

**Observations on the Irish
Human Rights and Equality
Commission Bill 2014 by
IHREC (designate)**

April 2014

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I. INTRODUCTION

1. The Equality Authority was established under the Employment Equality Act, 1998. The Statutory functions of the Equality Authority are set out in Part V of the Employment Equality Act, 1998. It was subsequently given additional functions under the Equal Status Act 2000. The main role of the Authority is to work towards the elimination of discrimination and to promote equal opportunities on nine specified grounds in employment and in the provision of goods, facilities and services. The specified grounds are gender, civil status, family status, sexual orientation, religious belief, age, disability, race and membership of the Traveller community.
2. 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
3. In 2011, Alan Shatter TD, Minister for Justice, Equality and Defence announced the merger of the IHRC and the Equality Authority to form a single new body, the Irish Human Rights and Equality Commission (IHREC). The Irish Human Rights and Equality Commission Bill, 2014 was published by Government in March 2014. As independent statutory bodies both the IHRC and EA provided Observations on the 2012 General Scheme of the Irish Human Rights and Equality Commission Bill.³
4. In April 2013, the Minister for Justice, Equality and Defence accepted the recommendation of the independent selection panel appointed to receive and consider applications for membership of the new designate Commission (IHREC designate). Fourteen members were appointed to either body under existing legislation (12 members to form the Board of the Equality Authority). No Chair or Chief Commissioner was recommended by the selection panel and that post has remained vacant to date. The IHREC (designate) calls for the early recruitment of a Chief Commissioner (designate) following the publication of the Bill.

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

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

³ See IHRC Observations and Equality Authority presentation to the Joint Oireachtas Committee on Justice, Defence and Equality, July 2012.

5. In these Observations, the IHREC (designate) acknowledges the improvements which have been made to the Bill from the General Scheme of the Bill, 2012 and acknowledges the engagement of the Minister, the Department, the Joint Oireachtas Committee on Justice, Defence and Equality and civil society organisations to this end. The Observations set out in this document for the most part note and welcome those aspects of the Bill which uphold and strengthen the human rights and equality infrastructure of the State, represented in the new IHREC. Where necessary, the Observations draw attention to parts of the Bill where further improvements could be made.

II. NATIONAL AND INTERNATIONAL STANDARDS RELATING TO NHRIs AND EQUALITY BODIES

6. 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).⁴
7. The 1993 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.⁵ The Paris 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.⁶
8. 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.⁷ This process is recognised and promoted by the United Nations,⁸ and is set out in more detail in **Appendix A** hereto.

⁴ Adopted by General Assembly resolution 48/134 of 20 December 1993. Available online at <http://www2.ohchr.org/english/law/parisprinciples.htm>.

⁵ 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>

⁶ See for example Paris Principles section 3 <http://www2.ohchr.org/english/law/parisprinciples.htm>

⁷ See further below in relation to the Sub Committee on Accreditation

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. 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;
 - 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

10. 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. 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.
11. 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;

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 as adopted at Geneva in May 2013.

<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>

- a head and board chosen and appointed through an open and transparent process;
- a pluralist, and independent board;
- 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 mandate and 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.

12. A note on assessing compliance with the Paris Principles and relationship between NHRIs and international bodies is set out in Appendix A hereto.

Equality Bodies

13. Equality Bodies are independent state bodies established to ensure the State meets its obligations under EU law. The EU Race Directive 2000/43/EC requires the establishment of an independent equality body in each EU Member State. The Race Directive post dated the establishment of the Equality Authority as an independent body under the Employment Equality Act 1998 in October 1999. Further requirements for equality bodies arise from the EU equal treatment directives; the Gender Goods and Services Directive (Directive 2004/113/EC), and the Gender Employment Recast Directive (Directive 2006/54/EC). These Directives require that the competences of equality bodies include: providing independent assistance to victims of discrimination pursuing complaints; conducting independent surveys concerning discrimination and publishing independent reports and making recommendations on any issue relating to discrimination.
14. The Equality Authority is a member of Equinet, the European network of national equality bodies and has worked with Equinet and its sister national equality bodies on the development of standards for those bodies. It also actively contributes to the work of Equinet in developing the capacity and enhancing the expertise of national equality bodies in fulfilling their mandates to combat discrimination and promote equality.

III. OBSERVATIONS ON THE IHREC BILL 2014

PART 1: DEFINITIONS AND INTERPRETATION

Section 1

15. This is a standard citation clause, and appears to be appropriate to the Bill. The IHREC (designate) has no comment on this section.

Section 2

16. This is the interpretative provision of the Act, setting out a number of definitional terms. The IHREC notes that there is no definition of “*equality*” under section 2. Noting the differing arguments in favour of and against defining equality, the IHREC (designate) has no recommendation on this provision.
17. The term “*dignity*” is defined as meaning: “*in relation to a person, the inviolable intrinsic value, equal to other persons, that the person has and includes the recognition by other persons of such value with respect of that person*”. This definition is slightly cumbersome and the legal significance of the reference to ‘recognition by other persons of such value with respect of that person’ is unclear. The IHREC (designate) therefore **recommends** consideration of the definition found in the EU Charter of Fundamental Rights which states “*Human Dignity is inviolable. It must be protected and respected*”.
18. There are two definitions of “human rights” in the Bill; a wide definition of human rights set out in section 2 which is welcome, providing as it does the NHRI with a wide mandate to protect and promote human rights and which will apply to Part 2 functions. A second, more limited definition is found in section 29 of the Bill where “*human rights*” are defined for the purposes of Part 3 functions as only referring to those rights “*which has been given the force of law in the State*”. as with the earlier 2012 IHRC Observations, the IHREC (designate) **recommends** that the wider definition be used in the Bill save for section 41 and sections 36 to 39 (noting that those functions could only relate to law that is enforceable. Limiting the definition of human rights for the purpose of Part 3 functions, may impose a limitation on the discharge of the range of functions listed under Part 3, not all of which relate to enforcement functions. The impact of the narrower definition of human rights under section 29, is considered in more detail hereafter.
19. The IHREC (designate) notes that private bodies in receipt of State funds may be designated as a “*public body*” by the Minister following consultation with the Commission when in the public interest. This appears appropriate in order to assist the State in meeting its obligations to “*respect*”, “*protect*” and “*fulfil*” human rights where public functions are exercised by private or public bodies or where the acts or

omissions of private bodies may result in a violation of a person's equality or human rights.

20. There appears to be no definition of "*functions*", as is present in the existing Employment Equality Act 1998, section 2 and section 1 of Human Rights Commission Act 2000 ("*functions*' includes powers and duties and references to the performance of functions includes, as respects powers and duties, references to the exercise of the powers and the carrying out of the duties.") The IHREC (designate) **recommends** that this definition be included.

Section 3

21. Section 3 provides that the Minister may by regulations provide for any matter under the Act to be prescribed, for example in relation to designating certain bodies as public bodies. This is a standard clause and the IHREC (designate) has no comment on this section on the understanding that any such regulations will be only made following consultation with the IHREC (designate) in deference to its independent status.

Section 4

22. This is a standard clause on expenses. The IHREC (designate) has no comment on this section.

Section 5

23. Section 5 provides for service of documents and is a standard clause. The IHREC (designate) has no comment on this section.

Section 6

24. Section 6 provides for penalties for offences committed under the Act. It provides that summary proceedings may be brought and prosecuted by the Commission, while those on indictment would be brought and prosecuted by the Director of Public Prosecutions. This is a standard clause and the IHREC (designate) has no comment on this section.

Section 7

25. This is a standard clause on repeals. The IHREC (designate) has no comment on this section.

PART 2: ESTABLISHMENT OF NEW COMMISSION

Section 8

26. This is a standard clause setting a date for Establishment Day which shall be by Ministerial order. The IHREC (designate) has no comment on this section.

Section 9

27. Section 9 provides for the establishment of the Irish Human Rights and Equality Commission. Sections 9(2) and (3) are a welcome confirmation of the fact that the Commission shall be independent in the performance of its functions and be guided by best international practice applicable to national human rights institutions and to equality bodies.
28. Section 9(4) is a standard clause stipulating that the Commission is a body corporate with perpetual succession and an official seal with power to sue and be sued in its corporate name. It shall also, subject to the consent of the Minister for Justice and the Minister for Public Expenditure and Reform have the power to acquire, hold and dispose of land or an interest in land, and shall have the power to acquire, hold and dispose of any other property.

Section 10

29. Section 10 sets out the functions of the Commission. These functions replicate to a large degree the functions of the existing Equality Authority and IHRC, while introducing some new functions. The definition of “human rights” employed in section 10 is, save for those functions more explicitly defined in Part 3 of the Bill, the wider definition which is welcome.

30. Section 10(1) states the functions of the Commission as:

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 the State; to promote understanding and awareness of the importance of human rights and equality in the State; to encourage good practice in intercultural relations and to promote tolerance and acceptance of diversity in the State, and to work towards the elimination of human rights abuses, discrimination and prohibited conduct, while respecting diversity and the freedom and dignity of each person.

31. The IHREC (designate) notes that the heading of “social cohesion” functions and the reference to “inclusive society” in Head 11C of the Heads of Bill is not present in the current formulation, although the references to intercultural relations, tolerance and acceptance of diversity remain. It **recommends** that reconsideration be given to removing the term tolerance, which may be viewed as unduly defensive and limiting, and the re-inclusion of the value of working towards an inclusive society, premised on respect for equality and human rights.

32. Section 10(2) provides for the specific functions to be taken in furtherance of the section 10(1) functions set out above. There is some overlap between section 10(2)(a) and section 30 in relation to provision of information to the public, although the later provision restricts information provision to the narrower definition of human rights (see further below).
33. Otherwise the provisions of section 10(2) correspond to a number of the provisions in the Human Rights Commission Act 2000, and to a number of the provisions under the Employment Equality Act 1998 and the Equal Status Act 2000, modified where possible to address both 'equality' and 'human rights' in a more integrated way.
34. The Commission's continued participation in the Joint Committee with the Northern Ireland Human Rights Commission in accordance with the Multi-Party Agreement annexed to the British-Irish Agreement under section 10(2)(p) is welcome as is the function of continued engagement with UN, Council of Europe and European Union bodies or agencies having a knowledge or expertise in the field of human rights or equality in section 10(2)(h).
35. The IHREC (designate) welcomes the decision to add "*equality*" to the *amicus curiae* function set out in section 10(2)(e) and to designate the wider definition of "*human rights*" to that function, insofar as one of the valuable contributions of the IHRC's *amicus curiae* interventions to date has been to draw constitutional, European and international human rights law standards to the attention of the courts in cases which involve or are concerned with human rights or equality.
36. The IHREC (designate) welcomes the new function in section 10(2)(k) which provides that the Commission may "*undertake, sponsor, commission, or provide financial or other assistance for programmes of activities and projects for the promotion of integration of migrants and other minorities, equality (including gender equality) and respect for diversity and cultural difference*".
37. Observations on the enforcement functions will be made under Part 3 hereunder.
38. Section 10(2)(q) sets out that other functions may be performed as transferred to the Commission under section 44 (see below).
39. Section 10(3) sets out the societal values which shall inform the exercise of the Commission's functions under the Act. Thus functions are to be exercised with a view to:

"encouraging and supporting the development of a society in which there is respect for, and protection of, each person's human right; there is respect for the dignity and worth of each person; a person's ability to achieve his or her potential is not limited by prejudice, discrimination, neglect or prohibited conduct; each person has a fair and equal opportunity to participate in the economic, political, social or cultural life of the State, and there is mutual respect between persons, including classes of persons, based on a shared

understanding of the value of diversity within society and on a shared respect for equality and human rights”.

40. Section 10(4) provides that the Commission shall exercise its compliance functions under Part 3 of the Act in a manner which it considers to be most appropriate and proportionate in the circumstances. This clarification is important as the Commission must retain the discretion to exercise its functions as it deems appropriate.
41. Section 10(5) is a saver clause and provides that the Commission shall have “*all such powers as are necessary or expedient for the performance of its functions*”. This provision is important and is commonly exercised by NHRIs to further their statutory objectives.
42. Section 10(6) provides that the Commission may perform any of its functions through or by any member of the staff of the Commission duly authorised in that behalf by the Commission. This is a common provision and complements the delegation of functions to the Director as set out in section 21 of the Act.

Section 11

43. Section 11(1) provides for the conferral of additional functions on the Commission by Ministerial order, with the agreement of the Commission. This provision is welcome insofar as it is predicated upon the agreement of the Commission and may permit the Government to confer such functions on the Commission as the National Monitoring Mechanism (whether alone or in tandem with another body) under Article 33(2) of the UN Convention on the Rights of Persons with Disabilities following ratification of that Convention.¹² It would not, however, permit the conferral of the function of National Preventive Mechanism under Part IV of the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹³ which would follow ratification of this protocol, insofar as under the current Bill, the Commission is not provided with the inspection powers necessary under the protocol, as such functions would have to be conferred by primary legislation.

Section 12

44. Section 12 provides for Membership of the Commission. Section 12(1) provides that the Commission shall consist of not more than 15 and not less than 12 members, one of whom shall be the Chief Commissioner of the Commission. Section 12(2) prescribes gender balance in the composition of the Commission which is welcome. The Commission also welcomes sections 12(3) and 13(1) which provides that the Commission shall be appointed by the President (rather than the Minister for Justice and Equality which is the current position for both bodies) on the advice of

¹² Signed and ratified by most European States, the convention was signed by Ireland in 2007 but has yet to be ratified.

¹³ Signed and ratified by most European States, the Optional Protocol was signed by Ireland in 2007 but has yet to be ratified.

Government and following a resolution of the Houses of the Oireachtas. Section 12(6) sets out the terms for members, being 3 or 5 years and under section 12(9) eligibility for reappointment. The current arrangement provides for a turnover of almost half the Members in years 3, 5, 6, 9 and 10 as well as renewing the contracts of the Director and the Chief Commissioner. While noting this is a matter for Government, the Commission would be slightly concerned that there not be a constant turnover of Commission members. The advantage of a 5 year term is that a collective entity, required under the Act, can be maintained over a period to ensure continuity in the delivery of the Commission's mission over that term and it is **recommended** that this section insofar as it refers to differing lengths of membership of the Commission be amended accordingly.

Section 13

45. Section 13 in addition to specifying who appoints the Commission (the President) also sets out the selection process for appointment. The Explanatory Memorandum helpfully sets out the purpose behind this section which is to ensure that *"the Commission is being established with the intention of being recognised, as the Human Rights Commission currently is, by the UN as Ireland's National Human Rights Institution"* being accredited *"in accordance with the provisions of the Paris Principles"*. Section 13(2) provides that Members are to be appointed following selection by the Public Appointments Service (PAS) *"following a Paris Principles-compliant selection process"* and that to *"underpin the independence of the selection process, this section provides that the Government shall accept the persons recommended for appointment by the Service, save in exceptional circumstances and for stated and substantial reasons."*
46. Section 13 sets out the process for appointing the independent selection panel which under section 13(4) must include one person *"nominated by the Director of the European Union Agency for Fundamental Rights"*. The expertise expected of the selection panel is set out in section 13(5). Section 13(7) provides for a public advertisement campaign for Commission appointment. Recommendations by the Service to the Government are to be accepted under section 13(11), unless there are "exceptional circumstances" under section 13(12) under which the Service may disagree with the Government's views on refusal.
47. The criteria for membership of the Commission are set out in section 13(13) which provides that the members of the Commission should:

"broadly reflect the nature of Irish society and that such persons possess knowledge of, or experience in—

- (a) matters connected with human rights, and in particular the 9 grounds set out in the Equality Employment and Equal Status Acts, namely gender; civil status; family status; sexual orientation; religious belief; age; disability; race (including colour, nationality, ethnic or national origin) and membership of the Traveller community.*

48. While the Bill provides for the appointment process by the PAS – in terms of selection of the interview panel and recommendation/ acceptance of those nominated as Members of the Commission by Government, there are two lacunae evident in section 13.
49. The first lacuna concerns the precise appointment procedure of the Chief Commissioner and whether this involves an interview process or not. While it is understood that the Chief Commission will be subject to a formal interview process, this should be more clearly stated. The timing of such interviews including the nomination to the independent selection panel of a member nominated by the Fundamental Rights Agency suggest that the recruitment of the Chief Commissioner should take place at the same time as the appointment of the five year members of the Commission.
50. The second lacuna concerns the precise role of the Chief Commissioner including her or his relationship with the Director who it is understood will be the Accounting Officer of the Commission (see Explanatory Memorandum and below). It is notable that three sections concern the Director's role, while the Bill is silent on that of the Chief Commissioner. The IHREC (designate) **recommends** that the precise responsibilities of the Chief Commissioner be made explicit (namely whether to chair meetings (section 16(1)) and sub-committee meetings of the Commission, liaise with the Director and act as spokesperson for the organisation or whether other more executive-type functions are envisaged to be performed). In order to ensure good corporate governance and a clear understanding of roles at the apex of the organisation, this is clarification regarding functions and roles is important.

Section 14

51. Section 14 provides for resignation or dismissal of Commission members. While the dismissal provision would not normally occur, it is **recommended** that the reference to dismissal on foot of a summary rather than an indictable offence under section 13(3) be reconsidered.

Section 15

52. Section 15 provides for casual vacancies.

Section 16

53. Section 16 provides for the conduct of meetings and procedure.

Section 17

54. Section 17 provides that the Commission shall appoint from its membership a person to the Management Board of the European Union Agency for Fundamental Rights which is welcome.

Section 18

55. Section 18 provides for advisory committees to consult with relevant agencies and civil society organisations. This is welcome insofar as it allows for a formal engagement with civil society organisations.

Section 19

56. Section 19 provides that a person shall cease to be a member if they are elected to Parliament or the European Parliament.

Section 20

57. Section 20 provides for the appointment of Director of the Commission. The IHREC (designate) welcomes the amendment from the Heads of Bill which confirms that the Director is to be designated and determined by the Commission.

Section 21

58. Section 21 sets out the functions of the Director. Under section 21(2) the Director is accountable to the Commission. The functions of the Director are set out in section 21(1) and include managing and controlling the administration of the Commission, acting as Accounting Officer for the Commission and performing Commission functions as determined by the Commission. Section 21(5) allows the Director to delegate the performance of functions to staff of the Commission with the consent of the Commission.].

Section 22

59. Section 22 provides for the accountability of the Director to the Public Accounts Committee of Dáil Éireann when required in writing to do so on the appropriation accounts and reports of the Comptroller and Auditor General who audits the Commission under section 27 of the Bill. Although a standard clause in all legislation, the provision of section 22(2) stating the Director should not question or express an opinion on the merits of Government policy or objectives in any appearance before the Public Accounts Committee could be revisited, given the potential to undermine the Commission's compliance with the Paris Principles' requirements of independence

Section 23

60. Section 23 provides for the accountability of the Director to other Dáil committees and provides under section 23(2) that where requested by a Committee, the Director shall attend before it to give account for the general administration of the Commission.
61. Insofar as section 23 only provides for attendance before a Dáil committee to discuss administrative matters, the IHRC recommends that in order to meet rising Paris Principles standards on the relationship between the NHRI and Parliament such as those standards set out in the Belgrade Principles,¹⁴ that section 23 be strengthened to add reference to the IHRC regularly meeting with parliamentary committees under procedures to be agreed to discuss and promote law and practice relating to the protection of equality and human rights. Head 11A (4) of the Heads of Bill provided that one of the functions of the Commission would be to provide advice and assistance on human rights and equality issues to Oireachtas committees *“as may be requested by such committee and as the Commission may be in a position to provide and as may be useful and appropriate in assisting such Committee in its work”*. It is accepted that the Commission and Authority regularly appear before Oireachtas committees, however, this could be formalised as set out in the Heads of Bill, while respecting the independence of the Commission and noting any capacity constraints.
62. The IHREC (designate) **recommends** that on the Parliamentary side, a dedicated committee be established to examine equality and human rights matters, with structural linkages to other committees.

Section 24

63. Section 24 provides for the staff of the Commission and their remuneration. The Commission welcomes the explicit provision that the Commission appoints its own staff who are fully accountable to it (direction and control), as confirmed in the Explanatory Memorandum.
64. Section 24(3) provides that Commission staff shall be civil servants in the Civil Service of the State for the purpose of the Civil Service Commissioners Act 1956 and the Civil Service Regulation Acts 1956 to 2005. The Commission has been advised that this is being introduced to ensure that legacy and future pension liabilities are not those of the new Commission but rather the State which will free Commission resources for programmatic work.
65. The Commission’s ability to recruit its own staff is subject to the standard requirement of Ministerial consent to ensure that all public service bodies remain within their overall staffing allocation and public service pay and grade structures, as determined for each public body by agreement with the Department of Public

¹⁴ Belgrade Principles on the relationship between NHRIs and Parliaments, February 2012.

Expenditure and Reform. As noted in the Explanatory Memorandum, this is in line with the staffing arrangements of other independent organisations *“of a constitutional nature such as the Ombudsman, Garda Síochána Ombudsman Commission, the Director of Public Prosecutions and the Oireachtas”*.

66. The Commission welcomes the clarification in the Explanatory Memorandum that *“As civil servants of the State, the staff of the Commission are not amenable to instruction by Government or by any Minister for the Government. These arrangements are designed to ensure the independence of the Commission in full compliance with the Paris Principles, which require that the National Human Rights Institution be legislatively empowered to determine its staff in accordance with national law”*.
67. Section 24(5) introduces the important power for the Commission to appoint temporary staff, for example in specialist positions. The Explanatory Memorandum explains that *“Such persons can be experts on a particular topic or project on which the Commission is working, who would be released by their public, private or NGO sector employer to work with the Commission for the duration of such a project. So as to ensure compliance with the Paris Principles, the Bill makes it clear that all staff employed by the Commission, both full time and temporary, will be under the control and direction of the Commission during any period of such employment and accordingly makes no provision for secondment arrangements”*. The Commission welcomes this statement and understands that when the Commission requests the appointment of temporary staff who it has negotiated with other public, private or NGO body, the relevant permissions from the Departments of Justice and Equality and Public Reform will be forthcoming.

Section 25

68. Section 25 requires the Commission to prepare a strategy statement for a period of 3 years, to consult with educational institutions, representatives of relevant agencies and civil society, Departments of State and other public bodies when preparing the statement and to lay the statement before the Oireachtas.

Section 26

69. Section 26 provides for grants to fund the Commission’s work whereby the Minister may, after consultation with the Commission, advance to it out of moneys provided by the Oireachtas *“such sums as appear to the Minister, with the consent of the Minister for Public Expenditure and Reform, to be reasonably sufficient for the purposes of expenditure by the Commission in the performance of its functions”*. While the reference to funding for the performance of Commission functions is welcome in recognition of the core principle on adequate funding of NHRIs under both the Paris Principles and (implicitly) EU Directives, the Commission recommends that the provision be strengthened from the term *“reasonably sufficient”* to *“reasonably sufficient in the view of the Commission”*.

Section 27

70. Section 27 is the standard provision governing accounts and audits by the Comptroller and Auditor General.

Section 28

71. Section 28 provides that the Commission shall prepare an annual report on its activities and lay copies of the report before each House of the Oireachtas. The report must include information on certain activities undertaken as set out. The IHREC (designate) welcomes that it reports directly to the Houses of the Oireachtas.

PART 3: ENFORCEMENT

General Observation

72. Part 3 is collectively headed “*enforcement*”, which while generally an appropriate description of sections under that Part, does not necessarily apply to certain functions under Part 3. For instance, section 42 places a certain statutory duty on public bodies, but has no enforcement mechanism. Similarly section 30, which relates to the provision of information to the public and keeping under review the operation of certain enactments, is not clearly linked to any enforcement function of the Commission. As will be observed, this is significant insofar as the definition of “*human rights*” under Part 3 would not appear to be appropriate to all the functions thereunder and would be a potentially limiting provision with respect to the functions discharged by both the IHRC and the Equality Authority. This restriction on current functions might be viewed as contrary to the Paris Principles, which provides that a national institution should be given as wide a mandate as possible.
73. The IHREC (designate) **recommends** that section 30 and section 42 be moved to Part 2 of the legislation, outside the clear enforcement functions under the Bill. One unified definition of human rights as discussed below, would also address this recommendation.

Section 29

74. Following from the general observation above, the definition of “*human rights*” in Part 3 of the Bill, is narrower than the definition which applies in the other parts of the Bill. This narrower definition is circumscribed by the requirement that the “*human rights*” in question have been given force of law in the State, and therefore excludes human rights to which the State has committed itself, but which it has not incorporated into Irish law.
75. There are two difficulties with this. First, as a matter of principle, human rights are universal, indivisible and interdependent. The mandate of the Commission as the

State's NHRI is to promote the indivisibility of all human rights. Having two definitions in the Bill does not assist this purpose.

76. Second, this narrower definition of "*human rights*" will impact in different ways in the context of the functions of the Commission as set out under Part 3. While the IHREC (designate) understands that the legislation is seeking to draw a distinction between those human rights to which the State has committed itself and which the Commission should promote more generally, and on the other hand, those human rights that may become the subject of some form of legal proceedings and which must therefore have force of law in the State, it is considered that this is neither a necessary distinction, nor has the definition under Part 3 been wholly confined to litigation functions. It is noted that there is presently one definition of human rights under the Human Rights Commission Act, 2000 save for section 11 of that Act (section 41 in the present Bill). Thus all the relevant human rights treaties to which the State has committed itself are present. This unified definition has allowed for consistency in approach across the functions of the IHRC. The IHREC (designate) would consider that it is a matter for the Courts to determine what human rights have force of law in the State if this is in dispute, and indeed there is established case law in this regard.
77. Accordingly the IHREC (designate) reiterates its **recommendation** that there be one unified definition of human rights, as set out in section 2, that would apply across the Bill, except as set out above.

Section 30

78. As already noted, the narrower definition of human rights would apply to the provision of information to the public under section 30 (1)(a), however it is noted that a similar function is also set out as a separate function under section 10(2)(a) which refers to the provision of information to the public "*generally*". There appears to be two separate sections of the legislation addressing the question of providing information to the public and so overlap significantly, and would also operate under two different definitions of human rights.
79. The IHREC (designate) **recommends** that the general function to provide information to the public under section 10(2)(a), be maintained, but that the section be amended to clarify that information can also be provided to individual members of the public, not just the public generally.

Section 31

80. Section 31 provides that the Commission, at the request of the Minister, may prepare draft codes of practice. Such codes shall address issues such as the protection of human rights, elimination of discrimination, promotion of equality of opportunity in employment and the promotion of equality of opportunity in relation to matters covered by the Equal Status Act 2000. Under section 31(2) the

Commission is required to consult widely including with relevant Government Departments prior to the submission of a code of practice. Section 31(3) provides that a Code of Practice will only be effected following Ministerial order to that effect. The IHREC (designate) understands that this refers to Statutory Instrument. While recognising that the Executive must pass a Code of Practice into law, the IHREC (designate) **recommends** that this section be amended to make clear that a Code of Practice, once approved by the Minister, is admissible as evidence in relevant legal proceedings and also to include a provision regarding the time within which the Minister will consider and approve or indeed reject a draft code of practice.

Section 32

81. Section 32 provides that the Commission may invite an undertaking to carry out an equality review and following such a review, to prepare and implement an equality action plan. The Commission may also carry out a review or prepare an action plan of its own volition if it considers it appropriate to do so for undertakings with 50 or more employees. The Commission may also carry out a review or prepare an action plan in relation to a group of undertakings. However, in order for the Commission to decide to look at a group of undertakings it appears that each individual undertaking within the group must also have at least 50 employees. This could potentially preclude the Commission from looking at a large undertaking that is made up of a number of smaller branches / individual undertakings. The IHREC (designate) **recommends** that while the overall group of undertakings must have at least 50 employees that the individual undertakings within that group should not be so restricted.

Section 33

82. Section 33 makes provision for the Commission to issue substantive notices requiring information from a person or requiring a person or undertaking to take action in relation to equality reviews or equality action plans. Such a notice may also be served if an undertaking fails to implement the requirements of an equality action plan as outlined in section 32. No information or action can be taken against an undertaking with less than 50 employees. As detailed at section 32 above, it appears that the limit of 50 employees would also be in place for individual undertakings within a group of undertakings. The IHREC (designate) **recommends** that there should be no restriction as regards the number of employees in an individual undertaking within a group of undertakings.
83. Any substantive notices to be issued under this section must be notified to the person in writing in advance of being issued. The Bill provides for a period of 42 days for a person to make representations in relation to the notice. This has increased from a period of 28 days under the Employment Equality Acts 1998-2011. It is unclear as to what the objective is in making this period longer and it may be that it adds an unnecessary delay in progressing matters.

84. Furthermore, if there is no appeal in relation to a substantive notice (such appeal having to be lodged within 42 days) it is provided that a substantive notice would come into operation 56 days from the service of the notice. Under the Employment Equality Acts 1998 – 2011 a substantive notice would come into effect on the expiry of the 42 day period. It is unclear as to what the object of increasing the time period so significantly from 42 days to 56 days is. Again, the IHREC (designate) **recommends** the shorter period of 42 days as this could otherwise lead to delays in matters progressing.

Section 34

85. Section 34 concerns an appeal of a substantive notice. A three stage appeal process is envisaged; to the District Court (Equal Status / Labour Court (Employment Equality)), to the Circuit Court, and To the High Court on a point of law. This appeal is said to be final and conclusive.
86. At section 34(5) there is a mechanism for the subject of a substantive notice to appeal a decision confirming a substantive notice to the Circuit Court. However, where the District Court / Labour Court allow an appeal and quash a substantive notice it would seem that there is no mechanism under the Bill for the Commission to appeal this decision to the Circuit Court. The IHREC designate **recommends** that this is clarified and that the wording of section 34(5) be amended in this regard.
87. The appeal mechanism proposed contains two layers before a matter is considered by the High Court. Thereafter it states that the appeal to the High Court is final and conclusive. By introducing an additional layer of appeal to the Circuit Court the process could become burdensome and costly. Furthermore, by denying the parties access to the Supreme Court this could impact on the ability to have constitutional law and EU law arguments ventilated before the Supreme Court on final appeal, which raises a constitutional issue in itself.

Section 35

88. Section 35 provides for inquiries to be conducted at the discretion of the Commission, or by direction of the Minister for Justice and Equality with complex procedures for the holding of an inquiry set out in Schedule 2 to the Bill. The Explanatory Memorandum states that the inquiry function has been re-designed and modelled on that contained in the Commissions of Investigation Act 2004 to ensure that it is robust and effective in practice.
89. It is recalled that the Paris Principles call for NHRIs to have functional independence from Government.¹⁵ In this regard the IHREC designate **recommends** that its inquiry function not be the subject of direction from a Government Minister, even though the IHREC would be independent in the conduct of any inquiry thereafter.

¹⁵ See Section II above.

90. Section 35 sets a high threshold for the decision to conduct an inquiry insofar as there must be evidence of either a serious violation of human rights or equality of treatment obligations or a systemic failure to comply with human rights or equality of treatment obligations and the matter be of grave public concern, and that it is in the circumstances necessary and appropriate so to do.
91. The IHREC (designate) **recommends** that the threshold for deciding to conduct an inquiry be lowered and be brought into line with the requirement under the Commission of Investigation Act 2004, which requires only that the matter to be investigated be “of significant public concern”.¹⁶ It may be expected that inquiries conducted by the Commission will not be routine in light of the resource implications of such an undertaking. The requirement that there is already evidence of a serious violation of human rights or equality of treatment obligations before the inquiry commences begs the question of the purpose of the inquiry. The requirement that a matter be of grave public concern could preclude an inquiry into a hidden violation, for instance the Magdalene Laundries; a confidential communication from a whistleblower not already in the public domain or a matter that only affects a limited group of people, but nonetheless has significant implication for human rights and equality compliance.
92. Further, the Commission recommends that it not be precluded from considering broader human rights standards than those obtaining under domestic law when conducting inquiries. In this regard, it would point out that the three inquiries undertaken by the IHRC to date examined international human rights law standards and were not the subject of any judicial review or other legal proceedings.
93. A clear distinction should be made in the present Bill between the narrative value of an inquiry report to document any failure to uphold human rights and equality standards by a public body or Government Department, and any enforcement proceedings resulting from an inquiry which by necessity could only refer to human rights and equality standards with force of law. The application of the narrower definition of human rights to inquiries fails to distinguish between the value of an inquiry to prompt a change in law and practice for the future, and those aspects of an inquiry which could possibly lead to enforcement action. It is clear that an inquiry can serve both valuable objectives, but the present definition of human rights in Part 3 may limit the value of an inquiry under Part 3. At a minimum it is **recommended** that a clause be inserted in the Bill that the IHREC is not preclude from referring to the definition of human rights under Part 2 of the Bill, in the course of conducting and preparing a report on an inquiry, even if it is considered necessary to provide that the narrower definition applies in relation to any enforcement action arising therefrom.

Schedule 2

¹⁶ Section 3(1)(a), Commission of Investigation Act, 2004.

94. Schedule 2 sets out complex procedures for conducting inquiries which by definition will involve significant cost. It is noted that Schedule 2 is largely modelled on the Commission of Inquiry Act 2004. In particular the IHREC designate is concerned that the 2004 Act envisages that inquiries will be conducted in private and the scope and procedures under that Act are modelled on such a private model of inquiry. While the IHRC has conducted all its inquiries to date in private, the IHREC designate does not wish to be effectively precluded from conducting all or part of an inquiry in public. In addition, the IHREC designate would wish to be able to adopt an inquisitorial as opposed to an adversarial model of inquiry if appropriate, whereas the current emphasis in the Bill would appear to be predicated upon a consistently adversarial approach to inquiries.
95. It is **recommended** that Schedule 2 be revised to allow for both the adversarial model envisaged, but would also allow more scope for an inquiry to be inquisitorial in form and to be capable of being conducted in public without being subject to the cumbersome procedures presently prescribed in Schedule 2.
96. The IHREC (designate) also has some particular concerns regarding specific aspects of Schedule 2. Paragraphs 7 and 12 deal with the payment of legal costs to witnesses that provide evidence in the course of an inquiry in certain circumstances. While the IHREC (designate) considers that a person may in certain circumstances be entitled to have any necessarily incurred legal expenses defrayed, it has concerns that under the Bill this cost must be met by the Commission. The IHREC designate is unclear how it could meet such costs in the context of its current budget. The IHREC designate therefore **recommends** that insofar as legal costs may become payable to a witness under the Bill, that any such costs should be underwritten by the State.
97. Under paragraph 15, the Commission may be compelled to provide interim reports in the course of an inquiry to the Minister, and is also obliged to provide the final report of the inquiry to the Minister; this is irrespective of whether the inquiry is conducted at the request of the Minister or at the volition of the Commission itself. While there may be some justification for such a reporting provision in the context where an inquiry is conducted on the request of a Minister, this provision runs counter to the independence required of a NHRI under the Paris Principles and it is **recommended** that it be deleted.

Section 36

98. Section 36 provides for the publication of an equality and human rights compliance notice following, or in the course of an, inquiry. Such notices will specify the nature of the discrimination or violation of rights concerned and will require the persons on whom they are served to act on the notice. The notice will also outline the steps to be taken to address the violation and specify the timeframe which applies. Where there is no appeal (which must be lodged within 42 days) a compliance notice will come into effect 56 days from the date of service of the notice. As with section 33 above, it is unclear as to what the object of increasing the time period so significantly

from 42 days to 56 days is. This could just lead to delays in matters progressing and the shorter period is **recommended**.

Section 37

99. Section 37 provides an appeal mechanism for persons served with an equality and human rights compliance notice, while section 38 provides for details of all equality and human rights compliance notices to be kept in a register. Section 39 provides that, on the application of the Commission, the Circuit Court may grant an injunction against a person who does not comply with a human rights and equality compliance notice. The appeal mechanism is similar to that provided for substantive notices at section 34 above. The IHREC (designate) would highlight the same issues again in relation to this section.

Section 38

100. Section 38 provides for details of all equality and human rights compliance notices to be kept in a register, and appears to be a standard clause.

Section 39

101. Section 39 provides that, on the application of the Commission, the Circuit Court may grant an injunction against a person who does not comply with a human rights and equality compliance notice, and the IHREC designate has no observations to make on this section.

Section 40

102. Section 40 provides for the grant of legal assistance to persons who apply for such assistance provided certain human rights and equality criteria are met and the assistance cannot be obtained elsewhere. Under this provision, legal advice, representation or other assistance may be granted. Section 40(4) relates to certain criteria that apply to the provision of legal assistance by the Commission. The IHREC (designate) **recommends** that a further criterion be included which would provide that the matter is of strategic importance in addition to raising a matter of principle.

Section 41

103. Section 41 permits the Commission to institute proceedings in its own name seeking relief of a declaratory or other nature in respect of any matter involving the human rights of any person or class of persons.

Section 42

104. Section 42(1) introduces a positive duty on public bodies to have regard to human rights and equality in the performance of their functions. Under section 42(3), the

Commission will assist public bodies to comply with the positive duty, including by producing guidelines, and codes of practice as outlined in section 31 in respect of the development by public bodies of performance measures, operational standards and written preventative strategies for the purpose of reducing discrimination and promoting human rights and equality in the public sector workplace and in the provision of services to the public. Under section 42(5) the Commission may review the operation of section 42(1) and make recommendations thereon.

105. The IHREC believes the text of section 42 could be reviewed and strengthened, noting the experience of the positive equality duty enacted in Northern Ireland in 1998 and of the public sector equality duty introduced in Britain since 2010, and the commitment made by the Irish Government in the Good Friday Agreement 'to ensure at least an equivalent level of protection of human rights' as pertains in Northern Ireland. In that context consideration should be given to (a) requiring public authorities to take such steps as are necessary and proportionate to embed equality and human rights in carrying out their functions and (b) to provisions for enforcing compliance with the requirements of the public duty.

PART 4: DISSOLVED BODIES

106. This Part deals with the dissolved bodies with section 43 providing for the dissolution of the IHRC and Equality Authority on the establishment day.

Section 44

107. Section 44 provides for the transfer of existing functions of the dissolved bodies to the Commission.

Section 45

108. Section 45 provides for the transfer of staff of the existing bodies to the new Commission, as civil servants of the State; that existing collective agreements negotiated with a trade union or staff association continue; that staff transfer to the Commission on no less favourable terms and conditions of service relating to remuneration than those which applied to them immediately before that day. The Explanatory Memorandum confirms that the terms and conditions of service include the transfer of the superannuation benefits accrued by staff transferring from the existing Equality Authority and IHRC which is to be paid from the Vote for Superannuation via the Paymaster General's Office. This provision strengthens the independence of the new Commission as it removes its pension liabilities from its balance sheet.

Section 46, 47 and 48

109. Sections 46 and 47 are transitional provisions providing for the transfer on establishment day of all relevant land, property, liabilities, licences and the

continuation of leases to the new Commission, while section 48 similarly provides that liability for any loss including from any ongoing legal proceedings will continue with the substitution of the Commission for the dissolved bodies.

Section 49

110. Section 49 makes additional provision to ensure continuity of functions so that functions initiated by the dissolved bodies will be continued by the Commission.

Section 50

111. Section 50 provides for final accounts of the dissolved bodies for audit. Section 51 is stated in the Explanatory Memorandum to be a general saver to ensure the continuity of schemes made under any enactment prepared or altered by the Equality Authority or the IHRC and which were in force immediately before the establishment day.

Part 5: AMENDMENT OF EUROPEAN CONVENTION ON HUMAN RIGHTS ACT, 2003

112. Part 5 amends the European Convention on Human Rights Act 2003 ("ECHRA") which according to the Explanatory Memorandum is *"to provide for an enforceable right of compensation in the case of unlawful deprivation of liberty due to judicial error in contravention of Article 5 of the Convention and to update the definitions of the Convention and of the convention provisions in that Act"*.

Section 52 & 53

113. Thus sections 52 and 53 redefine the ECHRA, while section 54 provides for the substantive amendment, providing for an enforceable right to compensation for a person whose detention is found to be in breach of Article 5 of the ECHR and where the detention was as a result of judicial error. This is in response to the Judgment *DG v Ireland*¹⁷ which concerned the placement, in 1997, of a child suffering from severe personality disorders in a penal institution (Oberstown Boys' Centre), due to the authorities' failure to provide appropriate accommodation and special care and protection suited to the applicant's condition (violation of Article 5(1)). A lack of enforceable right to compensation in respect of this detention was also found, since it was considered to be in conformity with national law (violation of Article 5(5)). The Judgment thus identified a domestic lacunae insofar as it was not possible to obtain compensation for such a violation as required under Article 5(5) of ECHR. As Ireland is required to execute this judgment, the State must demonstrate how an applicant

¹⁷ Application No 39474/98 (2002) available at [hudoc.echr.coe.int/sites/eng/Pages/search.aspx?fulltext":\["DG Ireland"\],documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-60457"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx?fulltext)

can seek and obtain redress where there is such an Article 5 violation. It is noteworthy that the Judgment of the European Court was handed down in 2002 and that while individual measures (such as compensation) have been dispersed, the structural issue is only now being addressed by the State.

Section 54

114. Section 54 inserts a new Section 3A in the ECHRA in effect providing for a new tortious action under which a person may institute proceedings in the Circuit Court to recover compensation for any loss, injury or damage suffered by him or her as a result of that judicial act and the Circuit Court may award to the person such damages (if any) as it considers appropriate. This can happen only if a *“finding has been made by the [High or Supreme] Court that he or she has been unlawfully deprived of his or her liberty as a result of a judicial act”*. Thus in order to succeed under this provision, the applicant must first make an application to the High Court or Supreme Court (on appeal presumably) that they have been unlawfully deprived of his or her liberty as a result of a judicial act or omission and only following that may they make an application to the Circuit Court which may or may not grant compensation.
115. While noting the importance of the independence of the judiciary as confirmed in Section 3A(6), the manner in which one can seek compensation for unlawful detention appears particularly cumbersome, noting also that only after exhausting this domestic procedure can a person bring an application to Court and the IHREC (designate) **recommends** that this procedure be re considered.

Appendix A

Assessing Compliance with the Paris Principles

1. As noted in the text of these Observations, 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.¹⁸ 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.¹⁹ The General Observations and the procedure of the Sub-Committee on Accreditation is recognised and supported by the United Nations.²⁰ 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.²¹
2. 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.²² Civil Society

¹⁸ 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%20SCA.doc>

¹⁹ See, *ICC SCA General Observations as adopted in Geneva in May 2013*, available at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx>

²⁰ 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>

²¹ 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: <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/COMPILATION%20OF%20THE%20RULES%20AND%20WORKING%20METHODS%20OF%20THE%20SCA.doc>

²² See for example ICC Sub-Committee on Accreditation Report – May 2013, p. 4, "The SCA convened from 13-16 May 2013. 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 – May 2013. Available online at: <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/SCA-Reports.aspx>

Organisations may also submit information to the Sub-Committee on Accreditation up to four months prior to the assessment of any NHRI.²³

3. The Sub-Committee on Accreditation undertakes a robust review of every NHRI that applies for accreditation or re-accreditation as a NHRI. As at 2014, 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).²⁴ 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.*²⁵

In the situation of Ireland therefore, even if the IHRC had not been due for periodic review in 2013 (which has been deferred pending the introduction of the present Bill), it is likely the Sub-Committee on Accreditation would undertake a special review as a result of the merger.

4. The Sub-Committee on Accreditation undertakes its assessment of each NHRI using an accreditation template.²⁶ The template – called the Statement of 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:

²³ Rules of Procedure of the ICC Sub-Committee on Accreditation 3.6.

²⁴ 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%20NIs%20\(30%20May%202012\).pdf](http://nhri.ohchr.org/EN/Documents/Chart%20of%20the%20Status%20of%20NIs%20(30%20May%202012).pdf).

²⁵ 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>

²⁶ 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>

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.

- 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.²⁷*

5. 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 of a specific NHRI (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 [NHRI] 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.²⁸

6. The IHRC's accreditation as an "A" status institution in 2003/4 was a major achievement for the State and the IHRC.²⁹ 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.³⁰ 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. This was why in 2012 it published robust Observations on the Heads of Bill drawing attention to the need to improve the legislation to ensure full Paris Principles compliance.³¹ During 2012 and 2013 the

²⁷ 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%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).

²⁸ 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).

²⁹ The IHRC had a 'reserved' status for its "A" accreditation from 2002 to 2004 at which time the reservation was removed by the ICC.

³⁰ 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

³¹ Insert Ref.

State liaised with international bodies including the Office of the High Commissioner for Human Rights to understand the requirements of the Paris Principles and this is acknowledged. The Department of Justice and Equality remained in communication with the independent IHREC (designate) in order to understand ongoing concerns. Although the IHREC (designate) wished to reserve its position until sight of the present Bill, in line with its independent mandate, it acknowledges this engagement by the Department and Minister for Justice and Equality.

7. In 2013, Sub-Committee on Accreditation scrutiny further increased the robustness of its scrutiny through the adoption of Revised General Comments. This reflects the UN Secretary General's 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."*³² 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 since 2010.

NHRIs in International Human Rights Bodies

8. 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.³³ 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 also acts as a support in developing the capacity of NHRIs globally, and promoting their compliance with the Paris Principles.³⁴
9. 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.³⁵ In its

³² 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>

³³ See <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>

³⁴ 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>

³⁵ 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."

Resolution 60/251 establishing the Human Rights Council, the UN General Assembly specifically urged the Council to work in close cooperation with NHRIs.³⁶

10. The UN General Assembly has also adopted biennial resolutions on NHRIs in recent years, reaffirming its support for NHRIs.³⁷ 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.³⁸
11. 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.³⁹ 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.⁴⁰ 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.⁴¹ The Committee on the Rights of the Child has elaborated working methods specifically encouraging NHRIs to provide reports and the Committee can meet with NHRIs at their request in private.⁴² 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.⁴³
12. 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

³⁶ 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

³⁷ 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.

³⁸ Available online at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/468/96/PDF/N1146896.pdf?OpenElement>

³⁹ 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.

⁴⁰ See CERD Committee Rules of Procedure CERD/C/35/Rev.3.

⁴¹ 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*

⁴² 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.

⁴³ Human Rights Committee - Working Methods, VIII. Participation of non-governmental organizations and national human rights institutions in the activities of the Committees.

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 2012.⁴⁴ Obviously, the necessary independence of Equality bodies is similarly a concern of the European Union.

13. If a NHRI fails to achieve 'A' Status accreditation, it is downgraded to a non-voting member of the ICC, with one year's suspension on this taking effect. Downgrading would mean it would lose its right to submit documents to and speak at the Human Rights Council. Its overall ability to engage with the international human rights mechanisms would also be diminished as the reliability of its submissions to Treaty Bodies and Special Procedures Mandate Holders would be called into question.

International Recommendations to Ireland on its NHRI

14. 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. These recommendations are documented in the 2012 Observations on the Heads of Bill and focus on structural independence, adequate staffing and reversal of budget cuts.

International Recognition of the Paris Principles

15. 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,

⁴⁴ <https://wcd.coe.int/ViewDoc.jsp?id=1934031>

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.

16. 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.*⁴⁵

⁴⁵ 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