

IHRC Observations on the Heads of Irish Human Rights and Equality Bill 2012

June 2012

IHRC

AN COIMISIÚN UM CHEARTA AN DUINE
IRISH HUMAN RIGHTS COMMISSION

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I. INTRODUCTION

1. The Irish Human Rights Commission (IHRC) is Ireland's National Human Rights Institution (NHRI), set up by the Irish Government under the Human Rights Commission Acts 2000 and 2001 and functioning in accordance with the United Nations Paris Principles. The IHRC has a statutory remit to endeavour to ensure that the human rights of all persons in the State are fully realised and protected in the law and practice of the State. One of the functions of the IHRC is to examine legislative proposals and to report its views on the implications of such proposals for human rights, having regard to the Constitution and international human rights treaties to which Ireland is a party.¹ The IHRC is mandated to make recommendations to the Government as it deems appropriate in relation to the measures which the IHRC considers should be taken to strengthen, protect and promote human rights in the State.²

2. The Heads of the Irish Human Rights and Equality Commission Bill 2012 were provided to the IHRC in June 2012, at the time of their publication. The IHRC welcomes the opportunity to provide its observations on the Heads of Bill. The IHRC recalls that it made a submission to the Minister for Justice, Equality and Defence's Working Group on the proposed merger of the IHRC and the Equality Authority in November 2011. The present observations build on the views of the IHRC made in that submission, considered against the provisions contained in the draft legislation.

3. Although it may at first appearance be unusual that a statutory body which is being merged with another statutory body would provide legislative observations on the proposal, there are good reasons why this is being done. The first reason refers to our statutory remit to provide such observations under section 8 of the Human Rights Commission Act 2000. One of the statutory duties of the IHRC is to provide observations to Government on human rights legislation which impact on human rights. In formulating these Observations to Government, the IHRC has sought to approach the draft legislation according to the same methodology it employs on other draft legislation: it examines the proposal against the relevant international standards. The relevant international standards employed here are the standards against which the merged body will be judged in its application to attain "A" status re-accreditation as a National Human Rights Institution. These standards are known as the United Nations *Principles relating to the Status of National Institutions* and they are interpreted under the General Observations of the Sub-Committee on Accreditation of the International Coordinating Committee of NHRIs (see below).

4. The second reason for providing these observations is that, as Ireland's NHRI, the IHRC has a duty to consider any legislation regarding the reform of Ireland's national institution.³ Should it not do so, its own independence would be called into

¹ Section 8(b) of the Human Rights Commission Act 2000.

² Section 8(d) of the Human Rights Commission Act 2000.

³ See for example the development of the Dutch Equal Treatment Commission into the NHRI for The Netherlands, and the structural changes to the Norwegian Centre for Human Rights, both of which actively involved organisations themselves.

question nationally and internationally. In this regard, it recalls the Guidance issued by the Office of the High Commissioner for Human Rights (OHCHR) that “[t]he full engagement of the concerned institutions in the merging process is strongly encouraged, particularly when it comes to ... NHRI accredited with the “A” status by the ICC, such as the Irish Human Rights Commission (IHRC)”.⁴ In that context, the IHRC provides these recommendations and comments, which are aimed at ensuring that the new body meets international standards and can be re-accredited as an ‘A’ status institution (that is, an independent NHRI in compliance with the UN Paris Principles).

5. The IHRC welcomed the report of the Ministerial Working Group on the merger where it set out the values that must underpin a human rights and equality body. The report set out the importance of human rights and equality underpinning the life of the nation and its citizens and highlighted why a robust, effective and independent NHRI must be the result of any merger. Insofar as we have now moved onto the legislative stage of the proposals, these Observations focus on two pillars under which national and international scrutiny of the Bill will focus on: structural independence and powers. The IHRC very much hopes that the technical lacunae identified in these Observations can be remedied as the Bill progresses through the legislative process.

6. The IHRC recalls that the Working Group on the Merger suggested in its report that the new body be designated as the National Preventative Mechanism under the Optional Protocol to the Convention Against Torture (OPCAT), and the National Monitoring Mechanism under the Convention on the Rights of Persons with Disabilities (CRPD). The IHRC notes with regret that the draft legislation does not include provision for either of these functions. Regardless of whether the IHRC or its successor body is designated under these mechanisms, it remains a concern that ratification and implementation has not yet occurred. It may be noted in this regard that Ireland signed the CRPD five years ago, in 2007. The IHRC draws attention to the fact that both ratification and implementation of both OPCAT and CRPD has occurred in numerous European States and that while alignment of national laws and policies is desirable in advance of ratification, it is not a condition for ratification. The IHRC draws attention to the fact that Ireland has already ratified a significant number of other international treaties without such undue delay.

7. The IHRC notes as a general comment that the role of a NHRI is to hold government to account in relation to human rights. The primary duty to uphold human rights lies with the State. The NHRI exists to ensure that the State is fulfilling its duties, to challenge it when it is not, and to promote human rights in general in the State.

⁴ *Best Practice on the Transformation and/ Or Merger of Human Rights Institutions* (December 2011, at para 20). Available online at [http://www.upr.ie/Clients/CEGA/UPRWeb.nsf/page/BEHO-8RXM7K16214029-en/\\$file/Submission%20Nov2011%20UN%20Deputy%20High%20Commissioner%20for%20Human%20Rights.pdf](http://www.upr.ie/Clients/CEGA/UPRWeb.nsf/page/BEHO-8RXM7K16214029-en/$file/Submission%20Nov2011%20UN%20Deputy%20High%20Commissioner%20for%20Human%20Rights.pdf)

8. A key concern of the IHRC in providing these observations is to ensure that the new body is in a position to protect the rights of those in the most vulnerable situations in Irish society. Marginalised individuals and groups are often the most vulnerable to having their human rights denied or infringed. The IHRC considers that it is vital that the new body can be robust and effective in ensuring that human rights and equality are monitored and protected and the IHRC's observations are provided with this principle in mind.

9. The IHRC made a number of recommendations to the Minister's Working Group on the Merger, primarily concerning independence issues, but also concerning substantive powers, insofar as these are the two most important aspects of a NHRI. The IHRC welcomes the fact that some recommendations it made were adopted in the Group's report and in the draft legislation, such as the reference to "class of persons" in Head 30(vii)(3). It is with some considerable regret that the IHRC thus sets out in the present submission its concerns regarding threats to independence and reduction of powers, which it considers might arise from the proposals contained in the present Heads of Bill.

II. NATIONAL AND INTERNATIONAL STANDARDS

10. NHRIs are independent state bodies established for the promotion and protection of human rights. The primary international standards for these institutions are the United Nations *Principles relating to the Status of National Institutions* (The Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993.⁵

11. The Paris Principles encourage the creation of independent national institutions founded in law and with a broad mandate to promote and protect human rights and monitor the compliance of their State with its international human rights obligations.⁶ The Principles provide a relatively general outline of what a NHRI should be, leaving the issue of the form of NHRI to be established to States themselves, while highlighting some essential criteria. The Principles set out some of the functions of NHRIs such as providing advice or recommendations on legislation and policy, receiving individual complaints, conducting human rights enquiries, human rights education and awareness raising, promoting the ratification of and adherence to international treaties and submitting its own 'parallel' reports to treaty bodies.⁷

12. The Paris Principles are thus the benchmark for the independence, functioning, mandate and structure of NHRIs. The international network of NHRIs; the International Coordinating Committee (ICC), early on in its establishment set up a committee to review the compliance of national institutions with the Paris Principles.

⁵ Available online at <http://www2.ohchr.org/english/law/parisprinciples.htm>.

⁶ For example, the Paris Principles provide that "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." <http://www2.ohchr.org/english/law/parisprinciples.htm>

⁷ See for example Paris Principles section 3 <http://www2.ohchr.org/english/law/parisprinciples.htm>

This process is recognised and promoted by the United Nations,⁸ and will be considered further below.

13. There are several key elements set out in the Paris Principles, which are considered essential to all NHRIs:

- Independence in structure and practice, demonstrated through a range of factors, considered in more detail below;
- A foundation in national law (by way of legislation or the national constitution);
- A mandate to promote *and* protect a broad range of international human rights standards;
- Adequate budget and staff with the ability to independently administer and recruit same; and
- Responsibility to work with all actors in the field including government and civil society.⁹

These key attributes must be met in order for a NHRI to comply with the Paris Principles.

Independence

14. Independence is a core requirement of the Paris Principles for NHRIs, and the element on which the most emphasis has been placed by the international community as well as by NHRIs themselves, particularly through the accreditation process, discussed further below. Independence means that the NHRI is unrestrained by the State in its operations and in carrying out its mandate. An independent NHRI should be free to work and comment – including publicly- on any human rights issue as it sees fit.¹⁰ Independence also requires that a NHRI has the human and financial resources to fully carry out its mandate.¹¹ Otherwise put, the NHRI should be provided with an adequate budget either annually or multi-annually and then be free to undertake its activities, subject to appropriate accountability to the national parliament and to the State’s independent Auditor.

⁸ See for example, Report of the Secretary General *Process currently utilised by the International Coordinating Committee for the Promotion and Protection of Human Rights to accredit national institutions in compliance with the Paris Principles* A/HRC/16/77, 3 February 2011 Available online at <http://www.ohchr.org/Documents/Countries/NHRI/A-HRC-16-77.pdf>.

⁹ <http://www2.ohchr.org/english/law/parisprinciples.htm>. See also in this regard the General Observations of the ICC Sub Committee on Accreditation, ICC Sub-Committee on Accreditation General Observations <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/COMPILATION%20OF%20THE%20RULES%20AND%20WORKING%20METHODS%20OF%20THE%20OSCA.doc> (pp.8-12).

¹⁰ See for example, Paris Principles 3(a)-(c) <http://www2.ohchr.org/english/law/parisprinciples.htm>.

¹¹ The Paris Principles provide “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.” <http://www2.ohchr.org/english/law/parisprinciples.htm>

15. According to the Paris Principles and the ICC Sub-Committee on Accreditation, the mandate and functioning of the NHRI is key to ensuring its independence, including through;

- a president (head) and board chosen and appointed through an open and transparent process;
- pluralistic, independent board members;
- a stable and sufficient budget over which it has autonomous control;
- selection and appointment of its own staff;
- no government representation on the board or on the staff;
- adequate powers to both protect and promote human rights, and
- the ability in practice to freely, transparently and publicly work to promote and protect all human rights in the country.

Assessing Compliance with the Paris Principles

16. As noted above, the competence to decide on a national institution's compliance with the Paris Principles lies with the International Coordinating Committee of NHRIs (ICC) and its Sub-Committee on Accreditation. The role and functions of the Sub-Committee on Accreditation are set out in the Statute of the Coordinating Committee.¹² The Sub-Committee on Accreditation assesses the compliance of NHRIs with the Paris Principles in law and practice. It has developed a series of guidelines known as General Observations, which serve as important interpretative tools of the Paris Principles.¹³ The General Observations and the procedure of the Sub-Committee on Accreditation is recognised and supported by the United Nations.¹⁴ The Office of the High Commissioner for Human Rights (OHCHR) acts as secretariat for the ICC and for the Sub-Committee on Accreditation in particular.¹⁵

¹² Annex to the ICC Statute - Rules of Procedure for the ICC Sub-Committee on Accreditation. See *Compilation of Rules and Working Methods of the ICC Sub-Committee on Accreditation* (ICC Statute Provisions, Rules of Procedure, General Observations, Working Methods, Guidelines for Applications, Template of the Statement of Compliance) Available online at: <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/COMPILATION%20OF%20THE%20RULES%20AND%20WORKING%20METHODS%20OF%20THE%20OSCA.doc>

¹³ The General Observations and accreditation templates are available in the *Compilation of Rules and Working Methods of the ICC Sub-Committee on Accreditation* <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/COMPILATION%20OF%20THE%20RULES%20AND%20WORKING%20METHODS%20OF%20THE%20OSCA.doc>

¹⁴ See for example, Report of the Secretary General *Process currently utilised by the International Coordinating Committee for the Promotion and Protection of Human Rights to accredit national institutions compliance with the Paris Principles* A/HRC/16/77 3 February 2011. Available online at <http://www.ohchr.org/Documents/Countries/NHRI/A-HRC-16-77.pdf>

¹⁵ The Committee comprises one 'A' status institution from each of the four geographical regions of the ICC (Africa, Americas, Asia-Pacific and Europe) with support from the Office of the High Commissioner for Human Rights (OHCHR), and attendance by the Chair or Coordinator of each regional group. Members of the Sub-Committee on Accreditation are elected by the full 'A' Status membership of the ICC for a period of 3 years, renewable twice. The OHCHR also supports the process through information from relevant Desk Officers. See *Compilation of Rules and Working Methods of the ICC Sub-Committee on Accreditation* (ICC Statute Provisions, Rules of Procedure, General Observations, Working Methods, Guidelines for Applications, Template of the Statement of Compliance). Available online at:

17. As Chair of the European Regional Group of NHRIs from 2006-2011, the IHRC attended a number of Sub-Committee on Accreditation meetings to support the Committee in its assessment of European NHRI accreditations.¹⁶ Civil Society Organisations may also submit information to the Sub-Committee on Accreditation up to four months prior to the hearing of any NHRI.¹⁷

18. The Sub-Committee on Accreditation undertakes a robust review of every NHRI that applies for accreditation or re-accreditation as a NHRI. At January 2012, there were 69 NHRIs accredited as fully compliant with the Paris Principles – called ‘A’ status institutions - and some 30 others were accredited as partly or non-compliant (‘B’ or ‘C’ status).¹⁸ Ordinary accreditation occurs once every five years. Where there is a major change in the structure of a NHRI Article 16.2 of the ICC Statute provides:

Where, in the opinion of the Chairperson of the ICC or of any member of the Sub-Committee on Accreditation, it appears that the circumstances of any NHRI that has been accredited with an ‘A’ status under the former Rules of Procedure may have changed in a way which affects its compliance with the Paris Principles, the Chairperson or the Sub-Committee may initiate a review of that NHRI’s accreditation status.¹⁹

In the situation of Ireland therefore, even if the IHRC were not up for periodic review in 2013, it is likely the Sub-Committee on Accreditation would undertake a special review as a result of the merger.

19. The Sub-Committee on Accreditation undertakes its assessment of each NHRI using an accreditation template.²⁰ The template – called the Statement of

<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/COMPILATION%20OF%20THE%20RULES%20AND%20WORKING%20METHODS%20OF%20THE%20SCA.doc>

¹⁶ See for example ICC Sub-Committee on Accreditation Report – October 2011, p. 4, “The SCA convened from 25 to 28 October 2011. OHCHR participated as a permanent observer and in its capacity as ICC Secretariat. In accordance with established procedures, regional coordinating committees of NHRIs were invited to attend as observers.” ICC Sub-Committee on Accreditation Report – October 2011. Available online at:

[http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2011%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2011%20-%20FINAL%20(with%20annexes).pdf)

¹⁷ Rules of Procedure of the ICC Sub-Committee on Accreditation 3.6.

¹⁸ Chart on the Status of National Human Rights Institutions, May 2012. Available online at:

[http://nhri.ohchr.org/EN/Documents/Chart%20of%20the%20Status%20of%20NHIs%20\(30%20May%202012\).pdf](http://nhri.ohchr.org/EN/Documents/Chart%20of%20the%20Status%20of%20NHIs%20(30%20May%202012).pdf).

¹⁹ The Statute of the ICC as amended at ICC25 (March 2012) is available online at

<http://nhri.ohchr.org/EN/News/Lists/News/Attachments/58/ICC%20Statute%20as%20amended%20at%20ICC%2025.pdf>

²⁰ Compilation of Rules and Working Methods of the ICC Sub-Committee on Accreditation (ICC Statute Provisions, Rules of Procedure, General Observations, Working Methods, Guidelines for Applications, Template of the Statement of Compliance)

<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/COMPILATION%20OF%20THE%20RULES%20AND%20WORKING%20METHODS%20OF%20THE%20SCA.doc>

Compliance with the Paris Principles - requests information on all of the aspects of the NHRI's mandate, functions and work. The Sub-Committee on Accreditation then considers the institution against the Paris Principles and General Observations. The reports of the Sub-Committee on Accreditation are considered and adopted by the ICC. The Sub-Committee on Accreditation ("SCA") notes that the General Observations:

Guide the SCA in its determination of new accreditation applications, reaccreditation applications or other review:

- i) If an institution falls substantially short of the standards articulated in the General Observations, it will be open for the SCA to find that it was not Paris Principle compliant.
- ii) If the SCA has noted concern about an institution's compliance with any of the General Observations, it may consider what steps, if any, have been taken by an institution to address those concerns in future applications. If the SCA is not provided with proof of efforts to address the General Observations previously made, or offered a reasonable explanation why no efforts had been made, it would be open to the SCA to interpret such lack of progress as non-compliance with the Paris Principles.²¹

20. The Sub-Committee on Accreditation considers not only the mandate, functions, resources and overall independence of a NHRI, but also its practice. For example, in a special review (under Article 16.2 of the ICC Statute) it noted that:

...the SCA is not satisfied that the [NHRI] has approached or conducted its functions in a manner that fulfils its mandate to protect and promote human rights. In particular, the SCA has not been provided with adequate information to confirm that the HRC has undertaken in-depth monitoring and rigorous investigation, nor provided critical advice to government or systematic follow up of its recommendations and findings on alleged human rights violations. Such activities together comprise a key part of its mandate.²²

The IHRC Statement of Compliance for its 2008 accreditation was 36 pages long, with annexes of all its Annual Reports and a range of substantive work in the previous period attached in support of the application.

²¹ Annex to the ICC Statute - Rules of Procedure for the ICC Sub-Committee on Accreditation, See e.g. ICC Sub-Committee on Accreditation Report – October 2011, p.5. Available online at [http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2011%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2011%20-%20FINAL%20(with%20annexes).pdf) .

²² ICC Sub-Committee on Accreditation Report – May 2011, p.22. Available online at: [http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MAY%202011%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MAY%202011%20-%20FINAL%20(with%20annexes).pdf) .

The IHRC's accreditation as an "A" status institution in 2003/4 was a major achievement for the State and the IHRC.²³ In 2008, the re-accreditation process saw greater scrutiny attached to the IHRC's functional independence. For example, in 2008, the Sub-Committee on Accreditation noted its "deep concern" at reports in 2008 that the IHRC was likely to have its budget cut.²⁴ It also raised concern about certain aspects of the Human Rights Commission Act 2000, such as the institutional links to the Department of Justice. The IHRC was in a position to argue that its independence was strongly asserted by it. Notwithstanding this, since 2008, Sub-Committee on Accreditation scrutiny has further increased and it may be that there are provisions of the 2000 Act which would now require revision, not least its silence on the process of appointment of Commissioners, including the absence of a prohibition on appointment of Government officials, and its accountability in certain areas to a Government Department. Its budget and staffing situation would also come under scrutiny.

21. It may further be noted that the formal procedure before the Sub-Committee on Accreditation is becoming more robust. The UN Secretary General in his 2011 Report to the Human Rights Council on the Accreditation Process noted "(b) The rigorousness of the review has increased. In that regard the Subcommittee on Accreditation bases its review on all the documentary evidence provided by the applicant NHRI, including the statement of compliance with the Paris Principles."²⁵ The reality of this increased scrutiny can be seen in the level of detail in reports of the Sub-Committee on Accreditation, which has significantly increased in 2010 and particularly 2011 compared to 2008 and 2009. Thus it can be expected that the Sub-Committee on Accreditation will rigorously scrutinise the mandate and functioning of the new body, including in comparison with the IHRC as the existing 'A' status institution.

NHRIs in International Human Rights Bodies

22. As a result of the importance attached to NHRIs by the United Nations, the Office of the High Commissioner for Human Rights has a dedicated section dealing with NHRIs – the National Institutions and Regional Mechanisms Section.²⁶ This section is tasked with supporting the ICC, including through acting as secretariat for the ICC, supporting the holding of NHRIs annual meetings (which take place in the United Nations Palais des Nations in Geneva) and the biennial meetings of the ICC. It

²³ The IHRC had a 'reserved' status for its "A" accreditation from 2002 to 2004 at which time the reservation was removed by the ICC.

²⁴ Sub-Committee on Accreditation Review on Ireland in ICC Sub-Committee on Accreditation Report – November 2008, available online at: http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/2008_November%20SCA%20Report.pdf

²⁵ Report of the Secretary General *Process currently utilised by the International Coordinating Committee for the Promotion and Protection of Human Rights to accredit national institutions compliance with the Paris Principles* A/HRC/16/77 3 February 2011. Available online at: <http://www.ohchr.org/Documents/Countries/NHRI/A-HRC-16-77.pdf>

²⁶ See <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>

also acts as a support in developing the capacity of NHRIs globally, and promoting their compliance with the Paris Principles.²⁷

23. NHRIs accredited with 'A' status are recognised within the United Nations, in particular, 'A' status NHRIs are explicitly referenced as independent interlocutors with the Human Rights Council and have specific participation rights.²⁸ In its Resolution 60/251 establishing the Human Rights Council, the UN General Assembly specifically urged the Council to work in close cooperation with NHRIs.²⁹

24. The UN General Assembly has also adopted biennial resolutions on NHRIs in recent years, reaffirming its support for NHRIs.³⁰ In 2011, the General Assembly adopted Resolution 66/169 co-sponsored by over 80 countries including Ireland, on NHRIs reaffirming the importance of developing such institutions and the contribution they make to promoting and protecting human rights.³¹

25. A number of UN Treaty Body General Comments, Recommendations and indeed Concluding Observations specifically refer to NHRIs. Some Treaty Bodies have developed formal guidelines on their working relationship with NHRIs.³² The Committee on the Elimination of Racial Discrimination (CERD) for example has formalised the role of NHRIs in the hearing process, allowing NHRIs to speak during the State hearing.³³ The Committee on the Elimination of Discrimination against Women has issued a statement on its relationship with NHRIs and the role of NHRIs in monitoring and protecting the rights of women.³⁴ The Committee on the Rights of

²⁷ See for example Report of the Secretary General *Process currently utilised by the International Coordinating Committee for the Promotion and Protection of Human Rights to accredit national institutions compliance with the Paris Principles* A/HRC/16/77 3 February 2011.

<http://www.ohchr.org/Documents/Countries/NHRI/A-HRC-16-77.pdf>

²⁸ See ICC Statute, Article 9; "Pursuant to Human Rights Council resolution 5/1, VII Rules of Procedure, rule 7(b), participation of NHRIs in the work of the Human Rights Council is based on arrangements and practices agreed upon by the Human Rights Commission including resolution 2005/74 of 20 April 2005. Resolution 2005/74, paragraph 11(a), permitted NHRIs that are accredited by the Sub-Committee on Accreditation to exercise participation rights in the Human Rights Commission and subsidiary bodies of the Commission."

²⁹ *Human Rights Council*, UN Doc A/Res/60/251, 3 April 2006.

http://www2.ohchr.org/english/bodies/hrcouncil/docs/a.res.60.251_en.pdf

³⁰ See for example, General Assembly Resolutions 63/172 of 18 December 2009 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/481/11/PDF/N0848111.pdf?OpenElement> and 64/161 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/471/49/PDF/N0947149.pdf?OpenElement> of 12 March 2010.

³¹ Available online at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/468/96/PDF/N1146896.pdf?OpenElement>

³² For example: General Comments 10, 16 and 19 of the Committee on Economic, Social and Cultural Rights; General Comments 1, 2, 5, 8, 9 and 11 of the Committee on the Rights of the Child; General Comment 31 of the Human Rights Committee; General Recommendations 27 and 33 of the Committee on the Elimination of Racial Discrimination; General Recommendation 28 of the Committee on the Elimination of All Forms of Discrimination against Women. See ICC Position Paper: the Treaty Body strengthening process: effective participation of National Human Rights Institutions, April 2012.

³³ See CERD Committee Rules of Procedure CERD/C/35/Rev.3.

³⁴ UN Doc. E/CN.6/2008/CRP.1, Annex II *Statement by the Committee on the Elimination of Discrimination against Women on its relationship with national human rights institutions*

the Child has elaborated working methods specifically encouraging NHRIs to provide reports and the Committee can meet with NHRIs at their request in private.³⁵ The Human Rights Committee has also invited NHRIs to submit reports and NHRIs may make oral statements to the Committee during the first morning meeting of every plenary session.³⁶

26. At the Council of Europe level, the IHRC has appeared before its Parliamentary Assembly Committees and before its Steering Committee on Human Rights in its role as Ireland's NHRI. The Commissioner for Human Rights also has a dedicated unit which liaises closely with NHRIs. Within the Council of Europe, NHRIs are increasingly recognised, as reflected in the call for the establishment of NHRIs in all Council of Europe Member States at paragraph 9(c) of the High Level Conference on the Future of the European Court of Human Rights (Brighton Declaration) in April 2012.³⁷ Obviously, the necessary independence of Equality bodies may similarly be a concern of the European Union.

27. Should the future Irish Human Rights and Equality Commission (IHREC) fail to achieve 'A' Status accreditation, it will be downgraded to a non-voting member of the ICC. It will lose its right to submit documents to and speak in the Human Rights Council. Its overall ability to engage with the international human rights mechanisms will be diminished as the reliability of its submissions to Treaty Bodies and Special Procedures Mandate Holders will be called into question. Such an occurrence could only be a negative reflection on the State's commitment to upholding human rights.

International Recommendations to Ireland on its NHRI

28. International bodies place considerable emphasis on states having an 'A' status NHRI. Ireland has received a number of recommendations from international human rights bodies relating to its NHRI (the IHRC). These are recommendations which Ireland is expected to follow as part of its obligations under each Treaty or Convention, in addition to the Human Rights Council's Universal Periodic Review Process.

29. In 2008, the Human Rights Committee, which is tasked with monitoring compliance with the International Covenant on Civil and Political Rights, recommended that the IHRC's independence and capacity be strengthened including by linking the Commission to the Oireachtas:

While welcoming the establishment of the Irish Human Rights Commission, the Committee regrets the limited resources of the Commission as well as its administrative link to a Government department. (art. 2)

³⁵ Committee on the Rights of the Child - Working Methods, VIII. Participation of non-governmental organizations and national human rights institutions in the activities of the Committees.

³⁶ Human Rights Committee - Working Methods, VIII. Participation of non-governmental organizations and national human rights institutions in the activities of the Committees.

³⁷ <https://wcd.coe.int/ViewDoc.jsp?id=1934031>

The State party should strengthen the independence and the capacity of the Irish Human Rights Commission to fulfil its mandate effectively in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles, General Assembly resolution 48/134), by endowing it with adequate and sufficient resources and linking it to the *Oireachtas* (Parliament).³⁸

30. In March 2010, the Committee on the Elimination of Racial Discrimination (CERD) expressed serious concern over budget cuts to the IHRC and Equality Authority and recommended that proper resources be provided:

The Committee expresses grave concern over the disproportionate budgets cuts to various human rights institutions mandated to promote and monitor human rights such as the Irish Human Rights Commission, the Equality Authority and the National Consultative Committee on Racism and Interculturalism (article 2)

The Committee, recalling its General Recommendation 33 (2009) on the Follow-Up to the Durban Review Conference, reiterates that responses to financial and economic crises should not lead to a situation which would potentially give rise to racism, racial discrimination, xenophobia and related intolerance against foreigners, immigrants and persons belonging to minorities. The Committee, therefore, recommends that the State party should ensure that, notwithstanding the current economic recession, enhanced efforts are made to protect individuals from racial discrimination. In light of this, the Committee recommends that budget cuts for human rights bodies should not result in the stifling of their activities to effectively monitor the protection of human rights and particularly racial discrimination. The State party should ensure that the functions of the bodies that have been closed are fully transferred and subsumed by the existing or new institutions.³⁹

31. The Committee Against Torture in its 2011 Concluding Observations on Ireland particularly recommended to the Government that the IHRC as the NHRI be accountable to the Oireachtas and that its financial autonomy be ensured:

Reduction of financial resources for human rights institutions

8. While welcoming the commitment by the State party to provide resources for human rights institutions, the Committee expresses concern at information received on the disproportionate budget cuts to various human rights institutions mandated to promote and monitor human rights, such as the Irish Human Rights Commission (IHRC), in comparison to other public institutions. Furthermore, while noting the

³⁸ Concluding observations of the Human Rights Committee – Ireland, 30 July 2008, CCPR/C/IRL/CO/3. Emphasis in original.

³⁹ Concluding observations of the Committee on the Elimination of Racial Discrimination - Ireland, CERD/C/IRL/CO/3-4. [Underline emphasis added]

decision to move IHRC from the Department of Community, Equality and Gaeltacht Affairs to the Department of Justice and Equality, the Committee regrets that IHRC does not have direct accountability to Parliament and lacks financial autonomy (art. 2).

The Committee recommends that the State party should ensure that the current budget cuts to human rights institutions, in particular the Irish Human Rights Commission, do not result in the crippling of its activities and render its mandate ineffective. In this regard, the State party is encouraged to strengthen its efforts in ensuring that human rights institutions continue to effectively discharge their mandates. Furthermore, the Committee recommends that the State party should strengthen the independence of IHRC by, inter alia, ensuring its direct accountability to Parliament and financial autonomy in line with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles).⁴⁰

It is of note that the Committee has specifically requested Ireland to report on this issue as part of the one-year follow-up process to Ireland's review under the Convention, in June 2012.

32. Similarly, in 2011, the issue of a strong and independent NHRI was highlighted by a number of countries during Ireland's consideration under the Universal Periodic Review Process:

106.7. Reinforce the independence and the capacity of the Irish Human Rights Commission to fulfil its mandate effectively in accordance with the Paris Principles (Moldova), by endowing it with adequate and sufficient resources (Ghana);

106.8. Ensure and strengthen the independence of its national human rights infrastructure (Egypt);

106.13. Work with all sectors to ensure the Human Rights and Equality Commission is an effective agent for enhancing the country's commitment to human rights (Australia);⁴¹

These recommendations were accepted by Ireland as part of the process. The IHRC recalls the commitment of States to implement the recommendations of the UPR process. The IHRC further notes that as the 'A' status NHRI, it appeared before the above-mentioned treaty bodies, as well as participating independently in the UPR process. The IHRC has also met with Special Procedures Mandate Holders who have visited Ireland.⁴²

⁴⁰ Concluding observations of the Committee against Torture – Ireland, 17 June 2011, CAT/C/IRL/CO/1, p.2. [Underline emphasis added]

⁴¹ Report of the Working Group on the Universal Periodic Review – Ireland, 21 December 2011, A/HRC/19/9.

⁴² For example, the Special Rapporteur on Extreme Poverty.

International Recognition of the Paris Principles

33. The Paris Principles are widely recognised as the benchmark for independence and functioning of national institutions even outside of the specific requirements for National Human Rights Institutions. In addition to the wide recognition and support for the Paris Principles outlined above from the United Nations and its Treaty Bodies, the Principles have also been recognised as essential for monitoring bodies under the Optional Protocol to the Convention Against Torture (OPCAT), Article 18 (4) provides:

When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights [Paris Principles].

Similarly, the Convention on the Rights of Persons with Disabilities, Article 33(2) provides:

States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

These instruments represent two of the newest international human rights instruments, and the specific reference in each demonstrates the increasing importance attached to the Paris Principles.

34. The European Commission Against Racism and Intolerance (ECRI) of the Council of Europe also recognises the importance of the Paris Principles, which are specifically referenced in their General Policy Recommendation on Specialised Bodies. The General Policy Recommendation sets out in similar terms to the Paris Principles the requirements of independence and accountability for such bodies:

Principle 5 -Independence and accountability

1. Specialised bodies should be provided with sufficient funds to carry out their functions and responsibilities effectively, and the funding should be subject annually to the approval of parliament.
2. Specialised bodies should function without interference from the State and with all the guarantees necessary for their independence including the freedom to appoint their own staff, to manage their resources as they think fit and to express their views publicly.
3. Specialised bodies should independently provide reports of their actions on the basis of clear and where possible measurable objectives for debate in parliament.

4. The terms of reference of specialised bodies should set out clearly the provisions for the appointment of their members and should contain appropriate safeguards against arbitrary dismissal or the arbitrary non-renewal of an appointment where renewal would be the norm.

...

Principle 7

...

3. Specialised bodies should ensure that they operate in a way which is clearly politically independent.⁴³

The IHRC welcomes the explicit reference to the Paris Principles in Head 8 but questions whether this assertion will be accepted by the Sub-Committee on Accreditation unless the concerns raised in these Observations are fully addressed.

⁴³ ECRI General Policy Recommendation No. 2 On Specialised Bodies To Combat Racism, Xenophobia, Antisemitism And Intolerance At National Level, Adopted On 13 June 1997.
http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n2/Rec02en.pdf

III. FACTORS IMPACTING INDEPENDENCE IN THE DRAFT LEGISLATION

35. While the IHRC welcomes the explicit reference to the Paris Principles in Head 8 of the proposed legislation, the IHRC expresses its concerns that a number of elements of the Bill, individually and cumulatively, may seriously impact on the independence of the new institution. In light of the overarching requirement for a NHRI to be independent and be seen to be independent, the IHRC has reviewed these elements under the present headings.

The areas of particular concern to the IHRC considered in detail below are:

- Link to Government Department,
- Financial Resources,
- Use of Regulations,
- Need for engagement with Civil Society,
- Leadership,
- Membership of Commission,
- Dismissal of Members of the Board
- Appointment of the Chief Executive/ Director and Staff,
- Audit and Accounts,
- Shared Services.

a. Links to Government Departments

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. (ICC Sub-Committee on Accreditation General Observations)⁴⁴

36. The IHRC notes with regret that despite the recommendations from international human rights bodies, noted above, and the consistent recommendation of the IHRC itself that it be linked directly to the Oireachtas rather than a Government Department, in reality, the new body will be linked closely to the Department of Justice. The IHRC welcomes the modest increased linkages proposed for the IHREC with the Oireachtas, as set out in Heads 12 and 27 regarding causing copies of its Strategic Plan and Annual Reports to be laid before the Oireachtas and Heads 14 and 20 which provide for power of dismissal of members and for the CEO/ Director to give an account of general administration to Oireachtas committees, respectively. However, the IHRC considers that the ongoing substantive links of the

⁴⁴ ICC Sub-Committee on Accreditation General Observations
<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/COMPILATION%20OF%20THE%20RULES%20AND%20WORKING%20METHODS%20OF%20THE%20OSCA.doc> (pp.8-12)

IHREC with a Government Department risks the actual independence and perceptions of independence of the IHREC.

37. The IHRC recalls the above-noted recommendations to Ireland by UN Treaty Bodies, including the Human Rights Committee and Committee Against Torture that the IHRC be linked to the Oireachtas instead of a Government Department. The ICC Sub-Committee on Accreditation also gives particular attention to this issue when reviewing applications for accreditation. In considering the accreditation of the Dutch Equal Treatment Commission (“ETC”), which was given ‘B’ Status, the Sub-Committee on Accreditation made the following recommendation:

Expresses concern regarding the lack of independence of the ETC from the Ministry of Justice with respect to sections 16.3 and 17.2 of its founding law, which leave the appointment, promotion and dismissal of the Centre’s members and staff mainly in the hands of the Ministry of Justice, also the entity in charge of authorizing and allocating the institution’s budget. The SCA refers to General Observations 2.2 “Selection and appointment of the governing body” and 2.9 “Guarantee of tenure for members of governing bodies.”⁴⁵

38. In addition to the concern expressed by the UN Treaty Bodies on this issue, the Sub-Committee on Accreditation, during consideration of the IHRC’s re-accreditation application in 2008, also suggested that the IHRC be linked to the Oireachtas rather than a Government Department,⁴⁶ and the continued linking of the new body to a Government Department is likely to draw the attention of the Sub-Committee on Accreditation at its upcoming accreditation of Ireland in 2013.

39. The Working Group on the merger had also recommended in its report that the new body report to an Oireachtas Committee (see paragraphs 4.39-4.40) rather than to the Department but that it remain administratively linked to the Department of Justice. It recommended that “the IHREC should be funded through a separate Vote under the Department of Justice” (see paragraph 4.36). This connection to one Government Department risks both the actual and perceived independence of the new body, including for the reasons set out in this paper and clearly has had a negative impact on the functioning of both the IHRC and the Equality Authority in the past. The IHRC expresses concern that Head 19 of the Bill limits what the Director may communicate to the Public Accounts Committee. It further expresses concern that Departmental control is increased from the Human Rights Commission Act 2000 in Heads 26 and 27. Over and above these, it notes in particular that the reality of the link between the future IHREC and Government Departments, particularly the

⁴⁵ ICC Sub-Committee on Accreditation Report March-April 2010, p. 10.

[http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MARCH%202010%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MARCH%202010%20-%20FINAL%20(with%20annexes).pdf)

⁴⁶ ICC Sub-Committee on Accreditation Report – November 2008, pp.7-8.

http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/2008_November%20SCA%20Report.pdf

Department of Justice, may not be fully apparent from the present draft legislation but is an operational reality.

Recommendations

40. The IHRC **recommends** that all links to Government Departments be removed from the legislation. The IHRC notes in this regard its comments below under headings b-c and f-j, which demonstrate the likely impact on independence of the retention of such a link. The IHRC **recommends** that the IHREC report to the Oireachtas in similar manner to the arrangements in place for the “A” Status Scottish Human Rights Commission, which exclusively reports to Parliament rather than to a Government Department. Alternatively, it recommends that it be accountable to a Government Department that is least likely to be subject to IHREC scrutiny and where any conflict of interest is least likely to arise. This should all be subject to the minimal linkages recommended in these observations.

b. Financial Resources

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. (Paris Principles)

2.6 Adequate funding should, to a reasonable degree, ensure the gradual and progressive realization of the improvement of the organization’s operations and the fulfilment of their 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. (Sub-Committee on Accreditation General Observations)

41. The IHRC is at present dependent on the Department of Justice for its funding; this funding being substantially the same year on year from 2003 and then reduced in budget cuts since 2008. This is an issue that goes to both independence and the requirement that a NHRI have financial autonomy. In 2008, the Sub-Committee on Accreditation noted its “deep concern” at reports in 2008 that the IHRC was likely to have its budget cut.⁴⁷ It is also of note that the severe funding cuts and staffing shortages have taken place after the IHRC had made its application for reaccreditation in mid-2008. As noted above, a number of UN Treaty Bodies have also expressed their concern at the reduction in budgets for Ireland’s NHRI and have made strong recommendations to Ireland in this regard.⁴⁸ The UN Secretary General in his 2011 report to the Human Rights Council on the NHRI Accreditation process called on States to provide funding to their NHRIs:

⁴⁷ ICC Sub-Committee on Accreditation Report – November 2008, p.8.
http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/2008_November%20SCA%20Report.pdf

⁴⁸ See for example Committee on the Elimination of Racial Discrimination, Committee Against Torture, quoted above.

The Subcommittee on Accreditation has emphasized the need for allocation by States of adequate resources to NHRIs, in order to ensure the effective discharge of their mandates. In this regard, States are encouraged to provide NHRIs with sufficient funds to perform the functions set out in their mandates.⁴⁹

42. Reports of the Sub-Committee on Accreditation demonstrate its concern regarding NHRIs who do not have sufficient budget to carry out their mandate and who do not have control and autonomy over their own budgets. For example, in relation to its review of the Human Rights Ombudsman of Bosnia and Herzegovina, the Sub-Committee on Accreditation recommended:

Financial systems should be such that an NHRI has complete financial autonomy. This should be a separate budget line over which it has absolute management and control. The Sub-Committee on Accreditation notes that the [Ombudsman] has recognized this and has stated that it intends on proposing legislative amendments to address this issue.⁵⁰

43. The Sub-Committee on Accreditation pays particular attention to lack of action by the State in providing adequate funding. In relation to the Senegalese Committee for Human Rights, the Sub-Committee on Accreditation noted that:

The SCA expresses concern for the lack of concrete support from the State in providing adequate funding to the [Senegalese Committee], and the SCA will consider the State's actions at its next session.⁵¹

44. The Sub-Committee on Accreditation also gives considerable focus to the issue of financial autonomy. For example, in its 2012 consideration of the NHRI of Mali ("CNDH"), the Committee observed:

⁴⁹ Report of the Secretary General *Process currently utilised by the International Coordinating Committee for the Promotion and Protection of Human Rights to accredit national institutions compliance with the Paris Principles A/HRC/16/77* 3 February 2011, p.7.

<http://www.ohchr.org/Documents/Countries/NHRI/A-HRC-16-77.pdf>

⁵⁰ ICC Sub-Committee on Accreditation Report – October 2010, p.5, emphasis added.

[http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2010%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2010%20-%20FINAL%20(with%20annexes).pdf)

⁵¹ ICC Sub-Committee on Accreditation Report – May 2011, p.23.

[http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MAY%202011%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MAY%202011%20-%20FINAL%20(with%20annexes).pdf) In its subsequent session in October 2011, the Sub-Committee on Accreditation noted "The SCA expressed concern for the lack of concrete support from the State in providing adequate funding to the CSDH. The SCA refers to Paris Principles B.2 and to General Observation 2.6. It noted also that during the process of the Universal Periodic Review of Senegal in February 2009, a request was made for the government to ensure the necessary financial, material, and human resources to allow the national human rights institution to fulfil its mandate." ICC Sub-Committee on Accreditation Report – October 2011, p.21.

[http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2011%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2011%20-%20FINAL%20(with%20annexes).pdf)

The funds for the operation of the CNDH are contained in the budget of the Ministry of Justice and the CNDH does not appear to have full and independent access, or management and control over their dispersal.

The SCA emphasizes that an NHRI should have financial autonomy as this assists in promoting independence of the NHRI by allowing it to freely determine its priorities and the allocation of its resources.

Funds should be allocated to a separate budget line item. Once funds have been allocated by Parliament, the funds should be released to the NHRI and it should exercise absolute management and control. Where accountability requirements are imposed by government, such regulation must not compromise the capacity of the NHRI to function independently and effectively. Further, the SCA emphasizes the importance of the State providing a level of funding that is adequate to ensure the gradual and progressive realization of the NHRI mandate. The SCA refers to Paris Principle B.2 and to its General Observations 2.6 on “Adequate funding” and 2.10 on “Administrative regulation”.⁵²

45. The IHRC recalls that despite numerous discussions with the Department of Justice on funding and staffing of the IHRC over the years, there have been relatively few positive outcomes, save the sanction of 6 additional staff in 2007 (for which no concurrent funding was made available). Since 2008 there have been cumulative budget cuts. The IHRC has no direct input into the estimates process but must mediate its requests through the parent Department. This level of Departmental interference with the IHRC’s autonomous control over its budget should not continue into the new body as to do so may seriously impair its independence and thus compliance with the Paris Principles.

Recommendations

46. The IHRC **recommends** that the new body must be provided with adequate financial resources to perform its statutory functions. The IHRC recommends that in keeping with the requirements of the Paris Principles for a NHRI to have financial autonomy, the IHREC should not be linked to the Department of Justice for the purposes of its budget.

47. The IHRC considers that it is in question whether the combined funding of the new body will be sufficient to allow it to discharge its proposed statutory functions. This it feels is a direct consequence of the budgetary cuts to both bodies of in excess of 40% since 2008. The IHRC recalls the numerous recommendations from international bodies in this regard. The IHRC **recommends** that specific arrangements are made to provide the new body with additional resources prior to its establishment.

⁵² ICC Sub-committee on Accreditation Report – March 2012, p13. Available online at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20MARCH%202012%20FINAL%20REPORT%20ENG%20WITH%20ANNEXURES.pdf>

48. In this regard, the IHRC welcomes the provision in Head 28 that the new body shall be provided with sufficient resources to ensure that it can carry out each of its functions effectively. In order to give this very welcome provision meaning, it **recommends** that a baseline resource per function be identified for the new body and that the State provide adequate resources to meet the need unless it can demonstrate to an Oireachtas committee why this should not occur. It suggests that this process should commence with the 2013 Estimates so that the new body does not commence its existence with inadequate resources.

49. A further negative impact on the resources available to the new body will arise in relation to legacy debts. The IHRC **recommends** that the new body not be encumbered by any legacy debts, noting that there may be other non-premises debts which need to be taken into account.

c. Head 5 – Regulations

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. (Sub-Committee on Accreditation General Observations)

50. The IHRC notes the inclusion of a provision in the legislation on regulations in Head 5. The Explanatory Memorandum to Head 5 states that:

It may be necessary to provide power to make regulations in relation to any thing that is stated in the Bill as to be prescribed, or where any thing is stated as to be done by regulations.

The IHRC recalls that the Paris Principles require a NHRI to be established pursuant to national legislation and notes the above provision of the Sub-Committee on Accreditation in this regard. This requirement is to ensure that the NHRI is not subject to undue interference in undertaking its functions, and has a sound legislative or constitutional basis. In its 2012 consideration of the NHRI in Indonesia ("Komnas HAM") the Sub-Committee on Accreditation stated:

Art. 81(5) of Law No. 39 provides that the position, duties, responsibilities and organizational structure of the Secretariat General of Komnas HAM shall be set Presidential Decree. The SCA notes that during Komnas HAM's 2007 review it recommended that these be established through Commission regulations and policies order to maintain independence and autonomy. It further notes that Komnas HAM not indicated what steps it has taken to address this recommendation. The SCA therefore not satisfied that Komnas

HAM has sufficiently addressed the recommendation it made in 2007. The SCA refers to its General Observation 2.10 on “Administrative regulation”.⁵³

51. While recognising that statutory instruments may supplement primary legislative policy aims, but mindful of the Sub-Committee on Accreditation recommendation, the IHRC **recommends** that this provision be either removed or be amended to stipulate that no such regulation may be made without the agreement of the IHREC, as in its present form it may risk compromising the independence of the IHREC.

d. Engagement with Civil Society

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. (Sub-Committee on Accreditation General Observations – emphasis added)

52. The IHRC notes with regret that there is no explicit provision relating to the IHREC’s engagement with Civil Society.⁵⁴ The Sub-Committee on Accreditation places particular emphasis on the need for NHRIs to actively engage with Civil Society. In relation to its review of the Austrian Ombudsman Board for example, the Sub-Committee on Accreditation stated:

In order to effectively fulfil their mandates, NHRIs must develop and maintain relationships and cooperation with civil society. The Sub-Committee on Accreditation encourages the [Austrian Ombudsman Board] to develop regular and systematic working relations with such organisations.⁵⁵

The IHRC **recommends** that in light of the importance of Civil Society to the promotion and protection of human rights in Ireland that an explicit reference to their being a stakeholder of the IHREC be included in the legislation.

⁵³ ICC Sub-committee on Accreditation Report – March 2012, p.19.

<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20MARCH%202012%20FINAL%20REPORT%20ENG%20WITH%20ANNEXURES.pdf>

⁵⁴ Although the Human Rights Commission Act 2000 did not include such a reference however, it is considered best practice and is an area of particular focus for the Sub-Committee on Accreditation.

⁵⁵ ICC Sub-Committee on Accreditation Report – May 2011, p.11. Available online at: [http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MAY%202011%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MAY%202011%20-%20FINAL%20(with%20annexes).pdf)

e. Leadership

53. The IHRC recalls that the Working Group on the merger report correctly identified the roles and relationship of Chief Executive and President/ Chair as being critical to the new body's successful operations.

54. The IHRC considers that these roles in the new body should continue to be at Chief Executive and President level. While acknowledging that the Director/ Chief Commissioner positions are terms employed by the Northern Ireland Human Rights Commission and some Commonwealth States, the IHRC considers that resorting to these titles could lead to the impression that these positions are to be diminished, noting the strong and authoritative positions denoted by the titles of President and Chief Executive, under Ireland's public sector norms. The IHRC notes that the term "Director" is currently employed by the IHRC for its divisional heads. The IHRC **recommends** that the titles of President and Chief Executive be retained for the IHREC.

f. Head 13 - Membership of the Commission

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.

(Sub-Committee on Accreditation General Observations)

55. The IHRC is concerned that the present appointment process for members of the board of the new body as suggested in Head 13, is not sufficiently independent, transparent and consultative and that there is an undue level of Government control in the process as set out in the legislation. While the IHRC accepts that the current provisions of section 5 of the Human Rights Commission Act 2000 do not stipulate the necessary selection process and may itself require amendment, it considers that the current proposal in the Heads of Bill may not meet Sub-Committee on Accreditation requirements. The IHRC sets out its concerns regarding Head 13 further below.

Government Representation on the Board

56. The IHRC notes with concern the absence of a provision prohibiting government representation on the board. The IHRC further notes that there is no requirement that members serve in their individual capacity. The IHRC **recommends** that the legislation specify that no civil servants or representatives of the

Government can serve on the board and further **recommends** that all board members are appointed in their *individual* capacity as required by the Sub-Committee on Accreditation, which states members must be selected “to serve in their own individual capacity rather than on behalf of the organization they represent”.⁵⁶ (See further below).

The Role of the Oireachtas

57. The IHRC notes that the procedure for, and appointment of, board members for NHRIs is considered crucial for its independence and is subject to intense scrutiny by the Sub-Committee on Accreditation. The IHRC welcomes the involvement of the Oireachtas in the selection process, and the appointment by the President, rather than by a Government Minister with whom the ultimate decision now vests. However, the IHRC **recommends** that the Oireachtas be given a stronger role in the appointments process, for example, through confirming the independent panel and interviewing nominated individuals in an Oireachtas Committee and through agreeing the list of such nominated individuals.

Broad Consultation Process in application, screening and selection

58. The ICC Sub-Committee on Accreditation places considerable emphasis on the need for a “broad consultation and/or participation in the application, screening and selection process”.⁵⁷ For example, in relation to the Ombudsman of Costa Rica, the Sub-Committee on Accreditation noted that “the selection process does not involve a broad consultation with civil society”.⁵⁸ The UN Secretary General in his 2011 Report to the Human Rights Council noted that:

The Subcommittee on Accreditation continues to attach great importance to a transparent and open process for appointing NHRI members, with a broad participation of all national stakeholders, including civil society organizations. This process is a key guarantee of NHRI independence, diversity and accessibility.⁵⁹

The IHRC considers that the present proposed process may not include a sufficiently broad consultation with civil society and other stakeholders. The IHRC **recommends** that the legislation specifically provide for a consultation process in the screening and selection of board members.

⁵⁶ ICC Sub-Committee on Accreditation General Observations

<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/COMPILATION%20OF%20THE%20RULES%20AND%20WORKING%20METHODS%20OF%20THE%20OSCA.doc> (pp.8-12).

⁵⁷ ICC Sub-Committee on Accreditation Report – October 2011, pp.8-9, recommendations to Ombudsman of the Republic of Bulgaria and Commission for Protection against Discrimination of the Republic of Bulgaria (both ‘B’ status). The Sub-Committee on Accreditation also made this recommendation to Macedonia, p.10 and Egypt, p. 13. Emphasis added. Report Available online at [http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2011%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2011%20-%20FINAL%20(with%20annexes).pdf)

⁵⁸ Ibid, p. 13.

⁵⁹ Report of the Secretary General *Process currently utilised by the International Coordinating Committee for the Promotion and Protection of Human Rights to accredit national institutions compliance with the Paris Principles A/HRC/16/77* 3 February 2011, p.8. <http://www.ohchr.org/Documents/Countries/NHRI/A-HRC-16-77.pdf>

The Selection Panel

59. The current provisions in relation to the composition of the selection panel are also somewhat vague. There is insufficient detail at present regarding the nature of the selection panel, who are appointed directly by the Government. Any lack of independence of the selection panel risks potentially tainting the entire process and should be avoided.

60. The IHRC **recommends** that Head 12(3)(a) must explicitly refer to the panellists being independent. There should not be Government or civil service representation on the panel. In addition, the IHRC **recommends** that the Oireachtas, and not the Government, be responsible for appointing selection panels.

The Selection Process

61. The IHRC notes that under Head 13, the details of the selection criteria for filling vacancies and the process to be used by the Selection Panel will be published at the same time as applications are invited. The Sub-Committee on Accreditation has criticised selection processes that are not set out in legislation or binding instruments.⁶⁰ In relation to the accreditation of the Canadian Human Rights Commission for example, the Sub-Committee on Accreditation noted that the selection criteria for assessing potential candidates was introduced but not included in legislative or regulatory provisions or binding administrative guidelines.⁶¹ Similarly, in relation to the Senegalese Committee for Human Rights, the Sub-Committee (“SCA”) stated:

The SCA noted with concern the absence of a transparent and pluralistic process for the nomination of members. The SCA highlighted the requirement for a clear, transparent and participatory selection process that promotes the independence of, and public confidence in the senior leadership of a national human rights institution. It encourages formalisation of the selection process in legislation, regulation or binding administrative guidelines as appropriate. The SCA refers to Paris Principle B.1 and to General Observation 2.2 ‘Selection and appointment of the governing body.’⁶²

In its 2012 review of the NHRI in Malawi (“MHRC”), the Sub-Committee on Accreditation found:

⁶⁰ See for example in relation to the accreditation of the Zambia NHRI, ICC Sub-Committee on Accreditation Report – October 2011, p.19, and Senegal, *ibid.* p. 21.

[http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2011%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2011%20-%20FINAL%20(with%20annexes).pdf)

⁶¹ ICC Sub-Committee on Accreditation Report – May 2011.

[http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MAY%202011%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MAY%202011%20-%20FINAL%20(with%20annexes).pdf)

⁶² ICC Sub-Committee on Accreditation Report – October 2011, p. 21.

[http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2011%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2011%20-%20FINAL%20(with%20annexes).pdf)

The procedure for assessment and selection of candidates is not clearly reflected in the legislation or officially documented. Additionally, the role of the Law Commissioner and the Ombudsman as the Selection Committee for members is incompatible with their role as ex officio members of the MHRC.

The SCA emphasizes the requirement for a clear, transparent and participatory selection process that promotes merit based selection and ensures pluralism. Such a process promotes the independence of, and public confidence in, the senior leadership of a national human rights institution.⁶³

The IHRC **recommends** that the selection criteria be published in advance and subject to public and civil society consultation and scrutiny. Ideally, the legislation setting out the selection criteria and the process of independent appointment would be passed by the Oireachtas and then applied to applications to the IHREC.

Independence of the Selection Process

62. The IHRC is concerned at the inclusion in sub-section (5) of the terms “and the Government agrees” and “with the agreement of the Government”:

(5) A person shall not be recommended for appointment by the President to be a member of the Commission unless it appears to the Selection Panel and the Government agrees that the person is suitably qualified for such appointment by reason of his or her possessing such relevant experience, qualifications, training or expertise as, in the opinion of the Selection Panel and with the agreement of the Government, is or are appropriate, having regard, in particular, to the functions conferred on the Commission by this Act. [emphasis added]

The IHRC considers that this provision may impact on the independence and impartiality of the selection panel and of the appointments process. This provision also appears to be somewhat in conflict with sub-section (6) which provides “[t]he Government shall accept the recommendation of the Selection Panel.” In relation to its 2010 review of Algeria, the Sub-Committee on Accreditation noted that “while the legislation establishes a selection committee to consider the appointment of members, the final selection and the appointment of members still remains with the President of the Republic”.⁶⁴ The IHRC **recommends** that the above-underlined provisions relating to the requirement of Government agreement be removed. The IHRC notes in this regard the role of the Oireachtas in confirming appointments and the provisions of sub-section (6).

⁶³ ICC Sub-committee on Accreditation Report – March 2012, p.20.

<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20MARCH%202012%20FINAL%20REPORT%20ENG%20WITH%20ANNEXURES.pdf>

⁶⁴ ICC Sub-Committee on Accreditation Report – October 2010, p.10.

[http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2010%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2010%20-%20FINAL%20(with%20annexes).pdf)

Security of Tenure of Members

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. (Paris Principles)

63. Particularly in light of the provision in sub-section (11) of Head 13 regarding 3 or 5 year terms for the first board, the precise term of appointment of board members into the future appears somewhat unclear. The IHRC recalls the requirements for security of tenure of members of NHRIs in the Paris Principles, noted above, and **recommends** in this regard that sub-section (7) be amended to provide for a *specific* term for each member of the Commission.

64. The IHRC further notes that the criteria to be applied by the Selection Panel under sub-section (11) relating to the board members who shall be appointed for either three or five years is vague. The IHRC **recommends** that the criteria for this selection be clearly set out in advance and be subject to public scrutiny.

65. The IHRC understands that provision for fees for Commissioners, currently absent, will be introduced into the legislation by the Department.⁶⁵

Qualifications of Members of the Board

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:

...

e) Selecting members to serve in their own individual capacity rather than on behalf of the organization they represent.

(Sub-Committee on Accreditation)

66. The IHRC is concerned that the above provisions of the Heads of Bill relating to the type of person to be appointed to the board. The current draft legislation provides:

(10) The Selection Panel and the Government, in **recommending** any appointments under this section, shall have regard to the need to ensure that the members of the Commission broadly reflect the nature of Irish society,

⁶⁵ The IHRC notes that the Sub-Committee on Accreditation regularly highlights the issue of NHRI Members being full-time, and that this recommendation is contained in the General Observations (point. 2.8). ICC Sub-Committee on Accreditation General Observations <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/COMPILATION%20OF%20THE%20RULES%20AND%20WORKING%20METHODS%20OF%20THE%20OSCA.doc> (pp.8-12)

including the recommendation of persons as appear to the Selection Panel to be persons who have knowledge of, or experience in, issues relating to the experience and circumstances of groups who are disadvantaged by reference to gender, civil status, family status, sexual orientation, religion, age, 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.

67. While the IHRC welcomes the acknowledgement of the importance of the groups identified, it considers that the list may be overly restrictive in only including the grounds of discrimination listed in the Equality legislation and hence not explicitly including human rights expertise. The IHRC **recommends** that the above provision be amended to provide that persons on the board should have recognised experience, however gained, in the field of human rights and/or equality. Furthermore the IHRC **recommends** that all members of the board must be recognised as independent and act in their independent capacity (not representing any particular group or organisation). In this regard the IHRC recalls the provisions of the General Observations of the Sub-Committee on Accreditation that members should be selected “to serve in their own individual capacity rather than on behalf of the organization they represent.”⁶⁶

Board Vacancies

68. The IHRC notes that the provision in sub-section (9) that the Commission may act notwithstanding vacancies. The IHRC **recommends** that any such provision must be accompanied by a requirement that vacancies on the board be filled via the appointment process as soon as possible, and at the request of the IHREC.

g. Head 14 – Dismissal of Members

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.

(Sub-Committee on Accreditation General Observations)

69. The IHRC is concerned that the present provisions allowing for dismissal of board members of the IHREC in Head 14 are overly broad and insufficiently precise

⁶⁶ ICC Sub-Committee on Accreditation General Observations
<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/COMPILATION%20OF%20THE%20RULES%20AND%20WORKING%20METHODS%20OF%20THE%20OSCA.doc> (pp.8-12)

to ensure security of tenure and that the terms ‘unable or unfit’ in subsection (2)(b)(iii) of Head 14 are undefined. It is furthermore unclear who will determine ability and fitness in this context. The Sub-Committee on Accreditation has commented that there must be an independent and objective process by which such assessments are carried out. For example, in assessing the New Zealand Human Rights Commission in 2011, the Sub-Committee stated:

The enabling law broadly defined the grounds for dismissal, section 7(2) providing that a Commissioner can be removed from office for inability to perform the functions of the Commissioner office for various reasons including “incompetence” or “misbehaviour”. These terms are not defined. In addition, the enabling law makes no provision for an independent and objective process by which ‘incompetence’ and ‘misbehaviour’ is assessed.

The SCA encourages the HRCZ to advocate for the inclusion of appropriately defined grounds for dismissal and an independent and objective dismissal process. It draws the HRCZ’s attention to General Observation 2.9 on Guarantees of Tenure.⁶⁷

70. The IHRC **recommends** that the terms ‘unable or unfit’ in Head 14 be defined in the legislation and that the decision in this regard rests with a majority of the Commission

71. Sub-Section (2)(b)(iv) of Head 14 is particularly troubling in that it seems to allow for a power to remove a member of the board for any reason. The IHRC **recommends** that this provision be removed.

72. The IHRC welcomes the fact that the Oireachtas will have the ultimate power of decision on removal of members, but **recommends** that this should only be on the recommendation of the Chief Commissioner of the IHREC pursuant to a Commission resolution.

h. Heads 17 and 21 – Chief Executive/ Director and Staff of the IHREC

73. The IHRC notes the provision in the legislation prescribing the appointment of a CEO to the new body in Head 17 and the provision stating that existing staff of the IHRC and Equality Authority will transfer to the new body, and further that provision may be made for junior civil servants to work in the IHREC under Head 21. The IHRC recalls in this regard the Paris Principles and that recommendation of the Sub-Committee on Accreditation that :

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

⁶⁷ ICC Sub-Committee on Accreditation Report – May 2011, available online at: [http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MAY%202011%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MAY%202011%20-%20FINAL%20(with%20annexes).pdf) , p.17.

of the Government and not be subject to financial control which might affect its independence. (Paris Principles)

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. (Sub-Committee on Accreditation)

2.7 Staff of an NHRI:

As a principle, NHRIs should be empowered to appoint their own staff.
(*Sub-Committee on Accreditation General Observations*)

74. In its May 2011 review of the National Human Rights Commission of Bangladesh, the Sub-Committee on Accreditation noted the following:

The [Bangladesh Commission] has advised that the Secretary-General and two senior officers have been seconded from the Public Service. While the SCA understands that this is permissible pursuant to s.23(4) of the Act, it notes that such an arrangement may, or may be seen to, compromise the independence of a national human rights institution. The SCA refers to General Observation 2.4 Staffing by Secondment.⁶⁸

75. In assessing the National Human Rights Commission of Mauritania (“NHRC”) as ‘B’ Status in 2009, the Sub-Committee on Accreditation (“SCA”) noted that:

Article 27 of the Executive Order stipulates that the Government provides the NHRC with the necessary administrative staff. This impairs the ability of the NHRC to hire its own staff. The Secretary General is appointed by the President of the Republic. The SCA refers to General Observation 2.4 “Staffing by secondment” and 2.7 “Staff of an NHRI”.⁶⁹

76. The Sub-Committee on Accreditation also highlighted its concerns in relation to secondment and the ability of the NHRI to recruit its own staff in relation to Chad (2009, ‘B’ status),⁷⁰ Congo (2010, ‘B’ status),⁷¹ Algeria (2010, ‘B’ status),⁷² and in recommending the downgrading of the Senegalese Committee for Human Rights

⁶⁸ ICC Sub-Committee on Accreditation Report – May 2011.

[http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MAY%202011%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MAY%202011%20-%20FINAL%20(with%20annexes).pdf)

⁶⁹ ICC Sub-Committee on Accreditation Report – March 2009, p.4.

http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/2009_March%20SCA%20REPORT.pdf

⁷⁰ Ibid, p.7.

⁷¹ ICC Sub-Committee on Accreditation Report – October 2010, p.4

[http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%202010%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%202010%20-%20FINAL%20(with%20annexes).pdf)

⁷² Ibid., p.10. The Sub-Committee on Accreditation noted that “senior-level staff are appointed by the President of the Republic which undermines the principle of institutional independence”.

from 'A' to 'B' Status in 2011.⁷³ In its assessment of the Belgian Centre for Equal Opportunities and Opposition to Racism as 'B' status, the Sub-Committee on Accreditation noted that the governing body was not vested with the authority to appoint all staff and determine the required skills and human rights expertise and that this provision may compromise its independence.⁷⁴ In its 2012 assessment of the NHRI in Mali ("CNDH"), the Sub-Committee noted:

The CNDH has advised that its staff is seconded from the Ministry of Justice. The SCA notes that such an arrangement may, or may be seen to, compromise the independence of a national human rights institution.

An NHRI should have the capacity to determine staffing requirements based on its determination of organizational priorities and should be able to hire its own staff accordingly.

The SCA refers to General Observation 2.4 on "Staffing by secondment".⁷⁵

77. In relation to The Netherlands Equal Treatment Commission, in 2010 the Sub-Committee on Accreditation:

[e]xpress[ed] concern regarding the lack of independence of the [Equal Treatment Commission] from the Ministry of Justice with respect to sections 16.3 and 17.2 of its founding law, which leave the appointment, promotion and dismissal of the Centre's members and staff mainly in the hands of the Ministry of Justice, also the entity in charge of authorizing and allocating the institution's budget.⁷⁶

78. Thus it may be seen from the above that the Sub-Committee on Accreditation has given particular focus to independent recruitment by the NHRI of all of its own staff and has repeatedly highlighted the impact on independence of seconded or Government appointed staff and this has been a significant factor in the downgrading or non-upgrading of a number of NHRIs.

79. The IHRC further recalls the recommendation of the Minister's Working Group on the merger that:

⁷³ ICC Sub-Committee on Accreditation Report – October 2011, p.21.

[http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2011%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%2011%20-%20FINAL%20(with%20annexes).pdf)

⁷⁴ ICC Sub-Committee on Accreditation Report – March-April 2010, p.11.

[http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MARCH%2010%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MARCH%2010%20-%20FINAL%20(with%20annexes).pdf)

⁷⁵ ICC Sub-committee on Accreditation Report – March 2012, 13-14.

<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20MARCH%202012%20FINAL%20REPORT%20ENG%20WITH%20ANNEXURES.pdf>

⁷⁶ ICC Sub-Committee on Accreditation Report – March-April 2010, p.10.

[http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MARCH%2010%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20MARCH%2010%20-%20FINAL%20(with%20annexes).pdf)

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.

It also recalls the Working Group's recommendation that in the future, "new staff at senior level should be recruited by the IHREC directly through an open competition". The IHRC considers that particularly for re-accreditation purposes, the appropriate time for all senior appointments must be the establishment of the new Commission as successor to the current "A" status NHRI.

80. The IHRC **recommends** that Heads 17 and 21 be reconsidered. To ensure fidelity to the Paris Principles, the appointment of a CEO should be by the new Commission, in an open and transparent competitive process as ideally should the appointment of senior staff not independently recruited by the 'A' status institution.

81. The IHRC notes that in order to comply with the Paris Principles, staff of the new body must be appointed by it alone. The IHRC further considers that the reference to appointments and terms and conditions requiring Ministerial consent may impact on the actual independence and perceived independence of the new body. It **recommends** that, if necessary, this consent be provided as a formality once the IHRC takes a decision to recruit appropriate staff.

Common Staff Pool

82. The IHRC recalls the requirement of independent and non-seconded staffing. While it considers that the provisions in relation to the common staff pool for clerical and administrative staff (Head 21 (c)), entered into at the decision of the IHREC, is not necessarily at odds with the Paris Principles *per se* (although arguably against the spirit of the Principles), the IHRC has concerns in relation to the wording of the provision. This provision should not serve to limit the staff to be brought in by the IHREC to being clerical and administrative staff only and should further not be limited to staff from the Department of Justice and Equality only (noting earlier concerns regarding linkage to a Government Department), but should allow staff from a variety of administration and specialist regulatory bodies and from the wider public service to be available to the IHREC as this would offer a greater potential for filling of vacancies on a short term basis. The clause must be explicit that the control over the recruitment and selection of staff remains with the Commission and that if adequate staff cannot be sourced through the Public Service, that the IHRC be given power to independently recruit its staff. The IHREC must be allowed to specify the type of staff required and to interview applicants. The IHRC **recommends** that the clause in relation to common pool of staff be explicit as regards control over the process – including selection and appointment – remaining with the IHREC.

Staffing Levels

83. Sufficient staffing to fulfil the mandate of a NHRI is crucial to its functioning. The IHRC has repeatedly highlighted that there is a vital need for additional staff to fill current vacancies. Without additional staffing, there is a serious risk that the new

body will start its existence with an insufficient number of staff to undertake its statutory functions.

84. The IHRC notes the Working Group on the proposed merger's report includes the recommendation at paragraph 4.36, "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". The IHRC considers however that in order to ensure that the new body is able to undertake its statutory functions a staffing review should occur prior to the enactment of new legislation. Simply drawing attention to the fact that a future staffing review will occur will, in its view, not suffice to avoid re-accreditation risks.⁷⁷

85. An ongoing monitoring of the adequacy of staff resources during the merger phase should be the required approach. IHRC experience (2002 to 2007) has shown that a low initial staffing contingent tends to remain static despite reasoned requests for sanction for additional numbers and funding to meet the pay costs involved. This is before any moratorium or current employment control framework restrictions are taken into account. In addition, the IHRC has consistently requested to be allowed to fill existing vacancies. Such a sanction requirement is contrary to the Paris Principles and is highlighted by the Sub-Committee on Accreditation in reviewing NHRIs. Despite recent recruitment being sanctioned to take place in other Statutory bodies, sanction has not been given to the IHRC even for interim staffing during 2012. This experience highlights the risk of the proposed review of staffing taking place following the enactment of legislation. The IHRC strongly **recommends** that staffing shortfalls be addressed immediately before the new body comes into existence. This will also assist in meeting the Paris Principles stipulations on independent staff recruitment. The IHRC notes the pluralism requirement of the Sub-Committee on Accreditation in relation to staffing.⁷⁸

86. The IHRC wishes to particularly highlight that the above issues in relation to financial and human resources demonstrate the risks posed by linkages between a NHRI and a Government Department. The fact that the IHRC as the NHRI had to repeatedly – and to little avail – seek even small additional resources or sanction for staff (even where its reduced budget would have been sufficient to cover such additional staff) demonstrates the need for the new body to be separated from the Department in order to meet the Paris Principles requirement of autonomy in these areas.

⁷⁷ In this regard, the Commission wishes to recall that prior to the severe budget cuts received by both bodies in 2008, the Equality Authority had approximately 51 staff, while the IHRC had 22 personnel. The staffing shortages at the IHRC have been repeatedly highlighted to the Department. During the Working Group's mandate, the expectation was that the then-sanctioned staff levels of 35 for the Equality Authority and 17 for the IHRC would be available to the new body. This is before any new functions would be added. These numbers have fallen further insofar as uncertainty is causing people to leave either organisation. The IHRC currently has 7 staff working for it. The loss of expertise and staffing resources is a very real concern.

⁷⁸ The IHRC notes that it has not been able to recruit staff since 2008 and that in relation to pluralism in staffing issues may arise under the Employment Equality Acts.

i. Head 26 – Audit and Accounts

87. The IHRC notes that Head 26 paragraph 1 adopts two provisions from the Employment Equality Act 1998 which would signal a significant eroding of administrative independence for the new body. These provisions are not present under section 16 of the Human Rights Commission Act 2000 which provide that the IHRC must keep accounts in a form approved by the Minister with the consent of the Minister for Finance. The proposed provisions appear to cede significant additional control to the Minister regarding the form of reports to be provided regarding estimates of expenditure and also the providing to the Minister of ‘any information which the Minister may require’ regarding estimates, proposals or plans. The IHRC **recommends** that in order to comply with the Paris Principle requirements of autonomy in budget control, the new body must not be subject to audit by a Government Department, but rather by the Comptroller and Auditor General, as is the case currently for the IHRC under section 16(2) of the Human Rights Commission Act 2000.

j. Shared Services

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.
paragraph 2.10 of the Sub-Committee on Accreditation General Observations

88. The IHRC notes that there is no reference to the issue of shared services or integrated systems in the present draft legislation. However, given the importance of these issues to the future independence of the IHREC, the IHRC highlights its concerns in this area. Retention of control over services is essential to ensure the independence of the new body. Any “regulation” by Government must be sensitive and must not equate to “control” by Government.

89. The IHRC is concerned that proposals that financial services including payroll and IT services be outsourced would, in the view of the Commission, raise Sub-Committee on Accreditation risks unless the recommended outsourcing was still controlled by the new body and was to companies or organisations other than Government. Otherwise these proposals regarding outsourcing may not be sufficient to meet the requirements of paragraph 2.10 of the General Observations in demonstrating that the new body is fully independent of Government. An adequate staff complement must support these functions being independently retained by the IHREC, particularly in relation to payroll.

90. The IHRC draws attention to the need to retain full control over all budgeting, spending, authorisation, drafting of financial controls and record-keeping being retained by the new body. In this regard, paragraph 2.6 of the General Observations

is quite clear: “complete financial autonomy” is to be understood as meaning “a separate budget line over which it has absolute management and control.”⁷⁹ Currently the IHRC has some outsourcing arrangements subject to review by its Finance, Risk, Audit and General Purposes Committee and subject to External Audit by the Comptroller and Auditor General’s Office. To satisfy paragraph 2.6 of the General Observations, this system, with adequate staffing, will need to be continued in the new body.

91. The IHRC also draws attention to the need for the IHREC to have an independent Human Resource function if it is to manage and self-recruit its staff. This is particularly important when there are such significant organisational changes planned which bring significant challenges. If the human resources function were to be assumed by the Department, serious questions of independence would arise. An adequate staff complement must support these functions being independently retained by the IHREC.

92. Retention of independent technology and case management is, in the view of the IHRC, an essential element in ensuring that the new body both is independent and is seen to be independent by the public insofar as the key question again is whether “such regulation [will] not compromise the NHRI’s ability to perform its role independently and effectively” under the Sub-Committee on Accreditation General Observations. Even with assurances that a fully separate confidential ICT system and back-up can be maintained on behalf of the new body, the public perception may be very different. This could be a matter raised at the re-accreditation process. The IHRC **recommends** that the legislation specifically include a statement of independence in relation to IT and case management systems.

93. The IHRC casework management system holds sensitive and confidential details of communications and information provided by individuals who may be bringing complaints against the State and its organs to the IHRC. Such complaints may involve organs of the State under the “Justice family” including Gardaí, Prisons, Immigration etc. Some of these complaints may become litigation files, which raises concern regarding solicitor/client confidentiality. If those complaints were to be stored and retained by the same parent Department there may be perceptions of dependence rather than independence. Any guidelines issued by the Law Society of Ireland in relation to safeguarding the confidentiality of client records and communications would also have to be adhered to. The IHRC **recommends** that the new body maintain use of a casework package endorsed by the Law Society) entirely separate and completely independent from any Government Department.

⁷⁹ ICC Sub-Committee on Accreditation General Observations
<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/COMPILATION%20OF%20THE%20RULES%20AND%20WORKING%20METHODS%20OF%20THE%20OSCA.doc> (pp.8-12).

IV FACTORS IMPACTING POWERS IN THE DRAFT LEGISLATION

a. Head 30 - Powers and functions in relation to enforcement and compliance

94. While the IHRC welcomes the broad scope of functions and powers included under Head 30, it is deeply concerned that in reality the ability to address breaches of human rights, and equality duties may be undermined by the restricted definition of human rights in Heads 30 to 36.

Definition of Human Rights

95. Head 30 sets out the compliance and enforcement functions of the IHREC. In this regard it is to be regretted that there was not closer consultation with the IHRC in relation to drafting this section of the Heads of Bill. The IHRC has previously made proposals for the strengthening of its legal functions and improving the manner in which complaints of a breach of human rights may be addressed, which experience could have most helpfully informed the drafting of the present Heads of Bill.

96. As noted earlier in these Observations, Head 30 proposes a much narrower definition for “human rights” than is set out under Head 3. This separate definition of human rights is proposed to apply to the powers and functions of the IHREC in relation to what is termed “enforcement” and “compliance” namely;

- Codes of practice;
- Provision of legal and other assistance to individuals (including advice and information);
- Instituting legal proceedings in its own name;
- Preparing guidelines for best practice in relation to human rights and equality;
- Inquiries;
- Non discrimination notices;
- To appear as amicus curiae; and,
- To examine a matter and issue a reasoned opinion.

The narrow definition of human rights would also circumscribe the Human Rights and Equality duty of public bodies set out under Head 36.

97. The essential distinction between this limited definition of human rights and that in Head 3 is that the narrower definition set out under Head 30 requires that the human rights in question would have “force of law in the State”. In other words such rights would need to be enshrined in legislation or at a constitutional level, before they would be applicable to the functions and powers listed above. In practical terms, the IHREC would be significantly hampered in protecting human rights, as it could only directly encompass consideration of the Constitution, the European Convention on Human Rights (and even then as incorporated at a sub-constitutional level into Irish law by the European Convention on Human Rights Act 2003) and existing domestic equality legislation. While there is no doubt that many of the rights enshrined in international treaties and conventions to which the State is a party are

reflected in domestic law, there are many more that are not. In addition, human rights are an evolving concept that may change over time, and current legislation often does not reflect those changes in the future. As the State has a practice of not directly incorporating international treaties into national law, this would effectively exclude the following treaties and conventions from consideration:

- International Covenant on Economic, Social and Cultural Rights;
- International Covenant on Civil and Political Rights;
- Convention on the Elimination of all Forms of Racial Discrimination;
- Convention on the Elimination of Discrimination Against Women;
- Convention on the Rights of the Child;
- Convention Against Torture and other Cruel, Inhuman and Degrading Treatment;
- Convention relating to the Status of Refugees;
- Revised European Social Charter;
- European Convention for the Prevention of Torture and Inhuman and degrading Treatment or Punishment.

The inability of the IHREC to respond to alleged breaches of the above fundamental rights protections would significantly undermine the credibility of the new body.

98. Currently the definition of “human rights” under the Human Rights Commission Act 2000, is a unified definition across all the functions of the Commission, other than section 11. This unified definition makes clear the broad mandate of the IHRC, and avoids any confusion on the part of the public in that regard. The IHRC considers that the proposed definition under Head 30 would signify a very substantial diminution in the current legal functions of the IHRC, insofar as the definition of human rights under section 2 of the Human Rights Commission Act, currently makes no reference to “force of law in the State”.

99. While it is accepted that in providing legal assistance or taking proceedings in the name of the IHREC (B vii), only those rights that are properly justiciable may form the basis of an application to Court (and indeed the Courts themselves strictly regulate the matters that may be adjudicated on), it is unclear why it is only such justiciable rights that may be engaged in the context of giving guidance on best practice; conducting inquiries, and providing information on human rights and equality to members of the public. Indeed, it is because such rights may be of limited justiciability before the Irish Courts that the IHRC was given those powers and why the IHREC should be in a position to promote adherence to such rights through other non-litigation means. The IHRC recalls in this regard that the Paris Principles require that a NHRI have as broad a mandate as possible, and it is highly questionable whether the proposed definition of human rights under Head 30, insofar as it applies to all compliance functions of the IHREC, meets Paris Principles requirements.

100. The IHRC considers that the present restrictive definition of ‘human rights’ in Head 30 may unduly limit the ability of the IHREC to undertake its functions. The IHRC **recommends** that in order to avoid restricting the remit of the IHREC to

consider a broad range of human rights standards in its work, that there be one unified definition of human rights under the Bill, and that any modification of that definition would only apply to specific functions where the IHREC has clear powers of legal enforcement.

Clarity in Services available to the Public

101. There are a significant number of powers and functions listed under Head 30 B, some of which are then set out in more detail in Heads 31-36. The range of functions under Head 30 constitute the functions pursuant to which members of the public will engage with the IHREC. It is therefore important that there is absolute clarity for persons contacting the IHREC in relation to what response or assistance they can expect to receive. Head 30(C) states that the options in Head 30(B) should be seen as a 'sliding scale' of options, and further that the IHREC should consider whether an issue can be resolved by mediation before taking a decision to institute legal proceedings under (vii) (own name proceedings). While such an approach is both practical and functionally efficient, it may nonetheless cause confusion for the general public as to how they can have their complaint addressed. While inevitably not all complaints received will be valid or credible, it is of paramount importance that every individual that approaches the IHREC receives a clear and appropriate response to their concerns. The current list of functions, and the reference to a 'sliding scale' of response, may not allow the IHREC to provide individuals contacting it with clear information as to how their complaint will be received and processed. This would leave the IHREC open to accusations of inadequacy and irrelevance at one end of the scale, to possible legal exposure at the other end of the scale for failing to discharge its statutory functions or fettering its discretion.

102. While it is a matter for the IHREC how it organises its communication systems with the public regarding its functions, it is a matter for the legislation to set out clearly what those functions are.

103. The IHRC **recommends** that there be absolute clarity for members of the public as to the possible statutory responses that the IHREC may make to complaints of a breach of human rights, and to what extent members of the public may apply to IHREC for assistance in relation to such complaints. In this regard, Head 30 requires reformulation.

Services to the Public

104. In relation to Head 30(B)(i), the response to members of the public that contact the IHREC for assistance will be across a range, from solely information to assistance and advice. As such assistance and advice would usually concern a person's legal rights, it is important that a distinction is made between the information function of the Commission and the assistance function as set out under Head 33. It is legally impermissible for a non qualified person to offer legal advice or assistance, and therefore such advice and assistance must only be provided by a qualified legal practitioner covered by professional indemnity insurance. The IHRC **recommends** that the information and assistance and advice functions under this Head be clearly delineated.

105. In relation to guidelines under Head (B)(ii), it is unclear what is intended by the reference to “geographical areas”, and the IHRC **recommends** that the rationale for the inclusion of such a classification should be provided. In addition it should be made clear that guidelines could apply to the public as well as the private sector, this is not clear in the present draft.

106. Head B(iii): Codes of Practice will be addressed separately below.

Codes of Practice

107. While Equality Reviews under Head (B)(iv) are based on the present equality legislation and so are linked to the obligations of businesses under that legislation, the IHRC considers that there is no reason to exclude human rights standards. The IHRC has addressed the responsibility of both the State and private actors in its third enquiry into persons with intellectual disability and it has already assisted the National Universities of Ireland with their human rights policy. Indeed this would assist the State in advancing the objectives of the United Nations Framework for Business and Human Rights.⁸⁰

108. Head B(v): Legal assistance will be addressed separately below.

Conduct of an Examination

109. The conduct of an examination under Head (B)(vi) would appear to be linked to the conduct of an inquiry under Head (B)(ix), and Head 34. The IHRC considers that this linkage should be made absolutely clear in the proposed Bill. There is also a possibility for the IHREC to “effect a settlement” in relation to an act or practice by mediation or conciliation. It is unclear what conciliation or mediation machinery is being referred to, and the IHRC considers that the IHREC will be best placed to determine whether the human rights or equality issue has been addressed and whether further enforcement steps are required. Thus the reference to conciliation and mediation may simply prove confusing. It may be expected that the IHREC as a matter of good administration would always take a graded approach to enforcement and compliance, and would always give a respondent body the opportunity to address any concerns raised. This has been the practice of the IHRC to date.

110. It is unclear from the Heads of Bill what the relationship is between a preliminary examination, and the conduct of an inquiry. For example, it is unclear whether it is intended that if a reasoned opinion is issued, and a response is not received, that an inquiry will automatically follow. Such a consequence would quite possibly prevent the IHREC from issuing reasoned opinions if same could only be issued where a definitive decision had been taken to conduct an enquiry in the absence of a satisfactory response. The additional statutory duties required for inquiries will likely render any such inquiries few unless adequate resources are

⁸⁰ Adopted by the Human Rights Council on 7 April 2008, <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>. The Framework and principles are now being developed by the Working Group on the issue of human rights and transnational corporations and other business enterprises: see resolution [A/HRC/17/4](#), of the Human Rights Council.

available to undertake this important work. Further, the IHRC considers that the consequences of not responding meaningfully to a reasoned opinion could usefully be made the subject of an application for enforcement to the Circuit Court by the IHREC to have an adequate response delivered. It is in light of the response received that the IHREC would presumably then go on to consider at that stage whether an inquiry or other measure is merited. While the compulsion on a person or body to respond to the IHREC is welcome, the IHRC **recommends** the inclusion of a clear rationale for issuing reasoned opinions and a clearer statement in the legislation regarding the consequences of such reasoned opinions issuing.

Instituting proceedings in its own name

111. The IHRC welcomes the effective re-enactment of its existing power under section 11 of the Human Rights Commission Act 2000 (as amended) in Head (B)(vii): Taking of proceedings in name of the IHREC. The IHRC acknowledges that the narrower definition of human rights under Head 30 may be appropriate in relation to own name proceedings and **recommends** that a dedicated definition of human rights be included in this section, as already applies under section 11 of the Human Rights Commission Act 2000. The IHRC also welcomes the clarification regarding the definition of a “class” under this Head, which should address the previous concerns the IHRC had regarding the difficulty of defining a class for the purpose of such proceedings. The IHRC would consider it appropriate that some guidance would be given to the Courts in relation to the awarding of costs in such proceedings, that would effectively insulate public bodies, including the IHREC from a costs order in the context of own name proceedings, where there is no question of *mala fides* on the part of the new body. Such effective restrictions on costs orders already exists in certain judicial review proceedings before the Superior Courts, and it is unclear that there is any legal impediment with taking such a measure under the proposed legislation.

Amicus Curiae (friend of the court)

112. The IHRC welcomes the proposed re-enactment of its existing *amicus curiae* (or friend of the court) function in Head (B)(viii), noting that the Equality Authority has been recognised as having such a function by the Courts without an express reference to same in its parent statute. This function has been of significant impact during the lifetime of the IHRC, and has allowed it give independent, expert and relevant advice to the Courts regarding the human rights standards it is applying. Such interventions have been either at the IHRC’s own initiative or through invitations from the Courts themselves. As *amicus curiae*, the IHRC has been able to contextualise domestic human rights protections that have “force of law”, in the wider system of human rights protections at an international level. Whilst the direct justiciability of such international human rights norms has been excluded by the Courts, there is no doubt that such analysis enriches the understanding of domestic protections which the Courts have welcomed.

113. It must be reiterated again with considerable force that the narrower definition of human rights under Head 30, would call into question the ability of the IHREC to make a useful and informative *amicus curiae* interventions if international

human rights principles could not be referred to. Indeed the Courts would be unlikely to seek or grant leave to the IHREC to intervene if it was considered that the mandate of the new body was so narrow as to make such an intervention unhelpful in light of submissions already made by the parties to the proceedings. This would be a significant risk to the reputation and functioning of the new body, and as referred to earlier in these observations would have adverse implications for the re-accreditation process before the ICC. The IHRC **recommends** that one unified definition of human rights, as set out under section 2 of the Human Rights Commission Act 2000 would be the applicable definition for the purposes of the IHREC's *amicus curiae* function.

114. A further observation that the IHRC would make in this regard, is that it is presently restricted under section 8 (h) of the Human Rights Commission Act 2000 from making *amicus curiae* interventions before Courts or Tribunals other than the Superior Courts. In light of the combined human rights and equality remit of the new body, it is submitted that the reference to the Superior Courts only may no longer be appropriate, also taking into account that the ECHR Act 2003 may be relied on as an interpretative tool before all courts and tribunals, and claims under equality legislation do not, at first instance, go before the Superior Courts.

115. The IHRC **recommends** that the reference to the Superior Courts be removed from Head B (viii) to make clear that the IHREC can apply to appear as *amicus curiae* before any Court or Tribunal, as it sees fit.

116. Head B(ix) and B(x): The conduct of inquiries and non discrimination notices will be addressed separately below.

b. Head 31 – Codes of Practice

117. The IHRC welcomes the proposed inclusion of Codes of Practice in the mandate of the IHREC, and in particular the legal consequences of such Codes of Practice where they are the subject of Ministerial regulation. The IHRC further welcomes the fact that such Codes of practice may include the protection of human rights, which is appropriate to the expanded mandate of the new body. However, the IHRC recalls its views made earlier in these observations regarding the independence of the new body and compliance with the Paris Principles⁸¹ and questions whether the level of Ministerial discretion regarding Codes of Practice is appropriate. It is noted that in Head 31(2) it is suggested that the Minister may direct the Commission to consult with other bodies or Government Ministers. The IHRC regards this as an undue interference with the exercise of a statutory function that is unwarranted. It would appear to the IHRC that while the Minister may of course consult with any body or other Minister he or she may so wish, it is not appropriate that the Minister can direct the IHREC to do so. The IHRC **recommends** that this provision be deleted.

⁸¹ See above section III.

118. Head 31(3) confers significant discretion on the Minister as to whether or not he or she will approve the Code of Practice, or indeed seek an amendment of the Code of Practice. While it is accepted that a Code of Practice could only have legal effect on foot of a Ministerial regulation, the level of discretion accorded to the Minister under this sub-head, in particular in relation to amendment of a Code of Practice, again raises significant issues regarding the statutory independence of the IHREC. In this regard the IHRC considers that while Ministerial consent to a Code of Practice is required, the discretion of the Minister should not go beyond this. In addition if the Minister is minded to refuse to consent to a Code of Practice, then he or she should be obliged to offer “substantial and stated” reasons for doing so. Ultimately it may be that a Code of Practice as presented by the IHREC is not accepted, but this consequence cannot be avoided if the body is to remain independent.

119. The IHRC **recommends** that in relation to Codes of Practice the reference to consultation by the IHREC at the direction of the Minister be removed. The IHRC also **recommends** that the word “may” in Head 31(3) be replaced with the word “shall”, and that a further provision would be included to allow the Minister refuse consent to a Code of Practice where he provides substantial and stated reasons for doing so. Head 31(5) should also be amended to keep it in line with the observations herein, such that the Minister has to offer substantial and stated reasons for revoking a Code of Practice and may not amend same unless with the consent of the IHREC.

c. Head 33- Provision of legal and other assistance

120. The IHRC welcomes the substantial re-enactment of section 10 of the Human Rights Commission Act 2000. The Commission would again reiterate that it is not desirable to have a narrowly defined definition of human rights for the purpose of legal assistance. In the first instance any proceedings brought before the domestic courts will relate to justiciable rights only, rather than those rights that have no counterpart in domestic law. However, the IHRC considers that this should not prevent the IHREC from considering the relevance of unincorporated human rights treaties to which the State is a party, when deciding on an application for legal assistance. In addition, due to the familiarity of practitioners with the ECHR as a result of the enactment of the European Convention on Human Rights Act 2003, applications to the European Court of Human Rights are now more procedurally established where domestic remedies have been exhausted. In this regard it would seem strange if the IHREC could represent a person as far as the Supreme Court in relation to a human rights matter, but was not then in a position to provide legal assistance to bring an application before the Strasbourg Court, when private practitioner would not be so prevented. As such the IHREC would have a narrower mandate in relation to the protection of human rights than a solicitor in private practice.

121. In the experience of the IHRC, section 10(3)(a) has not been a useful criterion in assessing applications for legal assistance. In coming to an opinion regarding the availability of alternative legal assistance, the IHRC is obliged to ask a person who

approaches it seeking legal assistance whether they have access to a private solicitor or whether they have made an application for legal aid, irrespective of the merit of the human rights matter concerned. This criterion essentially has a chilling effect on the ability of the IHRC to grant legal assistance in relation to cases which might be considered strategically important in terms of human rights, but where for example, the person has adequate financial resources to consult a private solicitor.

122. The IHRC considers that the IHREC will be unable to adopt a strategic approach to casework while encumbered by criteria that makes the new organisation more inaccessible to members of the public seeking to vindicate their human rights. In this regard it is particularly important to note that the Legal Aid Board has a service based, rather than strategic mandate in relation to the provision for legal assistance. Therefore, if we take the example of section 62 of the Housing Act 1966 (summary eviction of local authority tenants), the Legal Aid Board might grant legal assistance to a person in order to represent the person before the District Court, but might not proactively consider the possibility of bringing proceedings to impugn the underlying legislation, although same has now been declared incompatible with the ECHR by the Supreme Court. Therefore regarding the civil legal aid scheme as an equivalent alternative to legal assistance by the IHREC may not be appropriate.

123. The IHRC **recommends** that Head 33(3)(a) be deleted such that the IHREC does not have to concern itself with assessing whether legal aid might be available to the person, or whether they might have the means to access legal services privately.

d. Head 34- Inquiries

124. The IHRC welcomes the fact that some of its concerns regarding the operation of the enquiry function have been taken on board in drafting the Heads of Bill. The IHRC overall considers that, with adjustment, the Commission of Investigation Act 2004 provides a useful template for the conduct of inquiries by the IHREC. In particular the IHRC welcomes provisions regarding privilege and immunity, which are absent from the Human Rights Commission Act 2000, and which might be regarded as reinforcing the ability of the IHREC to conduct robust inquiries without fear as to possible legal consequences. However, the IHRC has a number of reservations regarding what is presently proposed under Head 34 when read together with Head 30.

125. The most significant concern of the IHRC is in relation to the narrow definition of human rights, pursuant to which it is proposed that enquiries would be conducted. The inability of the IHREC to meaningfully examine an issue in the course of an inquiry by reference to the State's international human rights obligations would be the most significant curtailment of the current compliance functions of the IHRC under the Human Rights Commission Act 2000 within the present Heads of Bill. It is important to recall that do date the IHRC has conducted three enquiries, all of which were directed to bringing the State's law and practice into line with the State's international human rights standards. As such those enquiries took into account not

only justiciable human rights standards under domestic law, but also sought to ensure protection of those rights the State has committed itself to under international law but has not incorporated into national law. The enquiries conducted to date were intended to be catalysts for positive change in relation to human rights standards in the State, rather than merely reflecting the existing state of law. Indeed it is for the very reason that certain rights are non-justiciable and there might not be a remedy through the Courts that the IHRC would conduct an enquiry rather than granting legal representation.

126. The IHRC considers that if the narrow definition of human rights proposed under Head 30 had been applicable when the IHRC was conducting the three enquiries referred to above, it is possible those enquiries might not have gone ahead, or been able to produce such meaningful results. As matters stand the three reports raised very important concerns in relation to the State’s compliance with the following human rights standards, which informed the recommendations that resulted from the enquiries:

Enquiry Title	Human Rights Standards
<i>The Self-Employed and the Old Age Contributory Pension</i>	<ul style="list-style-type: none"> • European code of Social Security; • European Convention on Human Rights; • International Covenant on Civil and Political Rights.
<i>Report on an Enquiry into the Treatment of a Visitor Refused Leave to Land in the State</i>	<ul style="list-style-type: none"> • United Nations Convention Against Torture and Inhuman and Degrading Treatment; • International Covenant on Civil and Political Rights; • European Convention for the Prevention of Torture and Inhuman and degrading Treatment or Punishment; • European Convention on Human Rights;
<i>Report of the Human Rights Issues Arising from the Operation of a Residential and Day Care Centre for Persons with a Severe to Profound Intellectual Disability</i>	<ul style="list-style-type: none"> • International Covenant on Civil and Political Rights; • International Covenant on Economic Social and Cultural Rights; • European Convention on Human Rights; • European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; • United Nations Convention against Torture and all Forms of Cruel,

	<p>Inhuman and Degrading Treatment or Punishment;</p> <ul style="list-style-type: none"> • Revised European Social Charter.
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In light of the above it is difficult to discern why a narrower definition of human rights is considered appropriate to the inquiry function, which as stated, is wholly distinct from taking own name proceedings or indeed providing legal assistance, where logic dictates that only justiciable rights will ultimately be addressed.

127. The IHRC recommends that one unified definition of human rights be adopted under the proposed legislation, and that this broad definition of human rights would be the one applicable to the conduct of inquiries by the IHREC.

128. Overall the IHRC would observe that the present proposal regarding inquiries is directed towards the conduct of a person or persons, however it is recalled that an inquiry may be directed to a systemic issue, such as a policy, practice or statutory provision that produces a result contrary to human rights, and such an inquiry does not appear to be envisaged in Head 34.

129. In relation to Head 34, bullet point 2, the emphasis on investigations being in private and only in public for certain narrow reasons is problematic. While all the enquiries conducted by the IHRC have been in private to date, with the report being made public, the IHRC considers it important that the discretion to conduct an inquiry either wholly or partly in public should be retained by the IHREC. This is because it may be considered by the new Commission that it is important in the public interest to have a public component to the inquiry, for reasons of transparency and accountability, or indeed to draw the public attention to a significant human rights issue. In addition an inquiry may not just be engaged with taking evidence but might also consider submissions or statements of relevant stakeholders in relation to the human rights matters at stake in a non –adversarial forum. Again the opportunity to undertake such an exercise in public would be valuable to allow greater understanding of the work of the IHREC and the importance of human rights in the public discourse. **The IHRC recommends that greater discretion would be left to the IHREC in determining whether inquiries should be conducted in public or private.**

130. Under Head 34, bullet point 7, there is reference to the payment of legal costs to a person. While it is unclear how such payments might arise, the IHRC is concerned that this might result in an undue financial burden on the IHREC, and **recommends** that any provision for the payment of legal costs or other expenses attached to participating in an inquiry should be underwritten by the State in an appropriate form.

131. The IHRC also has concerns, in light of its own experience of its enquiry function that the said function is still considered under Head 34 to be open to applications or “requests” from the public. The assessment of requests for enquiries

from members of the public has been a considerable draw on the present resources of the IHRC, and the IHRC very much questions the merits of this approach to the operation of the function because of the limited nature of the “remedy” the IHRC can legally provide to individuals seeking redress for their rights.

132. While applications for legal assistance very much concern the determination of the individual rights of the person, requests for enquiries do not insofar as the outcome of an enquiry will not lead to an adjudication on the person’s rights, nor will it provide an individual remedy. This is a matter that is not always easily understood by an aggrieved member of the public. This is not to undervalue the significance of the enquiries conducted by the IHRC to date, but it is the view of the IHRC that an enquiry should address systemic issues that affect an appreciable number of persons, and where meaningful findings and recommendation can be made in relation to the State’s duties to protect, respect and fulfil human rights, that will have a broad based impact.

133. It is clear that while the IHREC should be in a position to provide legal assistance to an appreciable number of people, it will not be able to carry out an appreciable number of inquiries. Inquiries are resource intensive, and cannot be conducted in overly restricted time frames. In this regard, it is realistic to assume that it will not be possible to carry out more than one or two inquiries at any one time. However, at the same time as being engaged in inquiries, the IHREC will also be assessing multiple inquiry requests, where resources are simply not available to conduct them, and where most enquiry requests will concern the individual situation of the requestor rather than a broad based human rights concern. The IHRC considers that the ability of members of the public to request inquiries, may set up false expectations regarding the resources of the IHREC to conduct inquiries, and the possible remedies available, while at the same time placing an unreasonable burden on the resources of the organisation in assessing such requests. Nonetheless, the IHRC recognises the paramount value of receiving communications from the public in relation to perceived breaches of human rights, which may of course ultimately lead to the conduct of an inquiry. In reality the three enquiries conducted to date by the IHRC could have been conducted on foot of information from the public, or a notification, and a formal request was not a necessary precursor to invoking the function.

134. The IHRC **recommends** in this regard that rather than inviting individuals to make inquiry requests, members of the public should be able to “notify” the IHREC of concerns regarding perceived breaches of human rights, which might form the basis of an inquiry, at the sole discretion of the IHREC. While the IHREC can respond to the issue raised, it would under this proposal, not be obliged to enter into protracted correspondence regarding enquiry requests, and formal assessments, where it is apparent that an inquiry will not be the ultimate result.

e. Head 35- Non- discrimination notices

135. It is noted that Head 35 is a re-enactment of provisions already in the Employment Equality Acts, and the IHRC welcomes their retention in the proposed legislation. It is proposed that such notices would also extend to the human rights aspect of the IHREC's work. It follows that appropriate amendments will have to be made to the current power under the equality legislation, including in relation to the appropriate appeal mechanism. It is to be noted here that in relation to the observations above regarding the definition of human rights, the IHRC would accept that the narrower definition as proposed under Head 30 would be the appropriate definition in relation to the powers under Head 35, however, this should not prevent inquiries taking into account the full spectrum of the State's human rights responsibilities.

f. Public Duty

136. The IHRC welcomes a positive duty on public bodies, as defined, to "have due regard" to the elimination of discrimination and the promotion of equality of opportunity and the protection of human rights. The IHRC regrets however that the obligation created under this Head is clearly not a legally enforceable one. In addition it is unclear that the obligation would extend to the drafting of legislation, an area which impacts very directly on the rights of citizens and others and where an equality and human rights assessment at first instance would be a useful way of the State ensuring that it is fulfilling its domestic and international human rights obligations, and also avoiding possible litigation in the future.

137. It is noted that there is a proposal regarding a periodic review of this mechanism to evaluate its impact. In this regard it is suggested that there might be an independent review jointly commissioned by the Department of Justice and the IHREC. In the IHRC's view, such a review should be initiated at the suggestion of the IHREC to ensure independence.

V FACTORS IMPACTING ON A STRONG MANDATE IN THE DRAFT LEGISLATION

a. Head 3 - Definition of Human Rights and Equality

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 (Paris Principles)

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. (Sub-Committee on Accreditation General Observations)

138. The Heads of Bill provide a broad definition of human rights but only for certain “promotional” functions under Head 3, whereas under Heads 2 and 30-36 the definition is severely proscribed as set out in Part IV of these Observations. Further, under the definition in Head 3 there appears to be some ambiguity in terminology. In keeping with the Paris Principles, as interpreted by the ICC Sub-Committee on Accreditation, a NHRI must have a broad remit to consider *all* human rights issues.⁸² In its 2011 review of the Commission for Protection against Discrimination of the Republic of Bulgaria, the Sub-Committee on Accreditation recommended the body’s mandate should include “all rights set out in international, regional and domestic instruments, covers all areas of human rights, and gives it explicit functions in the area of both protection and promotion of human rights”.⁸³ The Bulgarian Commission received ‘B’ Status Accreditation.

139. The IHRC **recommends** that the definition in Head 2 and the relevant cross-references in Heads 30-36 be deleted as otherwise the Bill would significantly reduce the IHREC’s mandate, as compared to that of the IHRC, and as set out in Part IV of these observations.

140. The IHRC considers that the definition of Human Rights, particularly in point (b) of Head 3 may not reflect the international standards binding on Ireland, for example, through resolutions or declarations of the Council of Europe, Organisation for Cooperation and Security in Europe (OSCE) or the United Nations.

141. The IHRC questions the definition of “equality” in the legislation. The present Bill limits the ‘equality’ the new body will be able to consider to those grounds already existing in Irish legislation. The IHRC recalls that it has previously

⁸² Paris Principles, <http://www2.ohchr.org/english/law/parisprinciples.htm>

ICC Sub-Committee on Accreditation General Observations
<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/COMPILATION%20OF%20THE%20RULES%20AND%20WORKING%20METHODS%20OF%20THE%20OSCA.doc> (pp.8-12)

⁸³ ICC Sub-Committee on Accreditation Report – October 2011.
[http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%202011%20-%20FINAL%20\(with%20annexes\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20REPORT%20OCTOBER%202011%20-%20FINAL%20(with%20annexes).pdf)

recommended an expansion of the equality provisions through for example the inclusion of 'or other status'. This definition of equality is more in conformity with the protection from discrimination as set out in all the major human rights instruments.⁸⁴ In light of the requirement that a NHRI has as broad a mandate as possible, the IHRC **recommends** that the definition of equality in the present legislation be broadened to include 'or other status', to allow the new body to consider all issues of discrimination, while noting that this may require some adjustment for the compliance functions of the IHREC.

142. The IHRC **recommends** that the definition of human rights be expanded to explicitly include standards that Ireland is required to respect, protect and fulfil by virtue of its membership of international organisations with a human rights remit such as the Council of Europe, OSCE and United Nations.

b. Head 9 – Purpose of the Commission

143. The IHRC notes that under Head 9, the stated purpose of the IHREC in the Heads of Bill 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.

144. While welcoming the spirit in which this clause is drafted, the IHRC recalling that the Paris Principles require NHRIs to both promote and protect human rights,⁸⁵ is concerned with the final part of this statement of purpose "to provide practical assistance to persons..." which may be read as limiting the remit of the IHREC by not adequately reflecting the remit of the new body to examine systemic and policy issues. The IHRC **recommends** either the deletion of the end of this paragraph or the addition of the word "including". The IHRC further **recommends** that independence be explicitly referenced in the stated purpose of the IHREC. Furthermore, an explicit reference to the Paris Principles should be included in the statement of purpose.

145. In addition, the IHRC considers that the current text may restrict the work of the IHREC to equality areas relating to intercultural issues. In this regard, it recommends that there be further clarity on the definitions of multiculturalism and interculturalism in the legislation. The IHRC recalls its comments in these observations that the equality definition in this legislation should be expanded, and

⁸⁴ For example, Article 14, ECHR, Article 40.1 of the Constitution, Article 2.1 of the International Covenant on Civil and Political Rights, and Article 2.2 of the International Covenant on Economic, Social and Cultural Rights.

⁸⁵ "1. A national institution shall be vested with competence to promote and protect human rights.", Paris Principles, <http://www2.ohchr.org/english/law/parisprinciples.htm>.

recommends that the purpose include only human rights and equality so as to provide the new body with the broadest mandate, in line with Ireland’s international commitments and the Paris Principles.

c. Head 10 – Principles to guide the Commission

146. While welcoming the intent behind the proposal under this Head, the IHRC is concerned that the principles set out in Head 10 are not sufficiently broad to adequately reflect the role of a NHRI. In addition, the Head refers to the role of the IHREC specifically referencing the Employment Equality and Equal Status Acts. This may serve to focus the IHREC away from a broad human rights remit towards an Equality compliance focus. The IHRC recalls that it is the State which has the primary duty under international law to promote a human rights based society. The reference to the role of the IHREC “to promote the development of a society in which the following principles have the greatest possible effect...” seems to shift this responsibility on to the IHREC. Further, the significant restriction to the IHREC’s mandate in Heads 30-36 (see below) would further weaken the ability of the IHREC to adequately protect human rights.

“Responsibilities”

147. The IHRC questions the inclusion of the term “responsibilities” under this and other Heads. In particular, the IHRC notes Head 10 provides that one of the guiding principles of the IHREC will be “(b) that every person is free and equal in dignity, rights and responsibilities”. While welcoming the intent behind this proposal, from a legal point of view the IHRC notes that the State is the primary duty bearer in terms of human rights, with the responsibility to protect, respect and fulfil human rights. The term ‘responsibilities’ has no legal meaning within international human rights law, and its inclusion here may be inadvertently misleading. In addition, the implication that every person also has ‘responsibilities’ may suggest that respect for human rights is conditional on the behaviour of the person, which is clearly not the case.

“Prohibited Conduct”

148. The IHRC is concerned with the reference to ‘prohibited conduct’ in Head 10, which is a term derived from the present equality legislation but has no apparent or specific meaning in the context of the Heads of Bill. The IHRC notes that every person in Ireland has a right to live their lives free from violations of their human rights. The reference to a ‘right to be free from prohibited conduct’ has no meaning and is as such misleading.

Equal Opportunities

149. The reference in Head 10 “that each person should have a fair and equal opportunity to participate in the economic, political, social and cultural life of society;” fails to reflect that every person should have an equal opportunity not just to participate in all aspects of Irish life, but to benefit from such participation through equality of participation and outcome. This should be reflected in the legislation.

Recommendation

150. The IHRC **recommends** that Head 10 be removed. It will be for the IHREC to determine its guiding principles in accordance with the Paris Principles. In addition, the principles as currently formulated under this Head are inadvertently misleading and seem to place responsibilities on the IHREC that are more appropriately laid with the State. They also fail to reflect the role of the IHREC as an independent monitoring body.

151. The IHRC considers that should there be a requirement to include a statement of principles of operation in the legislation, something along the lines of the following statement of values and operating principles, which are similar to those reflected in the IHRC's Strategic Plan 2007-2011 would be more appropriate and could be adapted for use in the legislation:

Values

In working to promote and protect the human rights of all, the Commission recognises the universal, indivisible and interdependent nature of human rights. Equal emphasis is therefore placed on the importance of civil, political, economic, social and cultural rights.

In working to promote equality, the IHREC recognises the importance of not only promoting equality of opportunity, but also equality of participation and outcome.

- The Commission will act in an independent and objective manner, while also ensuring accessibility, openness and accountability
- The Commission will respect the inherent dignity and equality of all

Operating Principles

- The Commission will work to ensure that Irish human rights and equality law and practice compares favourably with the highest international standards
- Where the Commission believe that such rights are being undermined or inadequately protected, it will be responsive, clear, impartial and unequivocal in advocating human rights and equality
- Dialogue, consultation and cooperation will be a hallmark of the Commission's method of operating, i.e. where relevant or appropriate, and with both domestic and international bodies

- The Commission will exercise its statutory powers in a manner which adds value to work already being undertaken by others to promote and protect human rights and equality
- The Commission will seek to avoid duplication and work collaboratively with other organisations, agencies and individuals, as appropriate, in order to deploy limited resources to best effect.

d. Head 11 – Functions of the Commission

Overall Functions of the Commission

152. The IHRC considers that, overall, the statement of functions of the IHREC do not reflect the purpose of a National Human Rights Institution which is to hold the State to account on human rights issues, including equality. The primary duty to uphold human rights lies with the State – including in raising awareness and understanding of human rights. As noted above, the NHRI exists to ensure that the State is undertaking its duties, to challenge it when it is not, and to promote human rights in general in the State where government fails to do so. The IHRC **recommends** that this Head be revised in light of the overall oversight purpose of the NHRI.

Human Rights Education and Training (Head 11.A.i)

153. In light of the State commitments to human rights education and training, the IHRC **recommends** that Head 11.A.i be amended to include specific reference to human rights education. In addition, paragraph 6 should be amended from a reference to ‘sector-specific toolkits’ to ‘training programmes’ as this is a broader term and reflects Ireland’s international obligations. The IHRC recalls in this regard the recommendation of the Committee on the Elimination of Racial Discrimination to Ireland in 2011:

The Committee recommends that the State party strengthen its efforts to sensitize relevant civil servants on human rights issues particularly against racism and intolerance by ensuring that human rights training is mainstreamed in the civil service. In this regard, the Committee invites the State party to develop a coordinated work plan with the Irish Human Rights Commission (IHRC) that allows the IHRC to raise awareness and provide human rights training to all civil servants including the *Garda Síochána* (Police) and the judiciary.⁸⁶

Employment of Persons (Head 11.A.ii)

154. The IHRC welcomes the inclusion of the sub-section relating to the IHREC’s ability to employ persons to assist it in its work:

For the purpose of assisting it in the performance of its functions under this section the Commission may employ any person or persons having

⁸⁶ Concluding observations of the Committee on the Elimination of Racial Discrimination - Ireland, CERD/C/IRL/CO/3-4, para 24.

qualifications which in the opinion of the Commission relate to those functions.

Noting the footnote included in relation to this provision questioning its inclusion, the IHRC **recommends** that this provision be retained in the legislation but be extended to all functions, recalling its views herein in relation to the ability of the IHREC to recruit its own staff. Furthermore, the IHRC **recommends** that this provision be expanded to cover all of the functions of the Commission including those set out in Head 11 and Heads 30-36.

Programme and Project Work (Head 11.A.iii)

155. The IHRC notes the reference to ‘Service Level Agreements’ in this subsection. The present wording could be read as suggesting that philanthropic support received by the IHREC could be subject to such agreements. The IHRC considers that this provision in its entirety could compromise the independence of the IHREC. The IHRC **recommends** that the second sentence of this paragraph be deleted to ensure that the provision complies with the independence requirements of the Paris Principles and a more practical level, it may affect the ability to obtain funds philanthropically.

Review Law Policy and Practice (Head 11.A.iv)

156. The IHRC **recommends** the retention of the broad power of the IHRC in the new body to “(a) to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights,”. This function of the IHRC demonstrated its broad oversight remit and enabled it to review a range of issues on an ongoing basis. The absence of this broad provision may restrict the work of the IHREC.

Social Cohesion Function (Head 11.C)

157. The IHRC notes the proposal in Head 11 that the new body would have a ‘social cohesion’ function:

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.

The IHRC recalls that social cohesion relates to all members of society and is not merely a concept aimed at immigrants or minorities. In this regard, the Council of Europe states that "Social cohesion is the capacity of a society to ensure the well-being of all its members, minimising disparities and avoiding marginalisation."⁸⁷ The Council of Europe notes that “[t]he hallmark of the Council of Europe approach is to treat access to rights for all as an essential reference for a cohesive society and also as a principle facilitating recognition of the dignity of all individuals regardless of

⁸⁷ Report of High-Level Task Force on Social Cohesion Towards an Active, Fair and Socially Cohesive Europe, Strasbourg, 28 January 2008, TFSC (2007) 31E.
[http://www.coe.int/t/dg3/socialpolicies/source/TFSC\(2007\)31E.doc](http://www.coe.int/t/dg3/socialpolicies/source/TFSC(2007)31E.doc)

their ability to meet their own needs.”⁸⁸ The IHRC **recommends** that this definition in Head 11 be reconsidered to ensure that it reflects current international standards.

International Organisations (Head 11.E)

158. In relation to paragraph E of Head 11, the IHRC **recommends** the explicit inclusion of the following bodies; the Organisation for Security and Cooperation in Europe (OSCE), the International Coordinating Committee of NHRIs and Equinet, and the removal of the term “accredited human rights commissions” and replacement with “national human rights institutions”, recalling that not all NHRIs are Commissions and that one role of an ‘A’ status NHRI is to support unaccredited NHRIs to seek accreditation and gain ‘A’ status.

Supporting Public Bodies (Head 11.F)

159. The IHRC **recommends** the explicit inclusion of education and training under this sub-section, recalling it’s above recommendation under Head 11.A.i above. The IHRC further **recommends** that the term ‘prohibited discrimination’ be replaced with ‘discrimination’.

e. Head 12 – Strategic Plans

160. As a point of information, the IHRC recalls that it has adopted 5-year strategic plans for its work since its inception.

161. While welcoming closer interaction with the Oireachtas, the IHRC notes the inclusion in sub-section (2) of this head that:

(2) The Commission shall consult in the preparation of a strategic plan with such bodies and groups as it sees fit, including but not limited to educational institutions, representatives of civil society and Government Departments and agencies.

The IHRC is concerned that such a provision might be read as a requirement on the IHREC to consult with Government Departments. For the avoidance of doubt, the IHRC **recommends** that the term “as it sees fit” be placed at the end of the paragraph. The IHRC further considers that the contents of a Strategic Plan would also include a statement of the vision, mission, values and principles of the IHREC.

162. The IHRC also considers that the proposal to have a strategic plan every three years may be unduly short when considering the time it takes to draft and consult on developing a strategic plan, as well as the time to assess its impact on completion. A strategic plan exists to set the strategic focus of an organisation over a longer period than an annual or business plan. The IHRC therefore **recommends** that either the period for IHREC strategic plans be four or five years or that the new body be given the discretion to decide on their duration.

⁸⁸ Ibid at para 15.

f. Head 24 - Superannuation

163. The explanatory note to Head 24 provides that:

Section 20 of the HRC Act 2000 provides for a Superannuation scheme. None has been made to date. There is no equivalent provision in the EEA Act, as the staff are covered by the civil service scheme. The above text is taken with modifications from the Property Services (Regulation) Bill 2009 as representing the most up-to-date text available on this issue.

As a point of information, the IHRC notes that it has a superannuation scheme in place on an administrative basis since January 2003 and that all staff are required to contribute to both the full scheme and children's and spouses and (and since the latest model scheme children, spouse and civil partners). The IHRC further notes that the Department of Finance has had draft IHRC schemes pending sign-off since 2005 and that assurances have recently been provided by the Department of Justice that the Human Rights Commission's schemes will be finalised before the merger. Even if the schemes are not finalised pre-merger, the pension entitlements of all staff remain as if the scheme were in existence.

164. The IHRC notes that the State has an existing liability in relation to superannuation and that the creation of a new scheme could be viewed as an additional liability.

k. Head 27 – Annual Reports

165. The IHRC notes the provisions of the draft legislation relating to Annual Reports. The IHRC welcomes the fact that the Annual Reports of the IHREC will be submitted to the Oireachtas, as it has previously recommended.

166. The IHRC **recommends** that to enhance the independence of the IHREC and strengthen relations with the Oireachtas, that the legislation should include a provision that the Oireachtas shall debate the Annual Report (and other reports of the IHREC as appropriate).

167. The IHRC considers that the present provisions detailing what must be included in the Annual Report may be overly prescriptive, and **recommends** that they should be broadened to include all the human rights and equality activities of the Commission, and not limited to equality reviews or the implementation of equality action plans. The IHRC also questions the inclusion of provision for the Minister to request information to be included in the IHREC Annual report. Insofar as this would fetter its independence, it **recommends** removal of this provision.

I. Other Comments and Recommendations

168. In relation to **Head 10** and **Head 11** the IHRC notes that reference to civil rights are absent from sub-section (e) and A respectively, and **recommends** their inclusion.

169. As a general point, the IHRC recalls that the Sub-Committee on Accreditation places an emphasis on the acceptance of NHRI recommendations by the State and that consideration should be given to introducing a requirement on the State to formally consider the recommendations of the IHREC and to provide a written response on the actions, if any, it intends to take.