding via this Department as not "a realistic option". It should be noted however that the Equality Commission for Northern Ireland (ECNI) receives its funding through the Office of the First Minister and Deputy First Minister, and that this appears to work well.[18] It may therefore be worthwhile considering this option further, in addition to those of the Department of Finance and the Department of Public Expenditure and Reform. While the requirement of independence promoted by the International Coordinating Committee of National Human Rights Institutions does not preclude funding for an NHRI via a Government Department, it has stated that the institution should have complete financial autonomy, and that this means that funding should be through a separate budget line over which the institution has absolute management and control. Were therefore a Minister or a Departmental official to seek in practice to manage or control the institution's funding, the independence of the institution would be compromised. Unless the founding legislation contains guarantees against such interference, such a method of

[14] Ombudsman Act 1980, s. 4(1).

[15] 1980 Act, s. 4(2).

[16] See, e.g., the debate of the Select Sub-Committee of Public Expenditure and Reform on 2 May 2012 on a number of revised estimates, including those of the Office of Ombudsman (Vote 19), www.oireachtas.ie
It may be noted that, in her Annual Report for 2010, the Ombudsman mentioned that she had sent a paper to all political parties and Oireachtas members in which she made a number of specific proposals for improving the Office of Ombudsman (see paras. 1.2 & 1.3). One of the proposals was that there be established a new Oireachtas Committee as a channel of consultation and collaboration between the Oireachtas and the Ombudsman. The paper is available at
www.ombudsman.gov.ie/en/OtherPublications/StatementsandStrategyDocuments/February2011-DevelopingandOptimisingtheroleoftheOmbudsman

[17] See the record of the meeting of the Select Sub-Committee on the Department of the Taoiseach, 19 April 2012, www.oireachtas.ie Six Votes were considered at the Meeting. The other Votes included those of the Office of the Director of Public Prosecutions and the Office of the Chief State Solicitor.

[18] Schedule 8 to the Northern Ireland Act 1998, paras. 6 & 7, as amended. The Northern Ireland Human Rights Commission is funded by the United Kingdom Government through the Northern Ireland Office. The Secretary of State for Northern Ireland is responsible for passing to the Commission the funding agreed by the Westminster Parliament. See Schedule 7 to the Northern Ireland Act 1998(U.K.), para. 6.

funding cannot be regarded as securing the complete independence of the body as well as would funding directly from the Central Fund.

The ICCL therefore recommends that provision be made in the Bill to ensure the financial independence of the new body either through:

a) Funding being granted by the Oireachtas and negotiated directly by IHREC with the relevant Committee of the Oireachtas, as recommended by the IHRC, or

b) Funding being granted by the Department which has overall responsibility for the business of Government spending and negotiated directly with IHREC. Such funding would e provided via grant-in-aid voted on separately by the Dáil and administered by the new body itself.

6. Title of Part 3 - Enforcement

Part 3

This Part should be headed '**Enforcement and Compliance'** to more accurately reflect the functions falling under that head.

7. Definitions – "Equal remuneration term" and "undertakings"

Section 29

The ICCL notes that the definition included in section 29 "equality remuneration term" should read "equal remuneration term" reflecting the form of words used in the EEA.

In relation to the definition of "undertakings", the ICCL notes that the provisions replicate the law as stated in section 69(7) (a) of the EEA. The ICCL also notes that under existing law, registered clubs are not subject to equality reviews and that matters concerning members and access to membership of registered clubs is exempt from equality reviews under section 69(7) EEA.

The ICCL recommends that provision be made in the Bill to include registered clubs under the definition of undertakings which may be subject to equality reviews.

8. Review of existing enactments

Section 30

The ICCL welcomes the inclusion in 30(1) (b) of section 19 of the Intoxicating Liquor Act, 2003 under IHREC's information and review function. Section 19 applies to cases of discrimination that overlap with the material scope of the Racial Equality and Gender Goods and Services Directives, but no statutory body is currently tasked with informing the public about its provisions. Presently, the Equality Authority can only provide information on the 2003 Act in

the context of an application for assistance. This is clearly unsatisfactory not least because it may distort application of the EA's assistance criteria and artificially inflate the assistance figures.

The ICCL also notes that Section 30(4) makes a distinction between the gender ground and other grounds for discrimination in relation to the working or effect of enactments specified therein which may affect or impede the elimination of discrimination in relation to employment or the promotion of equality of opportunity in relation to employment. In particular, the ICCL notes that the wording 'between men and women' replicates the narrow form of words used to define the gender ground under section 2 of the 1998 Act, which is not sufficiently inclusive of transgender persons.

> **The ICCL recommends that Section 30(4) be amended to remove the distinction between gender and other grounds for discrimination.**

9. Equality Reviews and Equality Action Plans

Section 32

Equality reviews (mandatory or voluntary) are a feasible alternative to the more protracted and procedurally complex option of undertaking an inquiry; especially since as framed in the draft legislation inquiries will be reactive, adversarial and potentially very expensive. If combined with a human rights review this mechanism could provide a means of building good practice in relation to the proposed public sector duty in particular.

The action plans provided for under section 32 could function as a less formal version of the agreements provided for under parallel UK legislation. The English Equality and Human Rights Commission (EHRC) has the power to enter into binding agreements with duty-bearers who undertake not to commit an unlawful act and to take positive steps to avoid an unlawful act. In the event of suspected default the EHRC can seek to enforce an agreement through court proceedings.[19] The Commission has entered into a number of agreements with large-scale public and private sector bodies.[20] In 2011 it entered into one concerning the use of stop and search powers with Thames Valley Police and Leicestershire Constabulary. "By early 2012 their overall use of stop and search powers had halved and race disproportionality in Thames Valley had reduced by a modest extent" (EHRC 2012a: 19).

> **The ICCL recommends that provision be made for expanding equality reviews and or action plans to encompass both human rights and equality matters.**

The ICCL notes that where the Commission considers it appropriate to carry out a review or prepare and action plan on an undertaking, the undertaking must comprise of 50 or more

[19] Section 24, Equality Act 2006.

[20] http://www.equalityhumanrights.com/legal-and-policy/enforcement/commission-signs-agreement-with-the-priory-group/

employees. This provision may hamper the ability of the Commission to function effectively in relation to conducting reviews and action plans if, as appears from the wording of the provision, that an undertaking which is a component of a larger undertaking comprises less than 50 employees.

> **The ICCL recommends that the wording of section 32 reflect an intention to permit the Commission to conduct an equality and human right review or action plan on a group of undertakings where the grouping comprises of 50 employees or more overall.**

10. Criteria for Inquiries

Section 35

The ICCL is concerned that the criteria included in section 35 of the Bill relating to inquiries means that the threshold for launching an inquiry will be very high. Section 9 of the Human Rights Commission Act 2000[21] provided the IHRC with the power to "conduct an enquiry under this section into any relevant matter". However, section 35 suggests that a matter must be of "grave public concern" (Section 35(1)(b)) before an inquiry is warranted.

It has been noted that while the Paris Principles do not make specific reference to inquiries, the functions and powers enumerated in the Principles are the functions and powers an NHRI requires to undertake an inquiry. Inquiries should enable NHRIs to conduct investigations into a serious human rights issue; to expose human rights violations; to develop findings and recommendations in relation to the issue considered; to raise public awareness and provide human rights education generally and on the specific issues considered; and to identify future action that should be taken by the institution itself or by others to provide remedies to victims and to ensure better enjoyment of human rights in future.[22]

> **The ICCL recommends removing the phrase "grave public concern" from Section 35, replacing it with a power for the Commission to inquire into matters that it deems relevant.**

11. General Inquiries

Section 35; Schedule 2

The ICCL notes that the proposed statutory provisions would enable IHREC to carry out both 'named person' inquiries (i.e. ones directed at a specified body) and general inquiries. General inquiries could address a particular sector or theme and as such are likely to be inquisitorial rather than adversarial in nature. However, as the IHREC Designate noted in its recent Observations on the Bill, the proposed provisions are oriented towards an adversarial model.

[21] Section 9, Human Rights Commission Act, 2000

[22] Asia Pacific Forum of National Human Rights Institutions and Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 2012, Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violations Available at: http://rwi.lu.se/wp-content/uploads/2012/09/Conducting_National_Inquiries_Manual.pdf

Consideration should be paid to separating out belief or suspicion based-inquiries from ones into general issues or themes modelled perhaps on the Equality Act 2006 in Britain, which provides for inquiries and formal investigations.[23] The latter are conducted only where the Commission "suspects that the person concerned may have committed an unlawful act."[24]

In addition, the proposed provisions including the preference for conducting inquiries in private as stipulated in the model outlined in Schedule 2 of the Bill are not conducive to conducting inquiries of a more general nature. Comparative experience suggests that general inquiries are especially useful for addressing matters affecting vulnerable groups and for getting at information that it is impossible for individuals to source (Barry 2003). For example, an inquiry into pay inequality in the City of London conducted by the EHRC (2009) revealed a 55 per cent gender pay gap.

The use of general inquiries in other jurisdictions suggests they can be a highly valuable means of effecting systemic change as well as raising the profile of human rights and equality issues more broadly. The Australian Human Rights Commission's[25] work on the Stolen Children inquiry (1997), which generated a major debate about the treatment of indigenous people, is often cited as an example of good practice (O'Cinneide 2002; Samson and Short 2006). O'Cinneide (2002: 21) maintains that while it diverted considerable resources from the performance of other functions that inquiry was warranted because of its "immense impact in terms of both dramatically increasing the public profile of the Commission and of the importance of the equality agenda in general." Activities that increase the profile of an NHRI or equality body are of critical importance given the low levels of awareness of the existence of such bodies amongst the general public.

General inquiries largely play an 'education role' (Dickens 2007: 476), complementing the research functions of equality bodies (Harwood 2006). Experience suggests that an NHRI or equality body's power to compel the production of documents and so on is the primary justification for using an inquiry mechanism as opposed to relying in its research functions. Research projects generally obtain data from stakeholders through a process of informed and voluntary cooperation. The EHRC (2012b: 15) justified use of its statutory powers to conduct an inquiry into human rights on the basis that it "ensured that our human rights work is appropriately focused, authoritative and evidence-based. It also provided the Commission with the opportunity to engage with a wide range of participants; and to offer an evidence based output to the public."

> **The ICCL recommends that provisions in the Bill, including Schedule 2, be revised to allow for inquiries both adversarial (named person inquiries) and inquisitorial (general inquiries) in nature, determined at the discretion of IHREC. Provision should also be made for certain inquiries (general inquiries) to be held in public, where appropriate.**

[23] Under section 16 and section 20 respectively of the Equality Act 2006.
[24] Section 20(2), Equality Act 2006.
[25] Formerly the Human Rights and Equal Opportunity Commission.

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Asia Pacific Forum of National Human Rights Institutions and Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 2012, Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violations Available at: http://rwi.lu.se/wp-content/uploads/2012/09/Conducting_National_Inquiries_Manual.pdf

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