



Policy Institute

**BRIDGING THE DIVIDE:  
THE MERGER OF  
THE IRISH EQUALITY AUTHORITY  
AND HUMAN RIGHTS COMMISSION**

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## 1. EXECUTIVE SUMMARY

At the launch event of the Human Rights Commission's annual report on 29 July 2011, the Irish Minister for Justice, Alan Shatter, announced a review of Ireland's human rights infrastructure to "ensure that resources are used efficiently" and "to facilitate the commission playing an enhanced role".<sup>1</sup> A couple of months later, it transpired that one of the proposals of this government review would be the revival of an idea which had been promoted by government since 2008; the merger of the Human Rights Commission and the Equality Authority into a new Irish Human Rights and Equality Commission (IHREC).

In principle, the integration of an equality and human rights mandate within a unified institutional arrangement may be possible and even desirable. However, in practice, the effective merger of a combined mandate has been fraught with difficulties. Combined mandate bodies now exist in jurisdictions around the world, although principally in Europe, and international agencies increasingly promote a comprehensive approach to the protection of equality and human rights (FRA 2010). However, as yet, it is difficult to identify a bonafide success story.<sup>2</sup> A growing consensus exists which recognises equality and human rights as mutually reinforcing. In the absence of either equality or human rights, the foundations of both are lost or undermined. The challenge presented by the Irish merger experience therefore is, in one sense, a familiar one: how to conduct a transition from two separate precursor bodies into one merged agency without placing either domestic equality or human rights promotion and protection in jeopardy. However, in another respect it is unique. The Irish situation involves the merger of two independent statutory bodies with clearly defined mandates that have both been active for over a decade in Irish public life. Given this context, the argument for integration is therefore not as self-evident as it may be elsewhere.

The transition to the new body is still underway, with legislation expected to be tabled in March 2013. The IHREC is therefore unlikely to assume its statutory function before late 2013. The government published draft legislation for consultation in the form of Heads of Bill in June 2012, providing an important indication of the intended structure of the

1 Irish Times, 'Legislation on way to boost human rights commission', 29 July 2011.

2 The Australian Human Rights and Equal Opportunities Commission may present a case of successful merger. In 1986 the functions of the former Human Rights Commission as well as Equality Bodies were unified under a single act. However, the Australian federal system displays a range of political and structural characteristics which make comparison difficult (for more information see O'Connell 2002).

merged body. The draft legislation has been the subject of considerable commentary, with particular attention paid to issues of independence, functions and powers.<sup>3</sup> Its publication follows the report of a Working Group (established by the Department of Justice) to the Minister of Justice published in April 2012 as well as ongoing consultation with interested individuals and groups undertaken by government, the Working Group, and the Parliamentary Committee on Justice, Defence and Equality.

Initial announcements by government that legislation to provide for the new body could be law by the end of 2011 proved to be optimistic. The proposed merger of the two bodies has generated a mixed response from non-governmental stakeholders within and outside Ireland. While the Minister's emphasis on reform in order to enhance the role of these two bodies has been welcomed, what emerges in this report from extensive consultation with observers is a genuine concern that the ultimate motive for merger is financial. Compounded by the controversial experience of the two precursor bodies in 2008, commentators are wary of embracing the merger as a genuine opportunity for institutional renewal in light of suspicions that this is the final act in a series of attempts by the Irish government to increase its influence over these two bodies.

The new body will replace two agencies which have both been active for over a decade in Irish public life. Their origins point to both domestic and international drivers of institutional innovation. The Equality Authority (EA) was created by legislation under the Employment Equality Act in 1999,<sup>4</sup> an important addition to a series of institutional developments in Ireland designed to advance equality and non-discrimination in the workplace and services sector (be it public or private). The Irish Human Rights Commission (IHRC) was established in 2000 as a result of the Good Friday Agreement and its stipulation of human rights parity north and south of the border,<sup>5</sup> as well as support from the United Nations and the then incumbent High Commissioner for Human Rights and former Irish

3 Most recently see Amnesty International, Submission to the Minister for Justice and Equality on the Heads of the Irish Human Rights and Equality Commission Bill 2012, December 2012.

4 Employment Equality Act 1998-2011, sections 39-105.

5 The Belfast Agreement requires the Irish Government to ensure 'at least an equivalent level of protection of human rights as will pertain in Northern Ireland'.

President, Mary Robinson, which has heavily promoted the diffusion of national agencies dedicated to protecting and promoting human rights (Pegram 2010).<sup>6</sup>

The idea of merging the two bodies was first proposed in 2008. The government had announced a radical programme of public service rationalisation, earmarking 41 mergers or dissolutions of state agencies. However, in response to vocal opposition from politicians, civil society, the bodies concerned, and the international community, this initial attempt at merger was shelved. Instead, the government imposed very severe budget cuts on both bodies. In a context of overall departmental budget reductions of four percent, in November 2008 the Minister for Justice announced cuts of 43 percent to the EA and 32 percent to the IHRC. While acknowledging the extraordinary fiscal context, the IHRC, alongside many other observers, denounced the cuts as disproportionate and excessive. In practical terms, this action ushered in a period of extreme institutional uncertainty for both bodies – one which, five years later, is still to be resolved.

A context of uncertainty and mistrust between government and equality and human rights advocates is also informed by a historically fractious relationship between the two precursor bodies and government, and in particular the sponsor department, the Department of Justice and Equality. Both bodies have been subject to resistance by powerful political actors within and outside the State and have had their operational autonomy and performance placed in doubt via dubious appointment procedures, inadequate budgetary provision and government opposition or indifference to their work. As such, a genuine commitment among many institutional designers and integration stakeholders “to get it right this time” must contend with the legacy effects of the prior bodies, both in terms of their respective performance and legitimacy, as well as their treatment at the hands of government. In many ways, this is the central challenge which frames the Irish merger experience.

The following report maps out the Irish merger process up to 2013. It provides a detailed account of the sequence of events which have impacted upon the process of design-making and the general climate in which the integration has taken place. It is important to emphasise that this is a study about the process of integration from two precursor bodies as opposed to its outcome. Furthermore, this report does not seek to provide a thorough legal

<sup>6</sup> Ireland has developed a significant equality and human rights infrastructure over the past decades. This includes legislation such as: the Employment Equality Act 1998-2011, the National Disability Authority Act 1999, the Equal Status Act 2000-2011, the European Convention on Human Rights Act 2003, and the Disability Act 2005.

critique of the proposed legislation in the Heads of Bill, which has been ably undertaken elsewhere.<sup>7</sup> The report highlights five principle ‘learning points’ relating to the integration of the functions of equality and human rights bodies which may be of salience to other cases (or future cases) that display a point of departure similar to the Irish experience. I evaluate these key insights under the following five headings:

### 1. Legacy effects of precursor bodies

The experience of the Equality Authority (EA) and Irish Human Rights Commission (IHRC) leading up to the events of 2008 casts a long shadow over the current merger process. It is widely held that organisations will generally be constrained by their origins, either through formal design features or the political circumstances of their inception (Mahoney & Thelen 2010). In this regard, it is material to note that the IHRC was widely feted in 2000 as a potential model for ‘best practice’ in NHRI design, especially in light of robust compliance and investigative functions. On closer inspection, however, deficiencies in terms of formal safeguards of independence – especially regarding appointment and budgetary allocation procedures – have had a bearing on the political trajectory of the office. Indeed, formal design weakness has mapped relatively straightforwardly onto political reality, with the IHRC subject to arbitrary Ministerial prerogative. Against this backdrop, it is unsurprising that debate surrounding the independence safeguards of the new Irish Human Rights and Equality Commission (IHREC) has assumed such significance. It is also material to note that the work of the IHRC has been hamstrung from the outset by a lack of elite political support for an independent human rights watchdog – the impetus for NHRI reform having emanated principally from outside Ireland’s borders under the Good Friday Agreement.<sup>8</sup>

Conversely, the experience of the EA suggests variation and divergence from potentially negative legacy effects. In formal design terms, the EA presents a more constrained template in terms of independence from government. However, rooted in an increasingly dense equality framework at the domestic and European level, and, importantly, broad domestic political consensus on the anti-discrimination and equality agenda, the

<sup>7</sup> See, in particular, the Report on hearings in relation to the Scheme of the Irish Human Rights and Equality Commission Bill published by the House of the Oireachtas in July 2012. Also, see observations by the Irish Human Rights Commission and the OHCHR on the Heads of Bill.

<sup>8</sup> Very real concern has been expressed north and south of the border that the diluting of equality and human rights infrastructure in the south may have significantly deleterious consequences for the Good Friday Agreement and analogous structures in Northern Ireland.

EA initially advanced its mandate to promote equality of opportunity and eliminate discrimination with considerable success. In this case, the body was able to exploit the positive legacy effects of its initial political circumstances. However, a crucial factor to understanding the ability of the EA to exceed expectations is leadership. In a political and civil service system defined by a culture of control, it is perhaps surprising that the first CEO of the EA was an individual with no official ties to government or the civil service and with a background in advocacy in the non-governmental sector. It is important not to underestimate the importance of leadership in enabling (and disabling) independent and effective organisational performance. Again, this insight informs the heated exchange of views within the current merger regarding the independence and transparency of the selection and appointment process. As one observer puts it:

Everything depends upon the process by which people are appointed and who is appointed. That is why we have pushed so hard on the appointment process, getting the right people in, plus a structure which provides a level of insulation from political forces, will mean the new body can get things done. Decisions made now [at design stage] will determine the ultimate independence of the IHREC.

Productive relations with stakeholders within and outside state structures will be vital to the future viability of the IHREC. It is important to acknowledge that these relations will also be informed by the history of the two precursor bodies. Both the EA and IHRC have had to contend with the often competing demands and expectations of different constituencies within Irish society. The EA has been generally regarded as responsive to civil society, especially in its legal defence and developmental work. It is also material to highlight that until 2008, the EA was widely viewed as performing highly effectively by observers within civil society, the media and international bodies (Harvey & Walsh 2009). Indeed, the Equality and Rights Alliance (ERA), an NGO-coalition emerged in response to government attempts to merge the two bodies and was in place and able to mobilise effectively when confronted with the budget cuts imposed on the two bodies in 2008. Relations with government have been problematic. Within government circles the EA under the stewardship of its first CEO was criticised for its adversarial stance towards the state. Without denying its achievements in terms of presence and impact in Ireland, officials viewed the EA as often behaving inappropriately – acting more like a campaigning NGO than a state agency. Notably, such official criticisms have not been directed at the EA under its post-2008 leadership. The future IHREC will have to contend with the demands and expectations of these diverse constituencies and the historical residue of the EA experience.

The IHRC offers a different legacy in terms of performance and the demands and expectations which may arise from diverse constituencies on the new body. The IHRC is generally regarded as having worked effectively at the international level, for instance engaging the UN treaty bodies. However, its presence and impact at the domestic level is widely viewed as underwhelming. Notwithstanding the value of its output, especially legal opinion work on draft legislation, *amicus curiae* interventions, and a growing body of outreach and education activities, a significant number of observers suggest that the IHRC could have done more. In particular, it has been criticised for not delivering on its initial promise as a robust human rights watchdog. It is important to underline that the IHRC has been chronically under-resourced, severely so post-2008. For instance, from 2003 to 2008, the IHRC had a total of 10 members of staff (five of which were administrative personnel). In contrast, the EA had an initial complement of 51 staff. All subsequent requests for additional staff by the IHRC were rejected. Nevertheless, strategically, observers point to its minimal use of investigative powers over its ten years of activity. This criticism is particularly pronounced within civil society, but also echoed among state officials. In other words, the rationale for merger has been informed by a desire to balance the role of Ireland's official NHRI as a participant in international forums with delivering human rights impact and presence in Ireland.

## 2. Decision-making and design processes

As alluded to in the quote above, decisions made during the merger process may have good or bad consequences for the IHREC. Research on institutional innovation suggests that the procedures adopted in creating an institution at design stage – for example, whether public consultation occurs – can shape the public perception of the institution over time (Goodman & Pegram 2012). NHRI entrepreneurs regard meaningful consultation with civil society as a threshold condition for the future viability of new offices.<sup>9</sup> In this regard, the Irish merger process may approximate a best practice model for open, inclusive and transparent consultation. Notably, there is little guidance currently available on best practice in transition management towards a unified equality and human rights body. It is important to emphasise that the focus of this learning point is restricted to the *process* not the *substance* of the proposed merger.

The Irish merger process has been characterised by a willingness on the part of the

<sup>9</sup> Brian Burdekin, NHRI practitioner and expert, in interview with author, University of Lund, Sweden, 16 November 2012.

sponsor department and minister to open up spaces for dialogue. Following the merger announcement, a Working Group was established by the Department of Justice to advise the Minister on the establishment of the IHREC. The Working Group invited submissions from stakeholders in Irish society – underwriting the credibility of its final report. In total, 69 submissions were received. In turn, the Minister chose to issue Heads of Bill. Unlike draft legislation, a general scheme or ‘Heads of Bill’ provides for the opportunity for consultation with each proposed clause or head accompanied by an explanatory note. Again, domestic stakeholders were invited to submit observations on the proposed legislation and participate in public hearings within the Oireachtas (Parliament). The role of the Oireachtas also bears highlighting. The Minister requested that the Oireachtas Committee on Justice, Defence and Equality examine the Bill and undertake a consultation process. There is little precedent in Irish political procedures for an Oireachtas Committee to assume an oversight role over the design of department bodies. Finally, the Minister proactively sought the view of international agencies as well, personally meeting with UN officials to discuss compliance of the IHREC within international standards.

Innovation in the process reflects the sensitivity of the Irish government to criticism on the merger. However, the substantive outcome is still yet to be unveiled. The role of the Minister in driving the merger process has been a recurring feature, as has his repeated assurances that he has responded appropriately and fully to the recommendations as laid down by the Working Group and the UN. As this report documents, the extent to which this is accurate is debated by observers, and will only become fully apparent when legislation is tabled before the Oireachtas. More broadly, while the Minister has asserted leadership over the process, other actors have also assumed degrees of autonomy. For instance, while the Minister may have viewed the Working Group and Heads of Bill initially as a technical exercise, such initiatives opened the door to a more expansive participative process. The calibre and independence of many of the individuals appointed to the Working Group were noted by stakeholders in civil society.

If there is a more cautionary lesson to be discerned from the Irish experience it is that the merger process has been conducted in a context of political and economic crisis which has served to constrain the parameters of debate around an institution which, presumably, will outlive the present situation. For instance, the Working Group was explicitly directed to have regard for the economic position and limited resources of government. The stipulation by the Working Group that there should be only three divisions in the

Commission's structure for instance has been criticised as unnecessarily restrictive.<sup>10</sup> Although, others counter that it is a helpful point of departure for transition management to a new combined structure. Many observers express concern that the quality of the process has been undermined by the parlous state of the EA and IHRC throughout the merger period. Other critical voices express concern that innovation by government officials has effectively served to pacify civil society mobilisation, as well as ensure that officials retain the initiative over the substance of the eventual reform.

### 3. Independence, accountability and sponsorship

The merger process also raises the question of how legislative amendment and reform over time will reset and unleash new legacy effects. The reconfiguration of the EA and IHRC into a new body represents new opportunities as well as challenges to the long-term success of the IHREC. A key issue in this regard is the importance of clearly defined lines of accountability and the safeguarding of independence from government interference. It has been repeatedly asserted by merger participants that increased accountability of the new IHREC to a government sponsor department is not conducive to either independent action or high-performance. This assessment is based not only on the experience of the precursor bodies, particularly the EA, but also on a growing body of international guidelines and evidence. For instance, the Council of Europe Commissioner for Human Rights in his Opinion on National Structures for Promoting Equality concludes that '[s]tand alone bodies with their own legal status have been found to be more independent. Bodies that form part of a Government department or ministry face significant issues of independence' (COE 2011, 14). Although the EA is an independent statutory body and therefore may meet the higher standard as specified by the European Commissioner – its independence has been repeatedly tested by Ministerial interference.

The merger process has brought issues of accountability into sharp relief, with various stakeholders subjecting the formal arrangements surrounding appointment procedures and budgetary provision to forensic scrutiny. International guidelines governing NHRI independence from government are relatively clear and robust. However, guidance on best practice arrangements for equality structures in European jurisdictions is only now emerging. Notwithstanding that the COE Commissioner for Human Rights has expressed concerns, a majority of equality bodies in Europe report to a Government Minister or

<sup>10</sup> These three divisions will be: (1) legal claims, (2) human rights and equality promotion, and (3) evaluation and research.

Department and/or a statutory financial control body (Equinet 2012, 15). As such, one outcome of such merger processes may be a raising of the design bar more on the equality than the human rights side of the structural equation. Alternatively, merger may risk levelling down the robust independence generally afforded to NHRIs but not equality structures. A recurring theme in the Irish case has been the difficulties of insulating an equality and human rights watchdog from interference in what observers variably term a “highly personalised” civil service and political system defined by “an anti-independence culture”. In particular, the EA’s robust record up to 2008 of pursuing a steady stream of discrimination cases through court actions, often against state officials and agencies, was neither well-understood nor deemed legitimate practice by significant figures within state structures. The same can be said of the overtly hostile reaction of government to the IHRC 2007 report detailing the alleged use of Shannon Airport by US aircraft involved in rendition flights.

As such, the appropriate configuration of linkages between the IHREC and government is of central concern. The Heads of Bill provides some insight into the potential consequences of merger for the future independence of the body. On the positive side of the balance sheet, the blueprint structure provides for a strengthened reporting mechanism to the Oireachtas. The evolving role of the Committee on Justice, Defence and Equality discussed above may be significant in this regard and was probed with interest, if not resolved, by the Committee during its hearings in July. This enhanced oversight reflects a specific recommendation of the Working Group. In turn, the Heads of Bill advances a number of positive changes diluting links to the Minister, and enhancing the role of the Oireachtas oversight. This is evident with regard to the strategic plan, strengthened safeguards of dismissal, reporting to an Oireachtas committee, and the direct submission of annual reports to Parliament. However, while welcome, such modifications do not sever the link between the new IHREC and the sponsor department (the Department of Justice) and ministerial control. The Minister has stated that enhanced Oireachtas oversight is ‘of symbolic importance in terms of underpinning the independence of the new Commission’.<sup>11</sup>

Many observers, including the IHRC, question whether the proposed accountability arrangement goes far enough. Indeed, the IHRC has advanced a ‘least-worst option’ that the IHREC at least be accountable to a department where any conflict of interest is least likely to arise. However, this appears unlikely to be incorporated into the forthcoming

<sup>11</sup> Department of Justice, Shatter announces publication of General Scheme of Irish Human Rights and Equality Commission Bill, Department of Justice [press release], 5 June 2012.

legislation. Similarly, there is a striking lack of substance on the mechanics of financial provision to the new body. In a 2008 survey of equality bodies in the EU, autonomy over resource management and personnel was flagged as undermining independence across cases (Equinet 2008). In this crucial regard, the 2013 merger process appears to be mirroring the establishment of the IHRC in 2000 in modifying international guidelines on independence to suit domestic political preferences. However, in the intervening years, international NHRI guidelines have been subject to increased refinement, precision and compliance. The Scottish Human Rights Commission, created in 2008, and other similar bodies in Europe have emerged as best practice models, displaying no links to the Executive, instead being accountable to the legislature. The IHREC is scheduled to be reviewed by the International Coordinating Committee of NHRIs in 2013.

Finally, the role of civil society watchdogs in monitoring the independence and accountability of equality and human rights bodies is exemplified by the Irish experience. Indeed, one of the key legacies of the Irish merger process has been the establishment and active mobilisation of the Equality and Rights Alliance (ERA) in opposition to the dismantling of Ireland's equality and human rights infrastructure. The unification of over 100 equality and human rights NGOs under one organisational roof is unprecedented and may serve as an example to activists elsewhere in Europe and beyond. However, in terms of impact, there are lessons to be learnt. NGO mobilisation in Ireland has not been sufficient to protect the two precursor bodies and observers point to deficits in terms of sustained action following a high watermark in late 2008.

#### 4. Selection and appointment process

Given the above, it is perhaps unsurprising that the selection and appointment process has attracted so much attention. This study is naturally limited by the ongoing nature of the Irish merger process. However, a key lesson that can be derived from the experience thus far is the absolute importance of the integrity of the selection and appointment process. The Irish study displays significant innovation and, above all, improvisation as key stakeholders have manoeuvred to enhance the procedural and substantive content of the appointment process. Again, this debate needs to be understood backwards, in the context of considerable controversy surrounding appointment to the precursor bodies. The consequences of the appointment procedures are still unknown. At the time of writing the latest development is that the Selection Panel has issued calls for expressions of interest for the posts of Chief Commissioner and Commissioners of the IHREC. However, reflecting on the conduct of the process up to this point does raise important insights into

the challenges that may arise in fusing the leadership structure of distinct equality and human rights bodies.

The formal appointment procedure of the IHREC is an improvement on the precursor bodies, with the final appointment of Commission members made by the President on the advice of the government and resolutions passed by both the Dáil Éireann (House of Deputies) and the Seanad Éireann (Senate). As documented in this report, both the EA and IHRC leadership were subject to Ministerial discretion and appointed individuals often had close personal links to the political establishment. In addition, the presence of current or former civil servants to senior decision-making roles within the EA and IHRC contradicts General Observations issued by the UN ICC Sub-Committee on Accreditation (SCA). The SCA is clear in its General Observation 2.4 that in order to guarantee independence, senior level NHRI posts should not be filled with secondees and the number of seconded should not exceed 25 percent and never be more than 50 percent of the total workforce.<sup>12</sup> In light of this, Head 17(5) of the Heads of Bill has provoked particular consternation, appointing the current CEO of the EA as the first CEO of the IHREC without referral to a public appointment process. Further controversy has surrounded the appointment of the selection panel and subsequent appointment process.

The events of July and August 2012 raise a number of possible lessons for the merger of equality and human rights bodies. The Minister's unilateral appointment of a selection panel may have been in keeping with domestic precedent, but rang alarm bells for domestic and international stakeholders. Notified of concerns raised by the UN Office of the High Commissioner for Human Rights (OHCHR), the appointed panel duly 'stepped aside' after four days in post. In response to this development and with Ireland's bid for a seat on the UN Human Rights Council looming, the Minister improvised, sending representatives to Geneva to reassure OHCHR officials of the credibility of the process and retroactively requesting that the Oireachtas Committee on Justice, Defence and Equality satisfy itself that the appointment of the Selection Panel was transparent and that it would perform its function independently. Clearly, there is scope for the role of the Oireachtas Committee in overseeing the appointment of the Selection Panel to be written into legislation, through confirming the independent panel and interviewing nominated individuals. Furthermore, in the aftermath of this episode, there are also important lessons to be learnt for international stakeholders. In particular, Ministerial assurance to the Oireachtas that

<sup>12</sup> One observer notes that the SCA guidance on this matter is not very helpful as 50 percent secondment of the workforce is a lot by any standard.

senior OHCHR officials view the Irish approach to merger 'as a best practice model' does not necessarily chime with the viewpoint of actors on the ground or elsewhere in the international system. At another level, it exposes a possible lack of coordination among a loose network of international stakeholders when faced with domestic equality and human rights reform.

The enhanced role of the Oireachtas Committee in retroactively confirming the Selection Panel as both highly credible and independent is welcome. In turn, the public hearing of the Selection Panel before the Committee in September 2012 was broadly reassuring, in particular the interpretation of Heads of Bill 13(6) advanced by the Panel that it, not the Minister, would have the final say over appointments. However, for some observers, the retroactive confirmation of the panel by the Oireachtas Committee did not address the fundamental objection that the Minister has exerted undue influence over the process. Similarly, there remains a lack of clarity over how the Selection Panel will function in practice especially with regard to upholding the principles of transparency and pluralism. On both counts, the Heads of Bill offer minimal guidance. Nevertheless, developments may have assuaged concerns over the outcome, if not the procedural mechanics, of the process. The Panel issued a call for expressions of interest in mid-November with criteria laid down as a benchmark to judge the suitability of candidates. On 16 April 2013 Minister Shatter announced the appointment of 14 members designate of the IHREC.<sup>13</sup> The expert calibre and diverse profiles of the 14 Commissioner designates bodes well for the future public standing of the new body.

More problematic is the failure of the Panel to identify a suitable candidate for Chief Commissioner.<sup>14</sup> Minister Shatter has invited the 14 Commissioner designates to appoint an interim Chair from among their own ranks until a Chief Commissioner can be recruited. In the meantime, the Selection Panel reportedly intends to re-advertise the position. The integrity of the selection process is of vital importance, with the future public confidence in the IHREC leadership at stake. Public confidence in the IHREC leadership will be crucial if the new Chief Commissioner and Commissioners are to effectively advance their mandate in a climate of austerity-driven equality and human rights policy.

<sup>13</sup> See Department of Justice, Appointment of members designate of new Irish Human Rights and Equality Commission [press release], 16 April 2013.

<sup>14</sup> Irish Times, 'Concern grows over human rights policing vacuum as merger crawls to conclusion', 8 April 2013

## 5. Integration of equality and human rights functions

The Irish experience promises to offer considerable insight into the integration of functions previously performed by separate equality and human rights bodies. First order questions surrounding what these institutions are actually for and whether their distinct mandates can be folded into the same programmatic vision of action defy easy answers. Given the ongoing merger process, any observations advanced here are inevitably speculative. Nevertheless, some preliminary points can be drawn out from the merger deliberations. The key point that emerges is that parity of equality and human rights has to be actively sought, through both design and transition management. While there may be no fundamental impediment to merging the two mandates, the process of bringing together equality and human rights under one institutional roof presents challenges. Above all, the question of what is gained and what might be lost as a result weighs heavily on observers' minds. More concretely, particular attention has fallen on whether the IHREC will be more oriented towards promotion or enforcement and how the merger might impact on the 'change agenda', especially in the areas of equality and elimination of discrimination.

In terms of design and transition management, the Irish experience has been characterised by innovative practices but also by a high degree of improvisation. Many observers concur that the protracted period of institutional uncertainty since 2008 has served to diminish the work of both the EA and IHRC. Of particular concern, the post of EA Legal Director became vacant in 2009 and was not re-advertised, with the legal work of the EA reducing precipitously. In turn, the management structure of the IHRC has been slowly eroded, with the President becoming the sole Member of the Commission with the expiry of the board in October 2011.<sup>15</sup> Since July 2012 and the non-reappointment of the President, the IHRC effectively has no serving Commissioners. Such significant omissions do not reflect well on transition management to the new body. At the micro-level, the dwindling staff of both bodies express concern regarding their future status following successive budget cuts and arbitrary reorganisations. Although personnel at all levels have made efforts to reach out to their counterparts in the other body, the process of knowledge-exchange remained largely informal until early 2013.

The merger of two very distinct organisational cultures will take great care and skill. The assumption appears to be that this task would have fallen largely on the shoulders

<sup>15</sup> Three interim Commissioners were appointed to the IHRC in December 2011. However, their appointment was not renewed in May 2012.

of the incoming CEO of the IHREC (the current CEO of the EA). However, the task of facilitating integration of a diverse workforce, distinct mandates and pooled resources should be more proactively managed from the outset. In this respect, one conspicuous deficit in the Working Group report was indepth discussion of how to integrate equality and human rights concepts. The fundamental compatibility of these related but distinct concepts was not probed in a substantial manner, the focus falling instead on the practical task of fusing structures. However, a recurring theme among equality and human rights advocates is the importance of a unified understanding of both concepts as the bedrock upon which to integrate a merged mandate-body and provide a strategic compass. Merged bodies operating in other jurisdiction, notably Britain and Scotland, have dedicated themselves to devising frameworks of actions which place unifying concepts at their core.<sup>16</sup> The Irish Working Group Report does refer to dignity as a core value underlying the idea of human rights. However, it could have usefully developed the core concepts which will underpin the integration of the IHREC, especially given the shallow roots of a human rights culture in Ireland. Unlike the EA, the IHRC struggled from the outset to clearly define its constituency or engender political support within or outside state structures.

Another area of significance for integration is parity or the levelling up of powers in relation to both equality and human rights. In this regard, the broad scope of functions and powers which the IHREC will enjoy has been broadly welcomed by stakeholders. In particular, the introduction of an equality and human rights duty on the public sector poses a potentially useful tool of influence (although it notably lacks any specific enforcement provision). The decision to create a purely voluntary positive duty appears to have been governed by the experience of Northern Ireland, where the positive duty has proven to be a particularly bureaucratic and resource-intensive instrument. It is perhaps surprising that a less onerous but still robust model entailing specific duties and the potential for enforcement, such as the positive duty which applies in Great Britain, did not guide design in the Irish case. The outcome is a notably weak positive duty in comparative perspective which may prove to be inadequate to the task of eliminating discrimination and promoting equality.

<sup>16</sup> The EHRC bases human rights on the FREDA principles: Fairness, Respect, Equality, Dignity, and Autonomy. See <http://www.equalityhumanrights.com/human-rights/what-are-human-rights/>. The Scottish Human Rights Commission has developed the PANEL framework: Participation, Accountability, Non-discrimination and equality, Empowerment, and Legality. See <http://www.scottishhumanrights.com/careaboutrights/whatisahumanrightsbasedapproach>

A number of concerns have also been raised regarding powers and mandate based on the preliminary Heads of Bill including inconsistencies in the definition of equality and human rights with a narrow definition of equality and human rights imposed on the IHREC's enforcement and compliance activities (Head 30-36). Equality advocates have expressed particular concern at the definition of equality which is a narrower and more limited definition than that currently used by the EA. This debate reflects a deep disquiet among advocates that it is the government's intention to dilute the equality agenda. Both equality and human rights stakeholder strongly lobbied for the introduction of a tenth socio-economic ground and expansion of the equality provision to ensure a levelling up of powers across equality and human rights. Government officials have indicated that these concerns will be addressed in the forthcoming draft legislation. It is important to note that the IHREC legislation will not replace existing equality legislation and therefore does not represent deterioration in the equality provisions afforded to the new body, at least in formal terms.

Related to the above, if there is a clear fault line between the precursor bodies it is their approach towards legal enforcement activities. While both bodies actively promoted their respective mandates through promotional and developmental work, the IHRC was not inclined to pursue human rights claims through legal action, relying instead on *amicus curiae* briefs before the courts and occasionally granting legal assistance to claimants. Under EU equality directive 2000/43, specialised anti-discrimination bodies should be enabled to 'provide concrete assistance for victims' – including legal assistance.<sup>17</sup> From the outset, the EA pursued with considerable success a steady stream of discrimination legal cases, with a view to stimulating a culture of compliance among Irish stakeholders within the public and private sector. Indeed, the adversarial approach adopted by the EA towards allegedly violators, many of them within the state, became a repeated flashpoint between the body and public officials. Some equality advocates suspect that the legal function of the EA will be diminished in the new body. Suspicion has been heightened by the ambiguity surrounding the phrase 'strategic litigation', which – depending upon your interpretation – may or may not fall short of what is required to ensure a culture of compliance. The potential to advance equality and human rights change through judicial activism may be de-prioritised with the transition to the IHREC. On the other hand, as will be outlined, the new body retains in the Heads of Bill the formal powers and duties of the precursor bodies. As such, whether strategic litigation is pursued effectively by the

<sup>17</sup> See *Council Directive (EC) 2000/43/EC of 29 June 2000 on Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, s. 24.*

IHREC in the fulfilment of its duties under domestic and international law is likely to hinge more on individual leadership by the Chief Commissioner than the IHREC's formal attributes, or lack thereof.

The report proceeds as follows. First, an outline of the proposed arrangements for the integrated IHREC is provided based on the General Scheme of the Irish Human Rights and Equality Commission Bill published in May 2012. Second, a historical mapping of the experience of the two precursor bodies is provided with a view to contextually foregrounding the current situation. Finally, the report details those key factors in the Irish case study which may (or are likely to) facilitate or inhibit the effective integration of equality and human rights functions.

## 2. GENERAL SCHEME OF THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION BILL

The Minister for Justice and Equality, Alan Shatter, published the general scheme of the proposed legislation to replace the Equality Authority (EA) and Irish Human Rights Commission (IHRC) on 29 May 2012. Unlike draft legislation, a general scheme or 'Heads of Bill' provides for an opportunity for consultation with each proposed clause or head accompanied by an explanatory note. The Heads of Bill (HOB) followed the report and recommendations of the Working Group published in April 2012 which the Minister announced he had accepted in full.

The legislative form of the Bill was initially approved by Government for priority drafting in the Office of the Parliamentary Counsel. However, this process has since been delayed. As of December 2012, the Bill remains within the Attorney General's office and is unlikely to be tabled before the Oireachtas (Parliament) until March 2013 at the earliest. Nevertheless, the Heads of Bill provides considerable insight into the proposed design of the new body. This section focuses in particular on attributes of independence and accountability, as well as the duties and powers to be assigned to the new Irish Human Rights and Equality commission (IHREC). Notably, the HOB explicitly states that the new body 'is established in compliance with the UN guidelines on the design of National Human Rights Institutions (NHRIs), the Paris Principles, and shall be guided in the exercise of its functions by those principles'.<sup>18</sup>

The composition of the Commission is specified in Head 13 comprising a Chief Commissioner and eleven Commissioners with emphasis on gender parity.<sup>19</sup> Reflecting a broader concern for plurality, appointees should reflect the multicultural 'nature of Irish society'.<sup>20</sup> All twelve positions are to be filled through a publicly advertised process, details of the selection criteria are to be published,<sup>21</sup> and a Selection Panel of five persons, appointed by government, are to make recommendations to government on candidates for

18 Head 8(3). See Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights, adopted by the UN Human Rights Commission, Res. 1992/54, 3 March 1992 and the UN General Assembly, Res. 48/134, 20 December 1993.

19 The number of Commissioners has subsequently been increased to 14 as reflected in the recent call for expressions of interest.

20 Head 13(8).

21 Selection criteria are not specified in the HOB beyond reference to 'relevant experience, qualifications, training or expertise'. Head 13(5).

the positions. The final appointment of Commission members is to be made by the President on the advice of the government and resolutions passed by both the House of Deputies (Dáil Éireann) and the Senate (Seanad Éireann).<sup>22</sup> Head 13 states that the government shall accept the recommendation of the Selection Panel except ‘for substantial and stated reasons in exceptional circumstances’.<sup>23</sup>

The term of office for members is for a period not exceeding five years with the possibility of reappointment for one further term.<sup>24</sup> The terms and conditions applying to individual members are to be determined by the government at the time of appointment.<sup>25</sup> A period of five years must elapse before a former member of the IHREC is again eligible for appointment.<sup>26</sup> It is further specified that, initially, six members will be appointed for a term of three years and six members, including the Chief Commissioner, for a term of five years in order to ensure continuity of experience in the new body.<sup>27</sup> The office of Commissioner, including Chief Commissioner, was originally designated as part-time with the possibility of the Chief Commissioner serving full-time at the discretion of the Minister.<sup>28</sup> This has subsequently been revised and the Chief Commissioner is now expected to be a full-time position. Former members of the precursor bodies will be restricted to serving one single term if appointed to the new body.<sup>29</sup>

In terms of operational autonomy, the HOB states that the IHREC is to regulate its own internal procedures, including working practices and decision-making by consensus or majority vote.<sup>30</sup> Importantly, grounds for dismissal by the President are clearly spelled out in Head 14. In keeping with the practice of the EA and IHRC, the IHREC is empowered to appoint advisory committees to advise on matters relating to its functions.<sup>31</sup> Of particular note is the requirement that ‘a stated reason’ must be advanced justifying dismissal and that such an action may only proceed following resolutions by the Dáil Éireann and by

22 Head 13(4).

23 Head 13(6).

24 Head 13 (7-8).

25 Head 13(8).

26 Head 13(13).

27 Head 13(11).

28 Head 13 (8).

29 Head 13(12).

30 Head 15 (7).

31 Head 16.

Seanad Éireann calling for his or her removal. This provision represents a strengthening of the independence safeguards afforded to the precursor bodies where in both cases dismissal of members by the Minister did not entail Parliamentary oversight.<sup>32</sup>

Head 17 provides that there will be a Director of the Commission who shall be appointed by the Commission without referral to the Public Appointments Service. The terms and conditions of contract are to be determined by the IHREC but must also receive the consent of the Minister of the sponsor department, as well as the Minister for Public Expenditure and Reform. The Heads of Bill states that the first Director of the Commission shall be the current Chief Executive of the Equality Authority who will serve out her current contract as Director of the new body.<sup>33</sup> The Director is responsible to the Commission for his or her functions and the implementation of the Commission's policies.<sup>34</sup>

In terms of accountability, the Commission must prepare and submit an annual report to each House of the Oireachtas. The information contained therein is to be determined by the Commission or at the request of the Minister.<sup>35</sup> There is no provision for the Commission to present its findings in plenary before the Oireachtas.

The IHREC is accountable to its sponsor department, currently the Department of Justice and Equality, and to the Minister for Public Expenditure and Reform for adequate funding and must seek their consent for allowance of all expenses.<sup>36</sup> Head 28(2) states that '[t]he Commission shall be provided with sufficient resources to ensure that it can carry out each of its functions effectively'. The Director is tasked with submitting estimates of income and expenditure to the Minister, as well as any accompanying information, at a time specified by the Minister.<sup>37</sup> The accounts shall also be submitted to the Comptroller and Auditor General for audit, as well as laid before both houses of the Oireachtas.<sup>38</sup> The new body, upon establishment, will prepare a strategic plan as soon as practicable and every three years thereafter.<sup>39</sup> Notably, the plan is to be tabled by the Commission before

32 See Human Rights Commission Act 2000, s. 7; Employment Equality Act 1998, s. 42; s. 44(3).

33 Head 17(5).

34 Head 18.

35 Head 27(2c).

36 Head 28.

37 Head 26(1).

38 Head 26(4).

39 Head 12 'Strategic Plan'.

each House of the Oireachtas without prior approval by the Minister, as was the case previously with the EA. Emphasis is placed on ensuring ‘the most beneficial, effective and efficient’ use of resources.<sup>40</sup> The Commission is further directed to consult educational institutions, civil society stakeholders, and government departments and agencies in the preparation of the plan.

It is the Director who is accountable to the Public Accounts Committee of the Comptroller and Auditor General and other Oireachtas Committees.<sup>41</sup> This is intended to strengthen the reporting mechanism from the IHREC to the Oireachtas. The Director shall, whenever required, give evidence to the Committee on the propriety, economy, effectiveness and efficiency of the Commission in the use of its resources.<sup>42</sup> Reinstating Section 14 of the Human Rights Commission Act, when giving evidence, the Director is expressly prohibited from questioning or expressing an opinion on the merits of any policy of the government or individual minister.<sup>43</sup>

Existing staff of the IHRC and EA will become staff of the IHREC on the day of establishment on the same terms and conditions under which they currently serve.<sup>44</sup> All appointments (subsequent to the initial transfer from the precursor bodies) are to be made by the Commission.<sup>45</sup> However, the number employed, their terms and conditions,<sup>46</sup> and the grade at which each individual serves must receive prior consent from the department and the Minister for Public Expenditure and Reform.<sup>47</sup> There may be a common staff pool with the sponsor department and agreement may be entered into whereby service personnel serve with the Commission while retaining their civil service status.<sup>48</sup> Reference to compliance with the Paris Principles in the explanatory note would – according to the UN-affiliated International Coordinating Committee of NHRIs’ (ICC) Sub-Committee on Accreditation (SCA) – imply that seconded personnel will not hold senior posts within

40 Head 12(3).

41 Head 19 and 20.

42 Head 19(1).

43 Head 19(2).

44 Head 21.

45 Head 21(B)(1).

46 Head 22.

47 Head 21(1, 2).

48 Head 21(C).

the IHREC nor should they exceed 25 percent and never be more than 50 percent of the total workforce.<sup>49</sup>

The mandate of the IHREC is notably broad and non-restrictive. It exercises its functions under the forthcoming IHREC Bill and under the Employment Equality and Equal Status Act. The purpose of the new body as laid out in Head 9 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’ as well as ‘provide practical assistance to persons to help them vindicate their rights’.

Equality and human rights are defined in Head 3 which applies to the promotional functions of the new body. A definition of equality is provided, that ‘all persons are equal in dignity, rights and responsibilities’, regardless of a series of grounds for non-discrimination.<sup>50</sup> A less conventional but expansive three-tier definition of human rights includes, firstly, those rights, liberties and freedoms conferred, or guaranteed, by the Constitution, secondly, those rights contained in any agreement, treaty, instrument or convention to which Ireland is a party or is binding on the state with regard to relevant European instruments such as the European Charter of Fundamental Rights. A third tier of rights, liberties or freedoms, reflects the recommendation of the Working Group that the IHREC should be in a position to take account of new and emerging issues not limited to specific rights incorporated into law or binding instruments.<sup>51</sup>

The functions of the IHREC are laid out in Head 11. They include promotion and communication of the importance of human rights and equality, preparation and publication of research, review of policy and legislation either of its own volition or upon request,<sup>52</sup> and consultation with national or international bodies with expertise in the fields of human rights and equality. The legal mandate of the new body is also supplemented by specific equality function from domestic and EU law, including working

49 See International Coordinating Committee of NHRIs, Sub-Committee on Accreditation, General Observation 2.4.

50 These nine grounds include gender, civil status, family status, sexual orientation, religion or ultimate beliefs, age, disability, race (including colour, nationality, ethnic or national origin) and membership of the Traveller community. Additional grounds might include socio-economic status, trade union membership, past criminal convictions and political opinion.

51 Head 3.

52 Review of legislation and functions regarding specific legislation is specified in detail in Head 29.

towards the elimination of discrimination in relation to domestic legislation,<sup>53</sup> promotion of equality of opportunity, and the integration of migrants. Also reflecting the origins of the IHRC in the Good Friday Agreement, the IHREC will continue to take part in the Joint Committee with the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland.<sup>54</sup> It is important to underline that it is expected that all existing functions and powers of the precursor bodies will be transferred to the new body by way of amendments as opposed to repeal and reinstatement in a new act of the Oireachtas.<sup>55</sup>

The powers and functions in relation to enforcement and compliance are contained in Head 30 to 36. Notably, the definition of human rights contained in Section 30 for the purposes of provisions laid out in Heads 30-36 provides a narrower basis for action than the definition set out in Head 3 which governs the promotional powers of the body.<sup>56</sup> The Commission is directed to exercise a 'sliding scale' of enforcement powers and to consider mediation as a first port of call.<sup>57</sup> Head 30 lists out a range of possible interventions open to the Commission where an infringement of human rights or equality is suspected. These interventions include 'soft powers', such as provision of information, preparation of guidelines on best practice, drafting codes of practice,<sup>58</sup> at the request of the Minister, which may be admissible in legal proceedings, requesting business to conduct an equality review,<sup>59</sup> as well as preparing and implementing an equality action plan, and, at its discretion,<sup>60</sup> providing legal assistance or representation.<sup>61</sup> The IHREC may also conduct an examination into any act or practice as well as engage in mediation or conciliation in seeking a consensual settlement of the matter. The Commission may issue an opinion

53 See Employment Equality Act 1998-2011, s. 39(a); Equal Status Act 2000-2011, s. 39 (a).

54 Head 11(D).

55 For details on the specific functions to be transferred, see (HOB: 19-22).

56 Head 30 limits the definition of human rights to norms that have 'force of law in the State', in effect excluding rights such as those contained in international human rights instruments and standards which are regarded as not justiciable.

57 Head 30(C).

58 Head 31 specifies in detail the power to draft codes of practice.

59 Provision on equality reviews, action plans and review of legislation is reinstated from the relevant sections of the Employment Equality Act 1998-2011.

60 The Heads of Bill specifies that the IHREC will take into account 'if there is an important point of principle involved or if it is unreasonable to expect the person to represent him or herself' in making a decision. See Head 30(B)(v).

61 Provision of legal assistance and other assistance is re-enacted from the relevant sections of the HRC Act 2000.

following such an examination and oblige the body to whom the opinion is addressed to respond in writing.

On the more robust end of the spectrum, the IHREC is granted recourse to institute proceedings before the Courts on matters of human rights,<sup>62</sup> can apply to the High Court or the Supreme Court for liberty to appear as *amicus curiae* in proceedings,<sup>63</sup> or conduct inquiries *ex officio*,<sup>64</sup> and can serve and enforce non-discrimination notices.<sup>65</sup> Head 34 provides for a formal power of inquiry along the lines set down in the Commission of Investigations Act 2004 as recommended by the Working Group. Reflecting on the fact that the Equality Authority never exercised its formal powers of inquiry and the IHRC only launched an inquiry on three occasions (although, it is worth noting that these inquiries were ongoing across years of operation), the explanatory note to Head 34 claims that the revised power will be more appropriate to the IHREC.<sup>66</sup> In particular, it does not require the prior consent of the parties involved. The Heads of Bill also proposes that the IHREC be empowered to support public bodies to meet their obligations under a new public sector equality and human rights duty.<sup>67</sup> Emphasis is placed on the IHREC roles 'of support and not of external monitoring', with no new rights and no cause of action created.<sup>68</sup> Provision for a formal review of existing monitoring mechanisms after three to five years is recommended by the Working Group.

62 Head 30(vii).

63 Head 30(viii).

64 Head 30(ix).

65 Head 30(x). Provision of non-discrimination notices is re-enacted from the relevant sections of the EEA Act 1998. See Head 35.

66 The HOB also introduces provisions regarding privilege and immunity which are absent from the IHRC Act 2000.

67 Head 36.

68 Head 36, explanatory note.

### 3. HISTORICAL BACKGROUND

It is impossible to ignore the prolonged and severe impact of fiscal austerity on the public sector in Ireland. The official narrative suggests that the integration of the Equality Authority (EA) and the Irish Human Rights Commission (IHRC) corresponds to the financial crisis which engulfed the Irish state in late-2008. However, it is material to note that the original proposal to integrate the two bodies in July 2008 actually preceded the official announcement of recession by two months. The EA and IHRC, both subject to very severe budget cuts subsequently, have wrestled with a situation of low-intensity institutional crisis until today. To understand the deeper contours of the merger negotiations, it is necessary to go further back than the events of 2008. Heated debate over the appropriate structural form of the new body, in particular safeguards of independence, is not academic in the Irish context. Rather, it is informed by the troubled experience of the two precursor bodies, fraught relations with government, and opinions on how best to formally enable the new Commission to fulfil an equality and human rights mandate independently and effectively, without fear or favour.

This report does not seek to provide an exhaustive historical account of the experience of the two precursor bodies. In any case, this has been ably undertaken elsewhere (Connolly 2010; Harvey & Walsh 2009; Crowley 2010; Harvey & Spencer 2011). Rather it surveys some of the key overarching contextual factors which inform the present situation.

In September 2008, the Irish Fianna Fáil/Green Party coalition government officially announced that the country had gone into recession. A radical rationalisation of state agencies was announced in July 2008. Of 35 candidate agencies identified by the Department of Finance in the Department of Justice, Equality and Law Reform (DOJ) as amenable to merger, it was announced that the Equality Authority and Human Rights Commission would be merged with three other bodies, the Data Protection Commissioner, the National Disability Authority, and the Equality Tribunal.<sup>69</sup> All five bodies were given until September 2008 to respond but were reportedly told that “there’s no point in fighting it, it’s going to happen”.<sup>70</sup> Although the Department of Finance suggested that the merger would be a “natural fit”,<sup>71</sup> few others were in agreement. The recently appointed chairperson of the Equality Authority, Angela Kerins, asserted that ‘there are genuine

69 Irish Times, ‘State plans merger of five bodies instead of just three’, 20 August 2008.

70 Irish Times, ‘Equality, data protection and human rights bodies to merge’, 24 July 2008.

71 *Ibid.*

incompatibilities in the functions of the different bodies'.<sup>72</sup> Eventually, in the face of concerted opposition, the merger proposal was shelved.

However, any relief was short-lived. When the 2009 budget was presented for approval before the Dáil in October 2008 it became apparent that while the EA and IHRC may have avoided merger or dissolution, they would not be spared from severe budget reductions. In the context of an overall reduction to the departmental budget of four percent and an increase in government spending from €53 to €55 billion, the Minister of Justice, Dermot Ahern, announced cuts of 43 percent on the EA and 32 percent on the IHRC.<sup>73</sup> No convincing rationale or explanation was provided for the severity of the cuts. For the EA, this meant a reduction from €5.89 million to €3.33 million in 2009 in their core grant in aid.<sup>74</sup> In response, the board of the EA issued a strongly worded statement claiming that the budget would leave the Authority unable to fully or effectively carry out its function.<sup>75</sup> Significantly under-resourced since establishment, the IHRC found its budget reduced to pre-2001 levels, falling from €2.3 to €1.6 million.<sup>76</sup> In effect, after non-discretionary expenses, this left the Commission little to no operational resources. The IHRC, while acknowledging the extraordinary fiscal context, denounced the cuts as 'disproportionate and excessive'.<sup>77</sup> The severity of the cuts provoked a storm of opposition from across the political spectrum, including Fianna Fáil's coalition partners, but Minister Ahern insisted that the budget cuts would not be reversed.<sup>78</sup>

While the cuts took place in the context of a deep recession, many observers saw an ulterior motive to this action; a desire to 'punish' two institutions which had been thorns in the side of government. In December 2008, the CEO of the EA, Niall Crowley, resigned in response to the 43 percent cut. He accused Minister Ahern of "victimising" the authority for "doing well what it was established to do", a sentiment shared by many.<sup>79</sup> In particular,

72 Irish Times, 'Equality Authority opposed to merger plans', 15 September 2008.

73 Irish Times, 'Human rights body says 24% cut makes it unworkable', 5 November 2008

74 The EA continued to raise additional project related funds subsequent to 2008 principally from EU sources (€490,000 in 2009).

75 Irish Times, 'Cuts will impair core functions – equality body', 12 November 2008.

76 The IHRC budget from 2003 to 2007 remained frozen at €1.9 million. In 2007 the IHRC received additional external funding. However, this increase in discretionary spending proved to be short-lived.

77 Irish Times, 'Human rights body says 24% cut makes it unworkable', 5 November 2008.

78 Irish Times, 'Ahern denies equality body's cut will be reversed', 1 April 2009.

79 Irish Times, 'Equality Authority chief resigns over budget cutbacks', 12 December 2008.

the EA's pursuit of legal cases against state agencies and officials in the Equality Tribunal was singled out as a contributing factor.<sup>80</sup> The EA frequently clashed with Department of Justice officials. On one occasion, the EA was subjected to legal action in the High Courts in an (unsuccessful) attempt by the DOJ to deny the EA *amicus curiae* rights in a case concerning Traveller discrimination (Crowley 2010: 90). In heated exchanges in the Dáil, allegations were made that senior Department officials were intent on forcing Crowley to resign.<sup>81</sup> Similarly, the severity of the cuts imposed on the IHRC was also viewed as punishment for having embarrassed government with a report on the use of Shannon Airport by US aircraft involved in rendition flights (IHRC 2007). The report provoked a major confrontation between the President of the Human Rights Commission, Maurice Manning, and the then Minister for Foreign Affairs, and future Minister for Justice, Dermot Ahern, who was subsequently censured by the European Parliament.<sup>82</sup>

Mistrust surrounding the motive for the budget cuts was further deepened by events leading up to 2008 and government interference in the operational autonomy of the two bodies. This was particularly acute within the EA, which had multiple run-ins with the Minister for Justice, Equality and Law Reform. Crowley has characterised the 2008 merger proposal and subsequent budget cuts as the final act in a 'quiet coup' intended to bring the EA 'to heel' (Crowley 2010). This control action by government was conducted on a number of fronts: firstly, an attempt in 2004 to arbitrarily terminate the CEO's contract, which was successfully resisted by the EA board (Ibid: 83); secondly, the imposition of a highly disruptive programme of decentralisation, proposing to move all operations outside of Dublin (Ibid: 85); thirdly, the wholesale replacement of the EA board in 2007 and the appointment of a chairperson with known links to government (Ibid: 93);<sup>83</sup> fourthly, the extraordinary edition by legislation of four board members to the EA, including one DJED official, in early 2008; and, fifthly, the outright rejection of a 'proposal for viability'

80 Between 2001 and 2007, the EA advanced 12 percent of all cases taken under the Employment Equality Act and heard by the Equality Tribunal. The EA had a notably high success rate of 57 percent over this period. For data see O'Sullivan & MacMahon (2010: 342-44).

81 Deputy Pat Rabbitte: "Can the Minister assure the House that the forcing out of Mr. Niall Crowley has nothing to do with the Equality Authority's referral to the Garda Síochána of an allegation that the Secretary General of the Department of Justice, Equality and Law Reform, while head of the Prison Service, had breached the Employment Equality Acts?", Dáil Éireann, vol. 671, 18 December, 2008 (Priority Questions – Departmental Agencies).

82 RTE News, 'Govt censured in report on rendition flights', 23 January 2007.

83 Angela Kerins was appointed chairperson of the EA in August 2007. Kerins was known to have ties to Fianna Fáil and to be a friend of Sean Aylward, secretary general of the Department of Justice, Equality and Legal Reform.

submitted by the EA board to Minister Ahern in November 2008 which would still have entailed a cut of 32 percent, but assured the continued function of the Authority, at least on a minimal basis. With a budget cut of 43 percent and subsequent departure of the Authority's CEO as well as six members of the board, the viability of the EA was placed in doubt. The cumulative effect of increasingly fraught relations between the EA and government, particularly its sponsor department, casts a long shadow over current debate on the merits or otherwise of merger.

With regard to the Human Rights Commission, similar concerns arise regarding safeguards of independence from government. Hostility generated by the IHRC report into rendition flights in 2007 is important. Accountability to a sponsor department which is often subject to investigation by the accounting body is *prima facie* a problematic governance arrangement.<sup>84</sup> However, the historical record suggests a relationship with government defined as much by indifference as hostility. The driver for the establishment of the Commission in 2000 was principally international. While the initiative received strong support from civil society and the then opposition Labour Party, it was not regarded as a priority by the Fianna Fáil government.<sup>85</sup> The independence and performance of the IHRC has subsequently been undercut via Ministerial control of appointments and chronic under-resourcing. The initial appointment of Commissioners in 2000 demonstrated little regard to due process or transparency.<sup>86</sup> Subsequent Ministerial appointments, including that of the President in 2002, without any consultation or open competition, prompted strong criticism and eventual reform of the selection process five years later.<sup>87</sup> The IHRC has also been subject to inadequate resourcing from the outset.<sup>88</sup> Ministerial veto over

84 For instance, the IHRC has frequently addressed issues of human rights abuses within agencies such as the police force which fall under the jurisdiction of the Department of Justice. See Irish Times, 'Plan for better human rights within Garda published', 21 April 2009.

85 The Irish Times, 'New body on human rights to have range of powers', 9 July 1999.

86 In 2000 a selection committee presented a shortlist of eight priority recommendations for appointment as Commissioners to the Minister. The Minister nominated only two individuals on the shortlist, with sources close to government suggesting that 'the list took no account of political representativeness'. See Irish Times, 'Clash over commission make-up predictable', 18 December 2000.

87 Irish Times, 'Criticism over human rights appointment', 30 July 2002; Irish Times, 'New human rights commissioners to be appointed', 25 July 2006.

88 The IHRC's budget in 2003 was €1.2 million against an estimated operating cost of €2.2 million. The securing of premises and opening of the IHRC was delayed due to the Department limiting the availability of funds by some €300,000 under what was sought (IHRC 2003: 78).

employment quotas, terms and conditions, and salary scales have frequently served to frustrate the internal operations of the body.<sup>89</sup>

The IHRC is widely held by civil society observers to have under-performed in the period prior to 2008. In part, a perception of limited impact is due to a lack of government support for its core operations or receptiveness to its recommendations. The IHRC has had a 37.5% reduction in funding since 2008, from €2,342,000 in 2008 to €1,463,000 in 2011.<sup>90</sup> However, as developed in the next section, it is important to also acknowledge that the Commission has been criticised for strategic leadership deficits, especially with regard to the limited use of its full range of powers, as well as its responsiveness to those most urgent human rights issues affecting the country and its inhabitants (Harvey & Walsh 2009, 77). Nevertheless, whatever their faults prior to 2008, the budget cuts placed the viability of both bodies in doubt, leading to a prolonged period of institutional uncertainty. The President of the IHRC noted in 2009 that the cuts had “seriously hampered” the Commission “in performing its statutory functions”.<sup>91</sup> The outgoing CEO of the EA similarly charged that “the Equality Authority cannot operate to even a minimal level”.<sup>92</sup> In the event, both bodies continued to function, although it is debateable whether either agency was able to effectively discharge its core functions.<sup>93</sup> Notably, the chairperson of the EA struck a quite different note in response to the cuts: ‘the Equality Authority will have to work towards its goals with more modest resources. This may limit what we have to spend but not what we may achieve’.<sup>94</sup>

Non-state domestic equality and human rights stakeholders have attempted to maintain pressure on government throughout this protracted period of institutional limbo. However, civil society itself is also struggling in the wake of the financial crisis with a steep reduction in available funding and the closure of support agencies.<sup>95</sup> Nevertheless,

89 The IHRC 2003 report documents the protracted nature of seeking Ministerial consent for appointments, as well as Ministerial refusal to approve positions at the grade which the IHRC considered appropriate and appointments above the first point of the salary scale (IHRC 2003: 16).

90 See IHRC UPR Report (2011, 3). At its height in 2008, the IHRC budget stood at €2.3 million compared to a budget of €5.9 million allocated to the EA.

91 IHRC Annual Report 2009 Launch, 9 July 2009.

92 Irish Times, ‘Equality Authority chief resigns over budget cutbacks’, 12 December 2008.

93

94 Irish Times, ‘Equality Authority open for business’, 17 February 2009.

95 Both the Combat Poverty Agency and the National Consultative Committee on Racism and Interculturalism (NCCRI) were closed down by the government and their remit assigned to the Equality Authority.

civil society actors have highlighted the existential threat posed by a fiscal prudence agenda to the human rights and equality infrastructure of the state and the gains made over the past decade. The NGO-coalition Equality Rights Alliance (ERA) was set up in mid-2008 for the express purpose of opposing the merger of the EA and IHRC.<sup>96</sup> ERA is a key legacy of the merger process, offering a highly mobilised and critical voice on the merger and subsequent cuts to Ireland's equality and human rights infrastructure. Other large non-governmental organisations, including Amnesty International and the Irish Council for Civil Liberties (ICCL), have also intervened. For their part, Ireland's trade unions, including Impact, SIPTU and ICTU all issued strong statements denouncing the cuts to the EA.<sup>97</sup> Notably, trade union representatives on the board of the EA, alongside the representative of the employers' body IBEC, jointly resigned in solidarity with the CEO in January 2009.<sup>98</sup> This important symbolic gesture was somewhat undercut by the Minister's request for replacements from IBEC and ICTU and IBEC's indication that a new representative would be forthcoming.<sup>99</sup>

Opposition has not only come from outside the political system. Throughout 2009 and 2010 the Green Party, minority coalition partners to Fianna Fáil, continued to express their disquiet regarding the treatment of the EA and IHRC. Indeed, observers attribute the failure of the original 2008 merger proposal to Green Party opposition. Green Party spokespersons criticised and are widely credited with defeating government policy regarding the costly relocation of EA operations to Roscrea.<sup>100</sup> In March 2009, the leader of the party announced a review of funding of the EA expressing concern over whether 'the authority can operate at its most effective'.<sup>101</sup> However, this proposal was rebuffed by the Minister for Justice. In a move welcomed by the IHRC and civil society, a Cabinet reshuffle of March 2010 resulted in the equality and human rights brief being moved to the Department of Community, Equality and Gaeltacht Affairs (DJELR) under Mary White, Green Party TD and Junior Minister for Equality.<sup>102</sup> Minister White subsequently announced a review of

96 ERA is a coalition of 171 organisations and individuals including groups such as the Irish Council for Civil Liberties, the Immigrant Council of Ireland and the European Anti-Poverty Network.

97 Irish Times, 'Equality body chief praised for courage and integrity', 13 December 2008.

98 Irish Times, 'Five Equality Authority board members resign', 20 January 2009.

99 This reflected the fact that whereas the ICTU representative, David Joyce, acted on behalf of the organisation, the representative from IBEC resigned in her own individual capacity – a stance not supported by IBEC.

100 Irish Times, 'Equality body's move to Roscrea 'stupid'', 17 December 2008.

101 Irish Times, 'Review of Equality Authority by 'Bord Snip Nua'', 9 March 2009.

102 Irish Independent, 'Surprise move for Coughlan in Cabinet reshuffle', 23 March 2010.

the Authority, the Equality Tribunal and the Irish Human Rights Commission and publicly opposed any amalgamation of the three bodies or further budget cuts.<sup>103</sup> The resulting 'Scoping Exercise' published in December 2010 provides a comprehensive account of the challenges facing equality and human rights in Ireland (DJELR 2010). However, published on the eve of the 2011 Irish general election, it was not picked up by the outgoing Fianna Fáil or incoming Fine Gael/Labour coalition government.

Beyond Ireland's borders, the experience of both bodies has provoked growing concern among international stakeholders. In anticipation of the 2009 budget announcement, the then Council of Europe Commissioner on Human Rights, Thomas Hammarberg, urged the Irish government to protect the Commission's funding.<sup>104</sup> Colm O'Cinneade, a member of the European Committee of Social Rights, speaking in November 2009, noted a perception abroad that Ireland has "fallen from grace" because of the sweeping cuts to the two bodies.<sup>105</sup> In October 2010, a new EU report on equality bodies singled Ireland out for criticism.<sup>106</sup> Closer to home, former UN high commissioner for human rights and President of Ireland, Mary Robinson, called on the Irish government to uphold the terms of the Good Friday Agreement.<sup>107</sup> As for the UN, which took an active role in the establishment of the IHRC, it has continued to monitor the Commission and EA. The Irish government, in its 2008 dialogue before the UN Human Rights Committee, highlighted the role of the Authority in meeting its human rights commitments. When the budget cuts were announced forty-eight hours later, Committee members were not impressed.<sup>108</sup> In turn, while the IHRC is accredited 'A status' by the UN-affiliated International Coordinating Committee (ICC),<sup>109</sup> the ICC Sub-Committee on Accreditation placed the Irish government on notice in its November 2008 review, expressing 'deep concerns' over plans to reduce the Commission's budget.<sup>110</sup>

103 Irish Times, 'Human rights body must not face more cuts, says Minister', 30 September 2010.

104 Irish Times, 'Cutbacks warning on human rights commission', 17 September 2008.

105 Irish Times, 'Human rights cuts harm image', 25 November 2009.

106 An EU report on equality bodies published in October 2010 singled out Ireland for its cuts to the EA and long backlog of cases before the Equality Tribunal. See Ammer et al. 2010.

107 Irish Times, 'Cutbacks warning on human rights commission', 17 September 2008.

108 Irish Times, 'Cutbacks warning on human rights commission', 17 September 2008.

109 A-status NHRIs are afforded access to the UN system, such as participation rights in the newly formed Human Rights Council (HRC) and the Universal Periodic Review of state practices undertaken by the Council.

110 See International Coordinating Committee of NHRIs, Report and Recommendations of the Session of the Sub-Committee on Accreditation, Geneva, 3-6 November 2008, p. 7.

Uncertainty as to the future of the two bodies has persisted following the General Election of 2011. A reformist Fine Gael/Labour coalition government was elected to office in February 2011. In the run up to the elections, both political parties indulged in the language of the ‘bonfire of the quangos’.<sup>111</sup> No indication was given in the party’s manifesto as to the future of the equality and human rights infrastructure. The IHRC published a report in March to be submitted to the UN detailing serious gaps in human rights protection (IHRC 2011). Among a series of proposed remedies, the report recommended that the budgets of the IHRC and EA be restored to 2008 levels (IHRC 2011, 3). In turn, ERA published ‘a roadmap to a strengthened equality and human rights infrastructure’ (ERA 2011). For its part, the government undertook a review of public service reform, eventually identifying 48 bodies to be rationalised by the end of 2012 and a further 46 to be critically reviewed by mid-2012 (DPER 2011: 2). In July, launching the Human Rights Commission’s Annual Report, the new Minister for Justice, Alan Shatter, announced that legislation to provide for ‘an enhanced role’ for the IHRC would be forthcoming – duly announced two months later. In reviving the idea of merger between the EA and IHRC, Shatter asserted that a “more streamlined body will be able more effectively, efficiently and cohesively to champion human rights”.<sup>112</sup> The Taoiseach (Prime Minister) reinforced this official change in tone, noting that the cuts imposed by the previous government had “actually threatened the very existence of the Commission”.<sup>113</sup>

The announcement by Shatter was greeted cautiously by civil society organisations. While welcoming the Minister’s stated commitment to the Paris Principles, they would reserve judgement until further details were forthcoming.<sup>114</sup> After two years of instability and budget cuts, severe mistrust characterised relations between the state and equality and human rights advocates, as well as fatigue on the part of actors struggling to maintain their own viability. For some, this latest initiative was ‘just another instance of austerity politics’, with the merger ‘presented as a means to save public money’.<sup>115</sup> Others cast the announcement as ‘an opportunity for renewal’, to inject new energy into a statutory architecture left in a protracted state of half-life for too long.<sup>116</sup> Statements of political will

111 Irish Independent, ‘Bonfire of the quangos looms in FG cull plan’, 10 October 2010.

112 Irish Times, ‘Minister announces details of merged human rights body’, 10 September 2011.

113 Speech by the Taoiseach, Mr. Enda Kenny T.D., at the Irish Human Rights Commission – Ten Years On Achievements and Challenges, 21 September 2011.

114 Irish Times, ‘Minister announces details of merged human rights body’, 10 September 2011.

115 Village Magazine, ‘Niall Crowley says merging equality and human rights bodies will add no value’, 18 November 2011.

116 Irish Times, ‘Rights body should have bigger impact’, 11 July 2011.



## 4. KEY FACTORS FACILITATING OR INHIBITING EFFECTIVE INTEGRATION

This section details those key factors in the Irish case study which may (or are likely to) facilitate or inhibit the effective integration of equality and human rights functions. Particular attention is paid to the importance of open, transparent and inclusive consultation in decision-making and design processes, the evolving significance of parliament as a counterweight to government lines of accountability and sponsorship, the importance of a fully transparent and consultative appointment process, and, finally, the challenge of levelling up equality and human rights in terms of powers, performance and organisational culture.

### 4.1. Decision-making and design processes

The current Irish merger process has been notable for the extent of consultation around decision-making and the design process. Minister Shatter and senior departmental officials, acutely aware of the shortcomings of their predecessors, have facilitated dialogue with key stakeholders, including civil society representatives, precursor bodies, and international equality and human rights agencies. This is evident in the publication of Heads of Bill in June 2012 as opposed to draft legislation, which would not entail the same degree of consultation. It is further apparent in a number of initiatives, including the establishment of a Working Group by the Department of Justice and the unprecedented role of the Oireachtas Committee on Justice, Defence and Equality, providing additional venues for stakeholder consultation. The Irish experience demonstrates the value of innovation in processes of integration as well as insight into how a 'best practice' model might be realised. However, it also offers important lessons regarding the deleterious consequences of protracted delays and chronic under-resourcing of existing equality and human rights infrastructure.

#### 4.1.1. *The Working Group on the IHREC*

Momentum behind the proposed merger finally began to pick up steam in early October 2011 with the announcement that the Minister for Justice, Equality and Defence had appointed a Working Group (WG) to advise on the establishment of the IHREC. Ideally, observers note, the WG would have been appointed by the Oireachtas and in place at an earlier stage to coincide with the initial merger announcement in July. However, this was a positive development in light of the arbitrary imposition of reform in 2008. Initially, the Minister imposed a short timeframe on the work of the Group, expressing his desire to

have the new body in place by the end of February 2012. The WG was initially envisaged principally as a technical exercise. However, it quickly became apparent that a two-month timeframe was unrealistic given the complexity entailed in reforming and developing existing legislation. In the event, the WG Report was published in April 2012 following an extensive process of consultation and deliberation, instigated largely by the WG itself in order to enhance the legitimacy of the process. The WG was welcomed by civil society as a positive development, providing something concrete to react to as opposed to the opaque actions of the previous government. In setting up the WG, Shatter reiterated his commitment to a “more streamlined body” able to more “effectively, efficiently and cohesively champion human rights and equality”.<sup>118</sup>

The terms of reference (TOR) directed the WG to advise the Minister on the mandate, structure, composition, functions, and performance of the new IHREC, as well as other matters.<sup>119</sup> The purpose of the group, among various tasks, included identifying best practice in each existing organisation, outlining how the existing bodies consult with service users and how existing arrangements can be improved, identifying the functions and area of work of the existing bodies to be merged, the new functions that should be added and the functions, if any, that should cease. The TOR directed the WG to also advise on a range of technical and human tasks, including staffing arrangements, the location of premises, and internal structures of the new body. Notably, the TOR makes explicit mention of the Paris Principles as guiding standards for the structure, as well as repeated reference to the economic position and limited resources of the Irish government. The TOR also presents a more ambitious brief to the WG in requesting advice on devising specific objectives and performance indicators for the IHREC as well as ‘the best approaches or means to achieving change’. Finally, the WG is specifically requested to look at the best form of inquiry powers in light of problems identified with the inquiry powers contained in the legislation of the precursor bodies.

The WG consisted of four serving representatives of the Board of the EA and an equal number of former members of the IHRC.<sup>120</sup> The group was chaired by an independent chairperson and also included the Assistant Secretary to the Department of Justice, Equality and Defence (DJED) and the Minister’s Chief Advisor. It is important to note that while the

118 Department of Justice, Shatter announces Working Group on establishment of enhanced Human Rights and Equality Commission [press release], 6 October 2011.

119 See Working Group Report, 19 April 2011, Appendix 1.

120 See Working Group Report, 19 April 2011, Appendix 1.

representatives of the EA were serving board members, their IHRC counterparts were in fact former Commissioners selected by the Minister to serve on the WG in their individual capacity. The reason for this situation was the expiration of the term of the 14-member IHRC in October 2011 which was subsequently left vacant. In effect, only the President of the IHRC was in post when the WG was announced. This situation was partially rectified in December with the appointment of three interim Commissioners, including one serving member of the WG. However, observers note that notwithstanding the high calibre of the WG members selected to represent the IHRC (in their individual capacity), concern was expressed at the lack of representational symmetry – especially given the comparatively small size of the IHRC and lack of serving Commissioners. However, the WG set down internal guidelines with all members committing to serve in their individual capacity and making it clear that informal briefings were not appropriate.

The ability of the WG to assert some autonomy was assisted by the inclusion of high profile equality and human rights advocates well-known for their independence of mind.<sup>121</sup> Civil society observers also credit the Principal Officer leading the process, recently arrived at the DJED from the DJLER, with being genuinely committed to making it a good process, in contrast to possibly more obstructionist individuals within the Department who were fixated on cost above all other considerations. The WG did come in for criticism from equality advocates that it lacked balance. In particular, while IBEC was represented via its EA board member, there was no representation of civil society actors such as the trade unions or prominent NGOs.<sup>122</sup> A request by the ICTU representative to the EA board to join the WG was turned down by the Minister. Others questioned whether the presence of three DJED representatives was appropriate, as well as whether the current EA chairperson and IHRC President should also have been invited to join the WG. The Group did, however, meet with both individuals in a private session and the EA and IHRC were invited to submit briefing papers upon request.

Another novel aspect to the process was the Working Group's development of its own rules and working method which emphasised discussion and compromise, the objective being an outcome based on consensus. There was some reluctance to permit submissions given the initial timeframe, workload entailed, and the extensive consultation already undertaken

121 One observer singles out, in particular, the inclusion of Michael Farrell (ex-IHRC) and Kieran Rose (EA) as inspiring confidence that the WG “would want to do a decent job”.

122 Village Magazine, ‘Niall Crowley says merging equality and human rights bodies will add no value’, 18 November 2011.

by others such as ERA. However, it was decided that the process would lack credibility in the absence of submissions and they were duly written into the WG proceedings. A notification and press releases about the consultation process were issued in November and placed on relevant websites, requesting submissions on three key questions:

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

In total, 69 submissions were received in response.<sup>123</sup> Coordination is apparent across submissions, in particular an emphasis on the Paris Principles as the guiding framework. Both ERA and the ICCL developed draft submissions and circulated them among their NGO constituencies as a template.<sup>124</sup> Partner organisations such as FLAC explicitly endorsed ERA's submission and asserted its wish 'to be associated with its recommendations'.<sup>125</sup> A strict limit on the length of submissions, although viewed by some as a constraint, also served to reinforce a consistency of message from equality and human rights advocates.

The Working Group report was published on 19 April 2012. It provides a detailed set of recommendations for merger with the WG stating its intention to deliver a report that takes into account the 'technical and human task' entailed in reshaping the equality and human rights architecture. The report states that some members were guided by the question 'what is it that as a society we want to achieve in terms of human rights and equality?'. It also emphasises the need to make practical recommendations in recognition of 'the severe financial crisis facing the state'.<sup>126</sup> The Paris Principles feature prominently in the report.<sup>127</sup> In addition, the Group integrated the General Observations of the ICC Sub-Committee on Accreditation, further clarifying best practice regarding Paris Principles compliance.<sup>128</sup> The WG met with the UN Deputy High Commissioner for Human Rights,

123 A list of submissions can be found in Working Group Report, 19 April 2011, Appendix 4.

124 See Equality and Rights Alliance, 'Response on Proposed Merger of the Equality Authority and the Irish Human Rights Commission', October 2011

125 FLAC, Submission to the working group on the proposed merger of the Irish Human Rights Commission and the Equality Authority into a Human Rights and Equality Commission, November 2011, p. 1.

126 Working Group Report, 19 April 2011, p. 11-12.

127 See Working Group Report, 19 April 2011, Appendix 2.

128 See Working Group Report, 19 April 2011, Appendix 3.

Ms Kyung-wha Kang during their deliberations, and the report is highly cognisant of UN standards, including relevant provision in the Optional Protocol to the Convention against Torture (OPCAT) and the Convention on the Rights of Persons with Disabilities (CRPD). The Report also acknowledges the ‘Scoping Exercise’ undertaken by Minister Mary White in 2010 and a report by Equinet on maximising the impact of equality bodies and NHRIs (Equinet 2011). A range of other practitioner and academic material is explored in relation to ‘good practice’.<sup>129</sup> One notable omission in terms of design standards is the Opinion of the Commissioner for Human Rights of the Council on Europe on National Structures for Promoting Equality (COE 2011).

The response of stakeholders to the WG report was generally positive (at least in public). In particular, the process was praised, as was the inclusion of certain design features which exceeded expectations, such as the provision of a positive duty on the public sector to give due regard to human rights and equality. Civil society observers noted the correct identification of SCA General Observations as norms of best practice and strong recommendation that they be observed in legislation.

However, while welcoming the report as a contribution, some observers have raised concerns regarding its substance, including an evident lack of expertise in the Group’s attempt to fuse the Paris Principles and EU Directives into a cohesive whole. This is a key concern for those who express doubt that the new body will be able or enabled politically to integrate the functions previously performed by the separate equality and human rights bodies. In particular, the tension between developmental or promotional work (strongly underpinned in the Paris Principles) and enforcement actions (a core function under the Race Equality Directive 2000/43/EC) has been left unresolved. This has its clearest expression in the Working Groups insistence that ‘there is clear merit in the view that the focus of the IHREC legal work should be on strategic cases which are ‘precedent-setting’ (WG Report 2012, 36). On the face of it, this may seem uncontroversial. However, for equality advocates, strategic litigation may be problematic. There is no sense in the resulting Heads of Bill of the obligations arising under EU directive 2000/43 that a specialised equality body must provide legal assistance to victims of discrimination.<sup>130</sup> The Council of Europe Commissioner of Human Rights recommends that equality structures should be directed

129 Additional materials include ICHRP 2000; Carver 2005; Goodman & Pegram 2012; Murray 2007; Commonwealth 2001.

130 See *Council Directive (EC) 2000/43/EC of 29 June 2000 on Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*; also, the EU Charter of Fundamental Rights guarantees the right to an effective remedy and to a fair trial. See EU Charter, Article 47.

to stimulate a 'culture of compliance' with an emphasis on sustained monitoring and the credible threat of legal action in the face of violations (COE 2011, 5). As it stands, an emphasis on strategic litigation risks undermining the core legal duties that fall upon the IHREC under EU law. How this might impact on the 'change agenda' in the fields of equality and human rights is discussed further in the final section.

Other concerns raised included diluting the impact of recommendations,<sup>131</sup> straying too far into the operational autonomy of the new body,<sup>132</sup> lack of clarity on how the positive duty can be enforced, and ambiguity surrounding key design features, in particular meritocratic criteria to guide appointments<sup>133</sup> and how to ring fence financial and operational autonomy.<sup>134</sup> In effect, the WG left unresolved crucial questions which have subsequently provoked considerable controversy. Others suggest that the WG missed an opportunity to assert full independence of the new body, in particular severing lines of accountability to the department and placing it under the jurisdiction of the Oireachtas (an arrangement akin to the Irish Ombudsman Office). In addition, the WG chose not to include reference to the potential role of the IHREC under the OPCAT or CRPD in their report. Carol Coulter concluded that while '[o]ne could quibble with aspects of the report'; it provides 'a blueprint for an effective human rights and equality commission'.<sup>135</sup> Others are less sanguine, arguing that the WG should have been more ambitious in advocating for an entirely new institution, rather than attempting to fuse two existing, but severely undermined, bodies. In part, faults identified in the report may be rooted in the compromise inherent to such an exercise, an (overly) expansive TOR, a lack of sufficient expertise

131 The report includes reference to the CRPD but does not recommend that the new body be assigned the role of national monitor under Article 33 of the Convention.

132 Observers regard the elaboration of an initial internal organisational configuration as unnecessary and potentially unhelpful.

133 The report recommends that there should be no automatic membership as there had been on the EA board. Emphasis is placed on expertise and experience, as opposed to affiliation to any organisation or group.

134 Reflecting the Paris Principles almost verbatim, the report recommends that the 'national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding'. Working Group Report, 19 April 2011, p. 92.

135 Irish Times, 'A blueprint for an effective human rights watchdog', 1 May 2012.

on contractual and budgetary matters,<sup>136</sup> and perceived difficulties of ensuring financial autonomy in a context of austerity.<sup>137</sup>

#### *4.1.2. The Heads of Bill are published*

Minister Shatter welcomed the Working Group report upon publication. In announcing the Heads of Bill (HOB) for the new merged body on 4 June 2012 he stated that he had accepted the WG recommendations “in full”.<sup>138</sup> The WG report places particular emphasis on explicit provisions ‘to ensure that the new organisation clearly and unambiguously’ meets the criteria of independence and Paris Principles compliance.<sup>139</sup> The extent to which the HOB meets the demands and expectations of stakeholders on these criteria has informed subsequent events, throwing up unexpected developments along the way. Opinion varies as to whether the recommendations of the Working Group have been faithfully transposed into the HOB. As the following analysis documents, key issues of controversy more often than not reflect areas of ambiguity or omission in the WG Report as opposed to Ministerial override – with the exception of provisions surrounding the appointment of the CEO. A number of these insertions are justified by institutional designers on the grounds of ‘workability’, the need to comply with the Paris Principles but also to meet the pragmatic challenge of an orderly transition to the new body.

As stated at the outset, the merger process remains in progress and legislation is unlikely to be tabled before March 2013. By issuing the HOB rather than draft legislation, Minister Shatter signalled his willingness to engage in an open consultation process. He also expressed “a personal commitment” to “strengthening the new commission and ensuring it complies unequivocally with the Paris Principles”.<sup>140</sup> Nevertheless, certain features of the HOB – especially regarding independence – have raised concerns among civil society observers and the IHRC that the legislation may yet be undermined by conservative

136 A subcommittee on staffing was set up by the WG but it only met twice and was not facilitated with the necessary information on existing contractual terms and conditions. The WG concluded that it was not competent to make detailed recommendations on this issue.

137 The report recommends that the new Commission undertake a review of staffing needs within the first year, presumably to pass on to the Minister, to ensure the body has adequate resources to fulfil its remit. Working Group Report, 19 April 2011, p. 65.

138 Irish Times, ‘Merged rights and equality commission Bill published’, 5 June 2012.

139 See Working Group Report, 19 April 2011, p. 8.

140 Seanad Éireann Debate, vol. 215, no. 15, Adjournment Matters - Departmental Agencies, 12 June 2012.

elements within the Department of Justice. In any case, the action now shifted to the Oireachtas, with the Committee on Justice, Defence and Equality requested by the Minister to review the HOB and conduct a further consultation process.

#### *4.1.3. The Committee on Justice, Defence and Equality*

The publication of the HOB also provided additional insight into how the merger process would proceed. In an innovative move, Minister Shatter announced that he had requested the Oireachtas Committee on Justice, Defence and Equality to examine the HOB and undertake a consultation process (within as short a period as possible). There is no precedent of an Oireachtas Committee assuming oversight of a departmental body, with the exception of the Public Accounts Committee which can hold all state agencies to account. The role of the Committee has evolved. The Minister may initially have viewed the Committee as a useful instrument of consultation within the wider legislative process. Also, engaging a cross-party committee could facilitate access to opposition parties prior to legislation being tabled which might be denied to a governmental department. Shatter directed the Committee to consider Head 13, the selection process, with a view to putting in place the independent selection panel and to proceed with inviting applications for the new Commission. However, it quickly became apparent that members of the Committee, following consultation on other priority issues, would not be restricted in their observations.<sup>141</sup> Notably, the Committee includes high profile equality and human rights advocates.<sup>142</sup> The growing profile of the Oireachtas within the integration process was not foreseen and constitutes one of the more novel aspects of the Irish merger experience.

Given its evolving status, there is a perception among some observers that the role of the Committee on Justice remains ambiguous and would benefit from statutory clarification within the IHREC Bill itself. They also highlight some discrepancies between the Minister's stated commitment to an open and inclusive consultation process and the difficulties encountered in accessing the Committee on Justice, with an initial timeframe for submissions of one week – subsequently doubled following protestations by NGOs that the process risked being “guillotined”. Others report that while department officials and the Oireachtas have been willing to meet with civil society representatives, Minister

141 See Senator Zappone, Seanad Éireann Debate, vol. 215, no. 15, 12 June 2012.

142 Senator Katherine Zappone (Independent) is a former Commissioner with the IHRC having served two terms from 2000 to 2010. Senator Ivana Bacik (Labour) is also a prominent equality advocate and emphatically opposed the 2008 budget cuts. See Irish Independent, “Quiet coup’ threatens to trample all over our rights’, 15 September 2008.

Shatter has largely ignored requests for meetings. Nevertheless, in the run-up to its hearings on 4 and 5 July 2012, the Committee on Justice received 17 submissions on the HOB, including robust interventions from the ICCL, IHRC, EA and the Scottish Human Rights Commission as the Chair of the European Group of NHRIs at the ICC.

On 4 July the Committee opened proceedings, inviting statements from a number of stakeholders including representatives of the ERA, ICCL, the Children's Rights Alliance and the IHRC (the acting CEO and the acting Deputy CEO). On the following day, the Committee held a separate hearing with individuals from the EA, including the chairperson and CEO. The Department of Justice sat in the gallery on the second day of the hearing. In terms of independence, a number of concerns were flagged by individuals in their submissions. The principal concerns raised in both written and oral submissions are reflected in the final Observations of the Committee published in July 2012, with particular emphasis on:<sup>143</sup>

- Head 17(5): The provision that the Director of the Commission shall be the incumbent Chief Executive of the EA is likely to be in conflict with the Paris Principles and should be deleted.
- Heads 17 and 21: To ensure independence the body should be empowered to recruit its own staff and there should be no civil service secondment at senior level
- Heads 12, 14, 20, 27 and 28: The IHRC recommendation that the new body be directly accountable to the Oireachtas, and the suggestion that financial accountability should be directed to the Comptroller and the Auditor General
- Head 13: There should be specific criteria for appointment to the IHREC which should be set out in the legislation the skills/attributes necessary for each Commissioner
- Heads 3 and 30: Inconsistencies in the definition of equality and the absence of a unified definition of human rights and equality
- Head 36: The public sector equality and human rights duty should be strengthened, in particular the obligation to 'give consideration' to equality and human rights is not sufficiently defined.

While the Committee does not itself endorse these observations, the report does affirm the Committee's agreement that the legislation should accord with the Paris Principles

143 See Houses of the Oireachtas, Joint Committee on Justice, Defence and Equality, Report on hearings in relation to the Scheme of the Irish Human Rights and Equality Commission Bill, July 2012, Final Observations. Hereafter Committee Report 2012.



## 4.2. INDEPENDENCE, ACCOUNTABILITY AND SPONSORSHIP

A central issue to emerge in the transition process is the appropriate configuration of linkages between the IHREC and government. Perhaps unsurprisingly, given the fraught history of recent conflict between the two precursor bodies and their sponsor department, this issue has been front and centre of the current merger discussion. Going further back, persistent concerns have been raised over the manner of appointments to the EA and IHRC and the impact of assignment by Ministerial fiat on the real and perceived independence of the two bodies. As recounted here, concerns over the IHREC appointment process – especially the status and role of the Selection Panel – have led to some of the more dramatic episodes of the Irish experience.

### *4.2.1. Department versus Oireachtas: lines of accountability*

The Heads of Bill (HOB) makes frequent reference to strengthening reporting mechanisms from the Commission to the Oireachtas. However, while welcoming this development as positive, many observers in civil society regard the actual reforms proposed as offering no more than “symbolic” accountability,<sup>144</sup> with ultimate authority still resting with the Department of Justice, especially through the budget line. The lines of accountability to the two precursor bodies are not satisfactory. This is especially the case with the EA which is directly accountable to the Minister of Justice as well as the Controller and Auditor General in budgetary matters. Although a minister for Equality exists, it is a junior post, and in practice has had little direct engagement with the EA. As described above, in 2010 the EA and IHRC were briefly placed under the jurisdiction of the Department of Community, Rural and Gaeltacht Affairs under Junior Minister Mary White. This was seen as a positive move, providing some insulation within a government department that was much less likely to be the subject of scrutiny by the two bodies. This is picked up in the IHRC submission to the Committee which recommends, as a least worst option, that the IHREC be accountable to a department where any conflict of interest is least likely to arise.

The HOB as it stands advances a number of positive changes to clarify the IHREC lines of accountability, including diluting links to the Minister, and enhancing the role of the

<sup>144</sup> Minister Shatter has affirmed the “symbolic importance” of Oireachtas oversight. See Department of Justice, Shatter announces publication of General Scheme of Irish Human Rights and Equality Commission Bill [press release], 5 June 2012.

Oireachtas oversight. This is evident with regard to the strategic plan,<sup>145</sup> strengthened safeguards of dismissal,<sup>146</sup> reporting to an Oireachtas committee,<sup>147</sup> and the direct submission of annual reports to the Oireachtas.<sup>148</sup> However, the body remains ultimately accountable to the Minister of Justice. International guidelines are clear that where ‘an NHRI is regulated by the Government, such regulation must not compromise the NHRI’s ability to perform its role independently and effectively’ (SCA GO 2.10). Given the difficult history of the two precursor bodies, this General Observation resonates in the Irish context and underpins the intense focus on the real (and perceived) independence of the new body. In its submission, the IHRC welcomed the ‘modest’ increased linkages but noted that the IHREC remains administratively tied to the Department of Justice. ERA concurred, citing it as ‘regrettable that the Bill proposes a merely symbolic accountability to the Oireachtas’. POBAL notes that Heads 12 and 27 provide only ‘limited accountability’ and urge that this be explored ‘as a matter of urgency’. Finally, in its submission, the Scottish HRC cited itself and a number of NHRIs in Europe as a ‘best practice model’ having no link at all to the Executive, instead being accountable to Legislature.

This issue is connected not only to the question of independence but also to that of performance. The IHRC has been criticised by some for under-performing as an independent human rights watchdog even prior to the 2008 budget cuts, unable or unwilling to exercise its full complement of investigation powers. IHRC representatives counter that they were subject to serious legislative constraints in exercising their powers to the fullest extent.<sup>149</sup> In a detailed analysis of the work of the Commission prior to 2008, a number of factors emerge which point to the importance of independence as well as engagement by government. Firstly, the IHRC did not become fully operational until 2003

145 An improvement on the precursor bodies on a number of fronts. Head 12 proposes that the IHREC will lay its strategic plan directly before the Oireachtas ‘to reinforce the independence of the Commission’. The EA did produce a strategic plan but to be laid before the Minister.

146 Head 14 also elevates the role of the Oireachtas in dismissal proceedings, removing the prerogative from the Minister to the President and requiring resolutions to be passed by both the Dáil Éireann and by Seanad Éireann calling for his or her removal. Previously, dismissal in the case of both the EA and IHRC was at the discretion of the Minister.

147 Head 20 instructs that the Director of the IHREC, upon request in writing of an Oireachtas Committee, shall give account for the general administration of the Commission. This Head is almost a verbatim reproduction of s. 15 of the 2000 IHRC Act and maintains the reporting mechanism to the Oireachtas.

148 Head 27 directs that the Commission will submit its annual report to each House of the Oireachtas on its activities.

149 For instance, national inquiry powers in Ireland are sub-constitutional and do not entail the same authority or protections afforded to the exercise of such powers in jurisdictions such as Australia.

and even then its work was developed ‘in a staggered manner’, not assisted by Ministerial intransigence on questions of staffing, budget, and infrastructure (Harvey & Walsh 2009 60). In turn, where the IHRC has had a positive impact, it has often struggled against an unresponsive state bureaucracy. For instance, in the area of legislative scrutiny, no bills were referred to the IHRC by departments other than Justice until 2007. Since 2011, there have been no referrals to the IHRC by state officials. On only two occasions was the IHRC able to scrutinise government legislative amendments at committee stage (Harvey & Walsh 2009 60-1). IHRC legislative commentaries are widely viewed as authoritative and valuable. However, ‘the degree to which government takes notice of its observations is another matter’ (Harvey & Walsh 2009 60-1). Accountability of the IHREC to the Oireachtas could be formalised via debate of the annual human rights report or annual plan before a specified Oireachtas committee. The SCA (GO 1.6) endorses this principle and clearly links it to impact:

NHRI recommendations contained in an annual, special or thematic human rights report should normally be discussed within a reasonable amount of time, not to exceed six months, by the relevant gov’t ministries as well as the competent parliamentary committees. These discussions should be held especially in order to determine the necessary follow up action, as appropriate in any given situation...

During the hearing of 4 July, the ERA representative reiterated that the new body remains ‘substantively linked’ and accountable to the Department of Justice. The IHRC also made plain its view ‘that the commission be fully independent and accountable to the Oireachtas’ and welcomed that ‘the Minister is moving in that direction’. It also noted the evolving role of the Committee on Justice in the merger process and the expectation that ‘meetings with Members will continue’. The CEO of the EA, speaking the following day, also submitted that “[w]e have no difficulty with oversight by the Oireachtas”. Members of the Committee responded positively to this suggestion, with Deputy Phelan “keen to see greater involvement and engagement with the Oireachtas in many areas”. The Chair, TD David Stanton, put it even more clearly, “One must ask what is the Oireachtas and how does it manifest itself...We are seeing a little more tension between the Executive and the Oireachtas, which is quite interesting and exciting”.

#### *4.2.2. Independence of the Director and IHREC staff*

Emblematic of the dispute over IHREC independence from government has been the proposed arrangements governing appointment of the first Director to the IHREC. The

Working Group report (2012, 27) underlines that '[a]s a principle, NHRIs should be empowered to appoint their own staff'. However, many observers have seized on Head 17(5) as contradicting that principle in stating:

The first Director of the Commission shall be the person who on the day prior to the establishment day is the Chief Executive of the Equality Authority and her contract with the Authority and the period specified in that contract shall be deemed to be a contract and a period for the purposes of subsection (2).

This provision is widely viewed as incompatible with best practices in terms of independence. As the ICCL submission bluntly puts it, 'In other words, in reality, Head 17(5) reads 'the first Director of the Commission shall be Renée Dempsey, Chief Executive of the Equality Authority'. The IHRC also recommended that the Head be reconsidered to 'ensure fidelity with the Paris Principles'. The SCA is clear that 'as a matter of principle, NHRIs should be empowered to appoint their own staff' (SCA 2009, 2.7). This General Observation is restated in the Working Group report (2012, 27). As one observer puts it, "to effectively appoint someone through a bill should not happen". Questions have been raised as to why Head 17(5) has been included in the HOB. Some suggest it is not the Minister or advisors but rather other Department of Justice officials who have insisted on its inclusion.

It may have been advisable to proceed with an alternative arrangement, for instance, appointing the current CEO on an interim basis or moving to fill the position through an open competition in which all individuals would be eligible to apply. For some observers this is a "red line issue", not only contravening the Paris Principles but also serving to potentially discourage applications to serve on the new Commission. Fears have been expressed that it will entrench the leadership and organisational culture of the EA within the new body, a culture which has been heavily impacted upon by events of 2008. The COE Commissioner for Human Rights (2011, 15) has affirmed that '[l]eadership within [equality structures]...is a factor in securing independence, in particular *de facto* independence'.

However, for others it is necessary to ensure a workable transition to the new body. They point to the WG acknowledging that the IHREC will depend on existing staff of the precursor bodies 'to help it off the ground' (WG Report, 11), while '[i]n future, new staff at senior level should be recruited by the IHREC directly through an open competition' (WG Report, 62). Following this logic, the Director will perform a critical role in ensuring that the future functional areas of the Commission 'do not operate as independent silos' (WG

Report, 63). The chairperson of the EA in the hearing of 5 July affirmed this position: “[we] do not want to lose the skills built up by individuals. For her part, the EA CEO emphasised that “[b]eing let loose from the mothership does not in any way require to have long-term loyalties.” In any case, the CEO is serving out an existing contract of 18 months until June 2014 at which point the vacancy will presumably be filled through an open competition. As such, one observer suggests that Head 17(5) “doesn’t look good, but maybe it is not so bad”. Nevertheless, it does speak to crucial issues regarding whether the body will have the wherewithal to deliver, whether the staff will be independent and have their loyalty to the IHREC, and whether the new body is going to be independent enough to work without fear or hindrance. A key issue in this regard is how the staff of the Commission will be recruited.

#### A. Civil service secondment

The continuation in post of the incumbent CEO of the EA is potentially more problematic in light of her status as a civil servant. Alarm bells have also gone off regarding Head 21 which suggests provision may be made for junior civil servants to work in the IHREC on secondment from their sponsor department:

The Commission may enter into an agreement with the Department of Justice and Equality for the Commission to offer employment to civil service clerical and administrative staff of that Department...during such period of leave of absence, the Commission shall be the employer of any person so released and such persons shall be civil servants of the State.

The SCA is clear in its General Observation (GO) 2.4 (issued in October 2007) that in order to guarantee the *de jure* and *de facto* independence of the NHRI, senior level posts should not be filled with secondees and the number of seconded should not exceed 25 percent and never be more than 50 percent of the total workforce.<sup>150</sup> The Working Group report reproduces this guidance. In its submission the IHRC states that Head 21 may violate the spirit, if not the letter, of the Paris Principles. However, it also states that the provision should not limit the new body to drawing solely on clerical and administrative staff and should also not be limited to staff from the Department of Justice and Equality (IHRC 2012, 34). The submission by ERA echoes this concern, suggesting that the IHREC should have access to specialist support from the wider public service (ERA 2012, 2). It is a matter of

<sup>150</sup> One observer notes that the SCA guidance on this matter is not very helpful as 50 percent secondment of the workforce is a lot by any standard.

fact that there have been instances in which senior appointments made to both the EA and IHRC have been filled by secondees contrary to GO 2.4.

The issue of organisational transition and civil servant secondment also raises less visible concerns. The majority of the 27 remaining permanent staff at the EA are civil servants and are deeply concerned that in transferring their employment status over to the new body they will be required to give up their entitlements as civil servants. This is a source of considerable anxiety for current EA employees and contrasts with the IHRC where the staff are public servants employed by the IHRC itself. The paradox then is that it may be the existing personnel of the EA, rather than the Minister, who are least enthusiastic about Paris Principles compliance which will impose a downgrade in their contractual terms and conditions. This controversy has coloured the merger for employees of the EA, adding additional insecurity to a staff complement already under stress following successive budget cuts and arbitrary reorganisation.

#### *4.2.3. Adequate resourcing*

Notably, individual observations, published by Senator Bacik and Zappone following the July hearings, recognised the IHRC recommendation that the IHREC be directly accountable to the Oireachtas and that financial accountability be directed to the Auditor and Comptroller General. Senator Zappone personally endorsed this position.

Budgetary autonomy goes to the nerve-centre of the independence of the future IHREC. As the COE Commissioner for Human Rights (2011, 14) has stated: '[i]t is a less complex step to use the external control of resources as a means to limit the independence of a national structure for promoting equality than to curtail the exercise of its functions'. The Paris Principles state that the NHRI shall have 'adequate funding...in order to be independent of the Government and not be subject to financial control which might affect its independence'. In General Observation 2.6, the SCA enhances the precision over what adequate funding means in practice, including that 'financial systems should be such that the NHRI has complete financial autonomy. There should be a separate budget line over which it has absolute management and control'. The Irish experience provides ample evidence in support of a robust approach towards financial autonomy. Prior to

2008, the IHRC in particular, was consistently denied adequate funding.<sup>151</sup> The IHRC has been criticised for not engaging more in legal casework and also for relying excessively on *amicus curiae* interventions.<sup>152</sup> One observer notes that “the IHRC never had enough money to take lots of cases, *amicus* actions were cheaper and reasonably effective”. It is material to note that after IHRC mandatory non-discretionary costs were factored in, the Commission was left without sufficient funds to undertake core operational activities.<sup>153</sup>

The EA chairperson speaking at the July hearing noted, “[w]e have a few stripes on our backs when it comes to funding cuts”. Indeed, cumulative budget reductions since 2008, combined with a strict public spending freeze, have left both institutions in a precarious position. As of late 2012, neither body has an active board, staffing numbers have fallen precipitously,<sup>154</sup> key senior positions remain unfilled, and operational activities have long been severely scaled back.<sup>155</sup> The IHRC President reported in 2011 that the body had lost more than half of its staff and 40 percent of its budget since 2008.<sup>156</sup> The position of IHRC President has been left vacant since July 2012 and currently no Commissioners serve on the body.<sup>157</sup> It is an open question as to whether Ireland currently has a Paris Principles-compliant NHRI given the inability of the IHRC to undertake core functions.<sup>158</sup> While the Minister ensured the EA retained a serving board until July 2012, in contrast to the IHRC, particular concern was voiced regarding its inability to fill the post of legal

151 Although the OHCHR recommended a minimum budget of £2 million in 1999, the office was initially allocated a budget of €1.2 million against an estimated minimal operating cost of €2.3 million.

152 As one report notes, “[a]t first sight, the number of cases [received by the IHRC] leading to subsequent legal assistance appears to be extraordinary small (excluding notifications, less than 0.3 per cent)” (Harvey & Walsh 2009, 62).

153 The IHRC has been criticised for spending a disproportionate amount of its income on staff and commissioners’ expenses. In 2010, 61.7 percent of the IHRC budget was allocated to paying salary costs. The salary of the IHRC President in 2011 was €202,422 (IHRC 2011, 85). The salary for the position of Chief Commissioner of the new IHREC is set at €134,523.

154 The IHRC currently has a staffing complement of six full-time staff, with additional support provided by unpaid interns. The EA has a staff quota of 29, down from 55 in 2009, and 18 further positions are due to be lost with the closure of the office in Roscrea.

155 On the operational front, the EA communication budget for 2009 was cut to 10 percent of its 2008 level and the legal budget meant that no new cases could be taken on.

156 Irish Times, ‘Reforms should be designed to bolster independence of human rights body’, 7 July 2011.

157 The IHRC currently lacks both Commissioners and a President, with the CEO serving as acting President. The term of three interim Commissioners appointed in October 2011 expired in May 2012, on the basis that the merger process would be far accelerated by then.

158 For instance, the acting CEO of the IHRC has not been designated as the accounting officer.

director since August 2009 due to a public service embargo. Observers claim that this has effectively undermined the ability of the EA to discharge its core functions under the EU Race Equality directive.<sup>159</sup> More broadly, observers lament the loss of legal expertise in the EA which has one solicitor on staff as of January 2013. As regards the IHRC, observers suggest that the current vacuum is in breach of the Good Friday Agreement and “runs the risk of allowing that institution to lapse.”

The merger needs to be placed in a context of low-intensity and prolonged resource crisis across the two bodies. Currently, the new body will have a total combined staff complement far below what many observers would regard as ideal. This has also raised the stakes in the merger process. As one observer remarks, “if the IHREC is set up with a particular complement it will be very hard to increase later on”. Currently, the provisional budget for the new IHREC in 2013 is €4.4 million which is far below the joint-resources of the two bodies prior to the 2008 cuts.<sup>160</sup> The Working Group was cognisant of the importance of adequate funding, clearly stating that the new body ‘will need adequate resources, including funding and staffing’ (WG Report 2012, 20). It also noted that the current bodies do not have enough resources to meet their existing obligations (WG Report 2012, 65). In a strongly worded passage, the WG (2012, 65) states:

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

And this gets to the nub of the matter; in the HOB the Minister retains discretionary control over the budget of the new body. Beyond the rhetoric of strengthened institutional arrangements, the merger also continues to be justified in terms of savings to be gained. Although Shatter has given assurances that the budget of the IHREC will be shielded from public sector cuts of 10 percent per annum and any savings gained from the merger

159 Irish Times, ‘EU to ask about cuts to Equality Authority’, 1 June 2010.

160 See Minister Response to Questions Nos. 172 and 189, Dáil Éireann Debate, vol. 793, no. 3, Written Answers-Departmental Responsibilities, 21 February 2013

will be rolled back into the new institution,<sup>161</sup> considerable disquiet remains at the lack of financial safeguards. Indeed, in its submission, the IHRC (2012, 19) expresses deep concern that departmental control is increased in Head 26(3) governing accounts and audit to the Minister.<sup>162</sup> For many observers, this situation is unacceptable. Others, however, point to the futility of safeguarding the IHREC from future interference given the “highly personalised” nature of Irish politics. Individuals such as Senator Zappone have strongly objected to talk of savings, asking instead, “how we will recover the €4 million that has been lost by the two bodies to allow the body be effective in its first year?”<sup>163</sup> However, in the July hearing, Committee member Senator Martin Conway reiterated the expectation that merger “should lead to cost savings”. The EA chairperson responded bluntly, “I do not agree that there should be a saving...I would hate to see further cuts in the authority’s and the commission’s budgets because someone thought it would be a primary reason for the merger”. For some, the unlikelihood of savings suggests that the truly cynical motive for merger “is not economic, it’s not even ideological, it’s just to look good by culling quangos”.

Head 28(2) governing grants to the IHREC, reflecting the recommendation of the WG, states that ‘the Commission shall be provided with sufficient resources to ensure that it can carry out each of its functions effectively’. However, little detail is provided on how this subsection will be operationalised in practice. The WG report recommended that, similar to the arrangement in Northern Ireland, ‘the IHREC should be funded through a separate vote under the Department of Justice’ as opposed to the current practice of funding through a subhead within the Justice vote. Reports indicate that this recommendation will feature in the forthcoming draft legislation. Indeed, there is a striking lack of substance on the mechanics of financial provision to the new body. Some observers suggest that enhancing the budgetary independence of the IHREC has been resisted by department officials as being incompatible with accepted practice regarding public departmental bodies. The ideal model might be similar to the Irish ombudsman where the internal audit to the Comptroller and Auditor General, according to the IHRC, “meets all statutory requirements

161 Shatter, speaking in May 2012, estimated savings “in the region of €500,000”. Written Answers – Departmental Bodies, Dáil Éireann Debate, vol. 763, no. 3, 1 May 2012, p. 405. See also, Minister Kathleen Lynch, Adjournment Matters – Departmental Agencies, Seanad Éireann Debate, vol. 215, no. 15, 12 June 2012, p. 12.

162 The IHRC (2012, 36) recommends that the provision instructing the IHRC to keep accounts in a form approved by the Minister, with the consent of the Minister for Finance, be removed.

163 Order of Business, Seanad Éireann Debate, vol. 215, no. 13, 6 June 2012, p. 13.



### 4.3. “RUNNING THE RULE OVER”: THE SELECTION PROCESS

Head 13 contains issues regarding the appointment process and specifically the role of a Selection Panel which would lead to some of the more dramatic events recounted below. In particular, Head 13(3)(a) mandates that where a vacancy arises on the IHREC ‘the Government shall appoint a Selection Panel’ and Head 13(5) states:

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...as, in the opinion of the Selection Panel and with the agreement of the Government, is or are appropriate...

SCA General Observation 2.2 makes a series of recommendations on best practice regarding the selection and appointment of the governing body of an NHRI, emphasising a transparent and broad consultation process. In a detailed submission on the issue, the IHRC, while welcoming the involvement of the Oireachtas in the appointment of Commission members,<sup>165</sup> recommends that the Oireachtas be given a stronger formal role in the appointment process, ‘through confirming the independent panel and interviewing nominated individuals...’ (IHRC 2012, 26). It also pointedly notes that the selection is appointed directly by the Government. The submission goes on to recommend that reference in subsection (6) to ‘the agreement of the Government’ be struck from the eventual legislation. ERA and the ICCL also highlight the appointment of the Selection Panel as a cause of concern with the ICCL in that the current arrangement would enable government to ‘exercise a degree of indirect influence on the likely composition of the slate of candidates’ and lacks the transparency required by the Paris Principles (ICCL, 2012, 3). For its part, POBAL is adamant that any selection panel ‘should be appointed by the Oireachtas (POBAL 2012, 6).

In sum, multiple submissions raised the independence of the Selection Panel as a crucial matter. However, they differed on the solution. The issue was raised during the hearing of 4 July and picked up by Senator Bacik who sought clarification on whether ERA agreed with the IHRC recommendation that the independent panel be confirmed by the Oireachtas or whether they shared the concerns of the ICCL that this would risk politicising the process

<sup>165</sup> Head 13(4) states that ‘members of the Commission shall be made appointed by the President on the advice of the Government following a resolution passed by Dáil Éireann and by Seanad Éireann recommending their appointment’.

and that the selection process would be best undertaken by the Public Appointments Service.<sup>166</sup> ERA agreed with the position of the IHRC. Given that the Minister had expressly asked for the Committee to consider Head 13, it is perhaps surprising that they did not highlight widely-held misgivings surrounding the appointment of the Selection Panel in their final observations, even if a solution was not self-evident.

This issue was likely to be a focal point given the history of opaque and arbitrary political appointments to both precursor bodies. Given the high bar set by the Paris Principles, the process surrounding IHRC appointment has come under criticism. The lack of a genuinely transparent and open appointment process has undercut the perception of independence of the IHRC, even if the office has ‘proven it is independent in reality in the exercise of its functions’.<sup>167</sup> A selection panel in 1999 was set up to recommend the first cohort of Commissioners. Of the eight given priority recommendation, only two were subsequently nominated by the government.<sup>168</sup> As one observer recalls, “the Selection Panel in 1999 was very good which is why the Minister didn’t appoint the recommended persons”.<sup>169</sup> Subsequently, under considerable pressure, the government relented and enlarged the number of Commissioners from eight to 14. Again, the appointment of the IHRC President in 2002 was surrounded by controversy due to the lack of transparency of the process.<sup>170</sup> In recognition of this legacy, the appointment process was reformed in 2006 with an Appointment Panel, chaired by a Supreme Court Justice, providing a shortlist of candidates which government duly endorsed.<sup>171</sup> The EA as a departmental body subject to ministerial appointees has been subject to more political appointments,<sup>172</sup> resulting in internal conflict and organisational instability.<sup>173</sup>

166 It is debateable whether the Public Appointments Service would meet the standard of procedural independence required by the Paris Principles.

167 Maurice Manning, ‘Reforms should be designed to bolster independence of human rights body’, 7 July 2011 [Irish Times].

168 Sources close to the Government suggested the list took no account of political representativeness. See Irish Times, ‘Clash over commission make-up predictable’, 18 December 2000.

169 Although it should be noted that no interviews were conducted, with the selection panel taking the view that it was preparing a shortlist for a governmental committee to proceed with recruitment.

170 Irish Times, ‘Criticism over human rights appointment’, 30 July 2002.

171 Irish Times, ‘McDowell names Human Rights Commission’, 31 August 2006.

172 As ERA (2012, 2) asserts in its submission, ‘[i]n 2008 a government representative was appointed to the Board of the Equality Authority for the first time which is contrary to the Paris Principles’.

173 According to Crowley (2010, 93), the new EA chairperson appointed in August 2007 was known to be close to the governing party, Fianna Fáil, and to be a friend of Seán Aylward, secretary general of the Department of Justice.

For this reason, the Selection Panel was likely to be a flash-point in the current merger process. As one civil society advocate puts it, “everything depends upon the process by which people are appointed and who is appointed. That is why we have pushed so hard on this process in our submissions”. Although civil society observers acknowledge that the process in 2006 was an improvement, they note that the recommendations were still conveyed to the Department of Justice, at which point it became a completely opaque process. For the IHRC and ERA, the solution lies in elevating the role of the Oireachtas in the appointment of new Commissioners, to provide a level of insulation from political influence by the sponsor department. This is echoed in a recent report by Equinet (2012, 14) which identifies accountability to a Government ministry as ‘hindering independence’. These issues were brought into stark relief with the experience of the Selection Panel established towards the end of July 2012.

#### *4.3.1. The appointment of the Selection Panel*

Head 13(3) states:

‘(a) the Government shall appoint a Selection Panel of five persons who are knowledgeable in the field of human rights and equality to invite applications from persons interested in serving as a Commissioner’, including as Chief Commissioner, and to make a single recommendation to the Government as to the person or persons to be appointed to fill such vacancy...

The Minister duly appointed the selection panel on 24 July 2012. There is general agreement that the five individuals selected are people of expertise and integrity. However, controversy has focused around the manner of their appointment.<sup>174</sup> As one observer puts it, “these are good, serious people. The problem is that the Minister assumed that the Selection Panel would be selected by Ministerial fiat”. Stakeholders made clear their desire for an open and transparent appointment process to be entrenched in legislation, as well as an enhanced role for the Oireachtas. The Minister received advice in a letter from the Committee on Justice on the Selection Panel and incorporated three of their recommendations.<sup>175</sup> The Committee also made a number of suggestions on candidates,

<sup>174</sup> See <http://www.ihrecpanel.com/> (accessed 15 December 2012).

<sup>175</sup> Their recommendations were for: (1) gender balance, (2) independence of members, and (3) that they should expert in human rights and equality.

one of which was accepted by the Minister. However, such consultation was conducted through back channels and not subject to public scrutiny.

Having been in post for four days, the Selection Panel suddenly announced they were “standing aside” in light of concerns raised by the UN Office of the High Commissioner for Human Rights (OHCHR) regarding the HOB. On 13 July, the OHCHR, in response to a request by the Irish government for comments on the Bill, replied with preliminary observations, stating that its provisions ‘do not reflect a full, open, transparent and independent process’ and that the nomination of the selection panel by the government ‘may undermine the transparency of the appointment process’. However, the Selection Panel was not made aware of these concerns at the time of their appointment.<sup>176</sup> Notably, the letter from the OHCHR to the Irish government was headed ‘legal advice’. This was regarded as misleading by some individuals within the department who viewed the letter as more ‘part of the ongoing consultation process.’<sup>177</sup> Nevertheless, while the Principles may be non-binding legal standards, they are indisputably the criteria upon which the SCA will base their decision with the IHREC scheduled for review in late 2013.

#### *4.3.2. The role of the United Nations and other international actors*

The significance of UN intervention needs to be put in the context of Ireland’s Universal Periodic Review before the UN Human Rights Council in October 2012 as well as an ultimately successful campaign to secure a seat on the Human Rights Council in elections the following month. The Irish Department of Foreign Affairs (DFA) has been particularly keen to ensure that difficulties surrounding the merger process do not derail Ireland’s objectives within international forums. Under pressure, advisors to the Minister travelled to Geneva in early October to meet with officials from the OHCHR. According to Shatter, he was assured by high-level delegates from the High Commissioner’s Office as well as the National Institutions and Regional Mechanisms Section that “the Irish Government is approaching the issue in the right way” and that the OHCHR “hopes that it can continue to use our approach as a best practice model”.<sup>178</sup> This comes as a surprise to some observers, who suggest that the OHCHR and other actors, including the European Group of NHRIs,

<sup>176</sup> Irish Times, ‘Panel to choose equality commission stands down’, 28 July 2012.

<sup>177</sup> See Response by Minister for Justice, Equality and Defence to letter from members of the Selection Panel for the Irish Human Rights and Equality Commission, available at: <http://www.justice.ie/en/JELR/Pages/PR12000230> (accessed 15 December 2012).

<sup>178</sup> Human Rights and Equality Commission, Dáil Éireann Debate, vol. 773, no. 19, 24 October 2012.

remain concerned by a number of provisions in the HOB.<sup>179</sup> This follows the submission of the Scottish Human Rights Commission to the Committee on Justice which makes plain that the A status of the new Irish IHREC is not assured.<sup>180</sup>

Most recently, the Commissioner for Human Rights of the Council of Europe has also intervened, specifying improvements needed in human rights protection in Ireland and prompting a detailed response from Shatter reiterating the assurances received from the OHCHR.<sup>181</sup> It is notable that there are no international standards directly addressing integration of equality and human rights bodies. Although the Paris Principles and SCA provide valuable guidance, the lack of a General Observation on integrated bodies is identified by one observer as a significant gap. Notably, in the Irish process, the so-called Belgrade Principles on the relationship between NHRIs and Parliaments have emerged as a corollary to the Paris Principles, repeatedly cited by the Selection Panel as important in affirming the importance of parliamentary engagement.<sup>182</sup> However, the Belgrade Principles lack the status of the Paris Principles which have been endorsed by the UN General Assembly and Human Rights Council as well as the ICC plenary. They also make no mention of balancing NHRI relations (and independence) between state and non-state actors. Along an equality dimension, the Opinion of the Commissioner for Human Rights of the Council on Europe on National Structures for Promoting Equality (2011) is a comprehensive statement on design standards but has been largely overlooked in the Irish merger process. The Council on Europe Commission Against Racism and Intolerance is focused on National Specialised Bodies, which includes NHRIs but also an array of other bodies. The development of an internationally-endorsed set of standards governing integration processes and resulting bodies is a pending task.

179 Informants in the OHCHR state that concerns persist on three key issues: (1) reporting arrangements to the Minister, (2) funding arrangements, and (3) selection and appointment procedures. Notably, the two-tier definition does not feature among these concerns.

180 The submission states 'the changes proposed in the Heads of Bill are clearly of a significant nature and would require a review of the accreditation status of IHRC (or a new application for the new body)'.

181 See [http://www.coe.int/t/commissioner/News/2012/121206Ireland\\_en.asp](http://www.coe.int/t/commissioner/News/2012/121206Ireland_en.asp) (accessed 15 December 2012).

182 The Belgrade Principles were devised in February 2012 at a meeting organised by The Office of the UN High Commissioner for Human Rights, the International Coordination Committee of National Human Rights Institutions (ICC), the Serbian Protector of Citizens (Ombudsman) and the National Assembly of the Republic of Serbia. See <http://www.theioi.org/news/serbia-belgrade-principles-on-the-relationship-between-nhris-and-parliaments> (accessed 15 December 2012).

#### 4.3.3. The “Confirmation Hearing”

In response to the Selection Panel “stepping aside”, Shatter said he was “both surprised and disappointed”.<sup>183</sup> However, for others, the intervention of the OHCHR provided a timely opportunity to advance a more independent process. The willingness of the Panel to step aside was widely praised as a demonstration of their independence. Some commentators pushed for Shatter to ‘invite the Oireachtas Committee to establish a selection committee that reflects a balance of equality and HRs expertise’.<sup>184</sup> In a public letter to the Selection Panel, Shatter stressed that ‘there was an extensive consultation process, both by the Working Group...and by the Oireachtas Justice, Defence and Equality Commission’.<sup>185</sup> However, while this is certainly an improvement on earlier practice regarding appointments to the IHRC, the process continues to lack a statutory basis and it is not clear that the Minister sought the advice of the Committee on Justice, or whether they intervened on their own initiative. Furthermore, only one of their suggested candidates was appointed to the Selection Panel. On 6 September the Panel met with the Minister and his advisors to raise their concerns, as well as propose that the Oireachtas, specifically the Committee on Justice, be requested to satisfy itself that their appointment was transparent and that they would act independently.<sup>186</sup>

In effect, the Committee on Justice retroactively approved the Selection Panel in a hearing held on 25 September, described by one member of the Panel “as essentially a confirmation hearing”. Some observers have welcomed this development, noting that it injects a further level of best practice into what has hitherto been an entirely Minister-driven process. However, others have been less impressed, noting that the Minister did not request the Committee to ratify his decision, but they endorsed the Minister’s decision anyway. In turn, this development does not address the fundamental objection that the Minister has picked the selection panel thereby exerting influence over the process. The Committee could have asserted its independence by publicly appointing additional qualified individuals onto the Panel.<sup>187</sup> While valid concerns, the high calibre of the individuals on the Panel was acknowledged by the Committee, suggesting that if someone inappropriate had been

183 Irish Times, ‘Panel to choose equality commission stands down’, 28 July 2012.

184 Village, ‘Deficiencies in the new Human Rights and Equality Commission’, Sept-Oct 2012, p. 16.

185 See <http://www.justice.ie/en/JELR/Pages/PR12000230> (accessed 15 December 2012).

186 Selection Panel for Irish Human Rights and Equality Commission: Discussion, Committee Debate – Joint Committee on Justice, 25 September 2012.

187 It may be material to note that eight of the fifteen members of the Committee are affiliated to the governing coalition parties Fine Gael and Labour.

appointed, the outcome may have been different. There is certainly scope for formalising Oireachtas oversight of the Selection Panel in legislation. The lack of clarity as to the appropriate role of the Committee was apparent during the proceedings and made explicit by the Chair of the Selection Panel as ““running the rule over. I think what the committee is doing is running the rule over us”. In responding, Senator Zappone similarly noted that the Committee is not clear in this regard.<sup>188</sup>

A large part of the discussion was taken up by presentation of credentials of individuals and their suitability to serve on the Selection Panel. The Panel were keen to invoke the recently devised ‘Belgrade Principles’ as international standards underpinning the importance of greater parliamentary engagement in the work of NHRIs. In turn, Committee members also expressed their interest in deepening engagement in the establishment and operations of the new commission. The substance of the discussion, however, centred principally on two issues, firstly Head 13 and whether the panel was satisfied with the method of selection for the commission and, secondly, whether the panel had given thought to designing the criteria for the selection of the chief commissioner as well as other commissioners. Both issues featured prominently in submissions to the Committee at the July hearing. With regard to the former, the Panel declared themselves satisfied with the procedure, noting in particular the safeguards around recommendations. Indeed, Head 13(6) was interpreted as saying that the Selection Panel will have the final say over appointments, unless there are exceptional circumstances. However, even in such a scenario, the government must justify its request and the Panel has leave to appeal the decision. As regards the selection criteria and the conduct of the actual selection process, this is the subject of the next section. As a final note, it is important to underline that throughout this protracted process, the operational effectiveness of the EA and IHRC has continued to deteriorate.

#### *4.3.4. Transparency and pluralism of the selection process*

In their final observations following the July hearings, the Committee noted that most submissions called for more specific criteria in Head 13 regarding the skills and attributes necessary for appointment to the Commission. Indeed, the IHRC ‘noted with concern the absence of a transparent and pluralistic process’ for the nomination of members. This

188 “I am not sure whether the role of the joint committee is to satisfy itself that the appointment of the selection panel was transparent and its members will act independently, or approve its appointment... The Ombudsman indicated that our role is one of approving the panel. Perhaps our role is to engage in an exchange and confirm and note our own sense of what the panel presents and how effective it can be.”

concern was echoed in submissions by the ICCL, ERA and others. The Scottish HRC drew attention to SCA General Observation 2.2 which emphasises the critical importance of transparency and pluralism throughout the selection and appointment process. Concrete recommendations included that the selection criteria:

- Be published in advance
- Are subject to civil society consultation and scrutiny
- Include a requirement for a demonstrable knowledge of human rights and equality issues
- Require possession of a range of clearly specified skills and competencies
- Are set out in legislation which is passed by the Oireachtas and then applied to applications to the IHREC
- Make explicit that appointees will serve “in their own individual capacity”.
- Make explicit a prohibition on appointment of government or government department representatives to the Board of the IHREC.

The question of selection criteria was picked up again by Committee members in their discussion with the Selection Panel. While stakeholder submissions generally favoured specific criteria for selection and nomination, this was not necessarily the consensus view among Committee or Panel members at the September hearing. Senator Zappone pressed the Panel on whether they had given thought to designing criteria for the selection of the chief commissioner, as distinct from other commissioners. In response, Panel members emphasised competence in international human rights law, evidence or proof of acumen, and a proven track record of effectiveness. However, Senator Bacik, in expressing the view that specific criteria in the bill “might limit or in some way restrict the choice”, appeared to gain more traction with the Selection Panel, with members expressing their misgivings about laying down specific criteria. Instead, emphasis was placed on casting “a very wide net”, using social media to engage the maximum number of candidates, as well to access “people who might be exceptionally good but may not want to go through the application process”.

A call for expressions of interest was issued by the Selection Panel in mid-November with a closing date two weeks later. A dedicated website was also created (and a Twitter feed).<sup>189</sup> In the information provided for applicants, the following basic criteria are provided for Chief Commissioner: ‘a high degree of expertise in, or knowledge of, human rights and

<sup>189</sup> See <http://www.ihrecpanel.com/> (accessed 15 December 2012).

equality issues and a clear understanding of board management and corporate governance. S/he will demonstrate an awareness of how to operate effectively across government and public administration systems'. No provision for civil society consultation or scrutiny of the process or candidates is indicated. With regard to individual Commissioners, the notice draws from Head 3 in stating that the Selection Panel shall have:

...regard to the need to ensure that the members of the merged Commission broadly reflect the nature of Irish society, 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), or membership of the Traveller community.

Recent developments may have assuaged concerns over the outcome, if not the procedural mechanics, of the selection process. On 16 April 2013 Minister Shatter announced the appointment of 14 members designate of the IHREC.<sup>190</sup> As displayed in Table 1, the expert calibre and diverse profiles of the 14 Commissioner designates bodes well for the future public standing of the new body.

More problematic is the failure of the Panel to identify a suitable candidate for Chief Commissioner.<sup>191</sup> Minister Shatter has invited the 14 Commissioner designates to appoint an interim Chair from among their own ranks until a Chief Commissioner can be recruited. In the meantime, the Selection Panel reportedly intended to re-advertise the position. It has also requested that the bar on previous members of the EA or the HRC applying for the post of chief commissioner be removed as it may have narrowed the pool of qualified candidates.

The integrity of the selection process is of vital importance, with the future public confidence in the IHREC leadership at stake. The Council of Europe Commissioner for Human Rights has reaffirmed that 'leadership within [equality structures] is crucial for securing independence (COE 2011, 4). Public confidence in the IHREC leadership will

<sup>190</sup> See Department of Justice, Appointment of members designate of new Irish Human Rights and Equality Commission [press release], 16 April 2013.

<sup>191</sup> See Irish Times, 'Concern grows over human rights policing vacuum as merger crawls to conclusion', 8 April 2013.

indeed be crucial if the new Chief Commissioner and Commissioners are to effectively advance their mandate in a climate of austerity-driven equality and human rights policy.

Table 1: Commissioner designates of Irish Human Rights and Equality Commission

Commissioner Designate	Current Position	Appointment Period
Ms. Teresa Blake	Chairperson of Mental Health Tribunal, Barrister	5 years
Ms Heidi Foster Breslin	Director of Exchange House National Travellers Service, Non Executive Director of MABS, Trustee of Common Purpose Ireland	3 years
Mr. Frank Conaty	Chartered Accountant, Former Chair and current member of National Parents and Siblings Alliance since 2002	3 years
Mr. Liam Herrick	Irish Penal Reform Trust	3 years
Mr. David Joyce	Barrister, Lecturer TCD and former legal policy officer with the Irish Traveller Board	5 years
Mr. Mark Kelly	Director of Irish Council for Civil Liberties (ICCL)	3 years
Prof. Siobhán Mullally	Professor of Law UCC Member of the Permanent Court of Arbitration The Hague, Member of the Council of Europe Group of Experts on Action Against Human Trafficking	5 years
Ms. Mary Murphy	Lecturer in Irish Politics and Society, NUI Maynooth	3 years
Prof. Ray Murphy	Professor of Law, Irish Centre for Human Rights, NUI Galway. Member of Human Rights Institutes	5 years
Mr. Fidele Muwarasibo	Integration Manager, Immigrant Council of Ireland	5 years
Ms. Sunniva McDonogh	Barrister Senior Counsel, Member of Property Services Appeals Board, Member of Penal Strategy Review Group	5 years
Ms. Orlagh O'Farrell	Independent legal expert on the EU Anti-Discrimination Legal Network, member of Community Legal Resource network. Director of Equality and Rights Alliance (ERA), Consultant on equality and discrimination issues	5 years

Ms. Betty Purcell	Television Series Producer	3 years
Mr. Kieran Rose	Chairperson of GLEN, Senior Official with the Offices of International Relations and Research in Dublin City Council	3 years

#### 4.4. INTEGRATION OF EQUALITY AND HUMAN RIGHTS FUNCTIONS

Although much of the focus in the Irish case has to date been on safeguards of independence, the HOB have also been scrutinised for what it reveals about the future remit and powers of the new body.<sup>192</sup> Particular attention has been paid by stakeholders to ensure that the powers of the precursor bodies are retained or strengthened in the IHREC legislation. Underlying a focus on formal design features for many observers is the need to ensure the continuity of the work of the existing bodies as well as to safeguard their respective legacies within a new integrated vision of a dual equality and human rights structure. In this regard, it is instructive to survey a number of key issues that have arisen relating to the levelling up of powers across both equality and human rights mandates – with particular emphasis on a broad and unrestrictive equality and human rights mandate and the positive equality and human rights duty.

##### 4.4.1. *Defining an integrated mandate*

The Working Group (2012, 18) identifies a ‘considerable degree of commonality between the two organisations’ and proposes that the ‘merger offers the opportunity to develop an integrated body that can be stronger than the sum of the two existing bodies’. The Report (2012, 33) further outlines an ambitious vision of the purpose of the new body:

The purpose of the Irish Equality and Human Rights Commission is to protect and promote human rights and equality, to encourage the development of a culture of respect for human rights, equality and inter-cultural understanding in Ireland,<sup>193</sup> 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.

This much-debated clause is replicated in the Heads of Bill (HOB). The WG further propose a definition of human rights and equality which is also faithfully transposed to Head 3 in the HOB. In turn, the broad scope of functions and powers contained in Head 30 has generally been welcomed by stakeholders. However, concerns have been raised regarding

192 For detailed and exhaustive legal analyses of the HOB see the compendium of submissions compiled in the Joint Committee on Justice, Defence and Equality, Report on hearings in relation to the Scheme of the Irish Human Rights and Equality Commission Bill, July 2012.

193 Some observers have questioned the inclusion of ‘inter-cultural’ in the IHREC’s legal mission statement suggesting it creates an unhelpful hierarchy among equality grounds implicitly elevating race and traveller grounds over non-cultural discrimination such as gender.

inconsistencies in the definition of equality and human rights between Head 3 and Head 30 which govern the IHREC's enforcement and compliance activities as well as the positive duty (Heads 30-36). Some observers initially interpreted this "two-tier definition" as an attempt to constrain the new body in its ability to launch inquiries and investigations. It is more widely believed that this is likely to be the product of legal conservatism on the part of Department of Justice officials or merely an oversight.<sup>194</sup> Either way, according to the IHRC (2012, 39) submission, if left unremedied in the resulting legislation, it would 'signify a very substantial diminution in the current legal functions of the IHRC'. Specifically, while Head 3 contains an expansive definition of equality and human rights, Head 30 is restricted to those rights which have "force of law in the State".<sup>195</sup> The issue here though may not be so much a two-tier definition in principle, but rather the application of the narrower definition to the broad package of powers afforded to the IHREC under Head 30. The general consensus is that, instead, the definition of human rights and equality under Head 3 should apply to the full scope of powers specified in Heads 30-36. Others have suggested an alternative solution: simply delete the requirement that the standard be 'given the force of law in the State' from Head 30.

Particular concern by equality advocates has also been expressed at the definition of equality contained in the HOB which is a more narrow and limiting definition than that currently used by the EA. This debate reflects a deep disquiet among advocates that it is the government's intention to dilute the equality agenda. Some observers point to statements by Shatter which suggest a prioritisation of human rights over equality.<sup>196</sup> In its submission, the Disability Federation of Ireland notes that while 'a focus on dignity, rights and responsibilities is core to a human rights approach, equality in terms of participation in social, political, cultural and economic life is equally essential. The definition also needs to incorporate a focus on equality of outcomes...'. The ICCL also takes this issue up, stating that the Equal Status Act provides a more substantive definition of equality of opportunity as well as permitting limited forms of positive action. The IHRC (2012,

194 The IHRC (2012, 38) notes in its submission that it was not consulted in relation to drafting Section 30 of the HOB.

195 Head 30 would restrict the IHREC to 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.

196 Shatter is reported to have stated in September 2011 that '[t]he essential objective of this body will be to champion human rights, including the right to equality', adding that it 'would respect the UN Paris Principles on such bodies'. See Irish Times, 'Minister announces details of merged human rights body', 10 September 2011.

51) in its submission, also calls for an expansion of the equality provision to bring it into conformity with the protection from discrimination 'as set out in all the major human rights instruments'. ERA proposes introducing a tenth socio-economic ground towards achieving parity of powers and functions of both the equality and human rights mandates.<sup>197</sup>

Head 36 of the HOB has also been seized upon as an important innovation in Irish equality and human rights protection imposing an equality and human rights duty on the public sector and stipulating that:

A public body shall in the exercise of its functions have due regard to the need to eliminate prohibited discrimination, promote equality of opportunity and treatment and protect the human rights of its staff and the persons to whom it provides services.

A positive duty already exists in the UK and Northern Ireland. In comparison, the Irish duty is relatively weak in terms of legal enforcement apparatus. The Northern Ireland arrangement was considered by the Working Group but rejected on the grounds that it imposed too onerous a burden on public bodies in both terms of both resources and monitoring.<sup>198</sup> The positive duty has been widely welcomed by observers although criticism has focused on the lack of concrete specification of what obligations arise from the duty. In particular, the HOB does not define what 'due consideration' might entail and there is no provision for enforcement of the duty. In comparative perspective, this is a notably weak positive duty. The high percentage of actions taken by the EA against the public sector prior to 2008 suggests the need for a robust enforcement mechanism.<sup>199</sup> Some commentators have voiced the fear that the positive duty on the public sector will lead to deterioration over time in the focus of the new body on the workplace.<sup>200</sup> However, others suggest that there is scope for the IHREC to use its equality plan and review powers as an enforcement tool, as well as on a voluntary basis. The new body will also be able to develop statutory codes of practice which have evidentiary authority before the courts. Notably,

197 Currently, intervention on equality is governed by nine grounds (gender, civil status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community) as opposed to a broad and unrestrictive human rights mandate.

198 See s. 71 of the Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000.

199 Prior to the 47 percent budget cut in 2008, half the complaints supported by the Equality Authority were against public bodies. See Irish Times, 'New human rights body', 8 June 2012.

200 As one observer puts it: "It would be disastrous if an equality body saw its activities retreating from the private sector, whether they should have active duties is a different question..."

the EA only developed one code of practice on sexual harassment in the workplace during all its years of activity.

#### *4.4.2. Promotion, enforcement and the 'change agenda'*

The Working Group report terms of reference expressly requested 'advise on what would be the best practice for the IHREC in devising specific objectives and...performance indicators'. In response, the WG (2012, 67) proposed the development of a performance framework based around the following questions:

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

It is not within the scope of this report to provide an exhaustive account of the performance of the predecessor bodies in light of these probing questions.<sup>201</sup> However, a few observations on the factors which underpinned the variable legitimacy of the EA and the IHRC may be instructive. It is widely held among observers that the budget cuts and departure of the EA CEO in 2008 were due primarily to the fact that 'its work was irritating the Government'.<sup>202</sup> It advanced a proactive equality agenda on various fronts, receiving a high number of queries relating to the Employment Equality Act and the Equal Status Act, 30 to 40 of which would become case files to be pursued in legal action before the courts each year,<sup>203</sup> commissioning research, working with employer and employee organisations on voluntary codes of good practice, proposing legislative reform and launching public

201 For a detailed account of the performance of both bodies see Harvey & Walsh 2009.

202 Irish Times, 'Why was the CEO of a beacon of equality forced to step down?' 12 December 2008.

203 EA case files are probably the most appropriate comparison with complaints received by the IHRC, as opposed to total queries.

information campaigns. A combination of assertive leadership, legal expertise, strategic use of available powers and function, and a strong emphasis on developmental work and awareness-raising, in partnership with employer and employee organisations, within the national context has provided the EA with a deep reservoir of legitimacy. As detailed elsewhere, with the cumulative cuts in resource since 2008 the performance of the EA has been affected negatively.

However, it is material to ask why there has not been more grassroots mobilisation to protest the EA budget cuts. At the national level, the ERA mobilised with considerable effect in the face of a clear and present threat to the EA and IHRC. In a matter of months, its membership grew from 20 to over 120 organisations and ERA activities attracted media attention, especially following Niall Crowley's resignation in December 2008. They were assisted in this task by a visibly uncomfortable Green Party, minority coalition partners to the Fianna Fáil government. However, in hindsight, observers suggest that Irish equality and human rights advocates could have been more vigilant – asserting a civil society watchdog role throughout the 2000s to monitor and pre-empt government attempts to demolish the existing equality and human rights infrastructure. At the grassroots level, another issue is resources and penetration. One participant recalls trying to mobilise local organisations to resist the merger of the equality and human rights bodies. The response was surprising; few had any understanding of the role of the EA or the IHRC. Presented with case studies of successful actions undertaken by the EA, they expressed surprise that such an avenue for redress existed. This is a key challenge for any NHRI – to mobilise awareness throughout the community with limited resources. Neither the EA nor the IHRC enjoyed sufficient resources to decisively penetrate Irish society outside its capital and urban centres.

A lack of knowledge regarding the function of the IHRC appears to have been even more profound, with commentators noting that '[m]ost non-governmental organisations pay little regard to it in its day-to-day work',<sup>204</sup> If the EA has been praised for its developmental impact in the Irish context, the IHRC has devoted more attention to the international arena – establishing an international reputation but little presence in Ireland. As one observer puts it, "the merger is also about bringing human rights to Ireland". However, the division between international and domestic activities need not be overly emphasised. The interventions of the IHRC before various international human rights bodies, including the UN Human Rights Council and treaty body 'shadow reports,' have allowed the body

204 Irish Times, 'Rights body should have bigger impact', 11 July 2011.

to assert a range of policy positions relating to the human rights performance of the Irish government at the domestic level.<sup>205</sup> The challenge has arisen in attempting to transform IHRC international advocacy activities into impactful interventions at home in a context of under-resourcing. The IHRC has in recent years made some moves towards engaging in domestic awareness and educational work.<sup>206</sup> However, it should also be noted that one of the IHRC's key collaborators in outreach work, the National Consultative Committee on Racism and Interculturalism (NCCRI), was shut down by the government on budgetary grounds in December 2008.<sup>207</sup>

The IHRC has been widely praised for its highly expert legislative commentaries, *amicus curiae* submissions, shadow reports before UN and European human rights bodies as well as its forceful intervention on the issue of rendition. But, the body has also been criticised for not addressing the most urgent human rights issues affecting the country.<sup>208</sup> Observers also question why they exercised extensive powers of investigation so infrequently.<sup>209</sup> The IHRC launched three inquiries over a decade and also rarely used its powers to litigate. Although it advanced a series of *amicus curiae* briefs, the IHRC never took a case in its own name despite having statutory authority to do so. In its submission to the Committee on Justice, the IHRC (2012, 42) suggests that one factor impeding such action is the lack of guidance in relation to the awarding of costs in such proceedings (especially against public bodies). National inquiries are possibly the most important investigative tool afforded to an NHRI. In the recent high profile case of the 'Magdalene Laundries',<sup>210</sup> the report produced by the IHRC was welcomed by civil society and victims groups. It was, however, also criticised for recommending that the state conduct an inquiry of its own when it was well-equipped to do so itself.<sup>211</sup> Resource constraints were advanced by the IHRC as a justification. The response from the then attorney general to the IHRC recommendation

205 See, for instance, IHRC CERD Shadow Report to the UN Committee, November 2010; IHRC Statement to the Human Rights Council on Ireland's Universal Periodic Review, 15 March 2012.

206 For instance, the IHRC actively campaigned for the European Human Rights Acts to be incorporated into Irish law, collaborated with NGOs to promote an independent police complaints body, and provided human rights education to civil servants (funded by Atlantic Philanthropies).

207 See <http://www.nccri.ie/>

208 For instance, the IHRC has been conspicuously absent from the debate on same-sex unions in Ireland.

209 The IHRC enjoys similar powers to a select committee in the UK, including subpoena powers.

210 For information on the Magdalene Laundries case see: <http://www.magdalenelaundries.com/>

211 See IHRC, 'Assessment of the Human Rights Issues Arising in relation to the "Magdalen Laundries"', November 2010.

was reported as 'a curt dismissal'.<sup>212</sup> The IHRC has subsequently committed itself to responding to the human rights issues arising from a government report on the Magdalene Laundries published in February 2013.<sup>213</sup>

The IHRC has broadly welcomed the inquiry function as laid out in the HOB, in particular provisions regarding protections absent in the IHRC Act 2000 which 'might be regarded as reinforcing the ability of the IHREC to conduct robust inquiries without fear as to possible legal consequences'. Clearly such considerations weighed on the minds of senior IHRC personnel. Observers, however, attribute what they view as IHRC under-performance to a range of factors, including limited resources, legal conservatism, a reticence to directly confront the state, and a distinct legalistic tradition embedded in the IHRC's organisational culture. In this final observation lies a deeper concern among equality advocates that the social change agenda pursued by the EA until 2008 will be irretrievably lost in the merger. As Niall Crowley reflects, "the IHREC is not meant to be an ombudsman, a neutral expert body. The EA always saw itself as a social change agent, the IHRC much more as an expert adjudicator".<sup>214</sup> In principle, there is much to be gained from combining the legal and activist strengths and traditions of these two precursor bodies. The challenge will be in reconciling these visions of the IHREC as an 'expert body' versus 'change agent' into a coherent programme of action. As the WG (2012, 20) makes clear, 'it is important that the new organisation does not function in two separate silos'.

Achieving this objective will require great care and skill. It may be difficult to reconcile two culturally distinct organisations which have been active for over a decade and carry with them significant legacy effects. Information and knowledge exchange have begun to occur across both organisations at all levels through informal channels. However, only in late 2012 were transitional arrangements in the form of periodic meetings activated to facilitate the fusion of two distinct mandates and organisational realities. Government officials have placed emphasis on the role of the CEO in positively steering the newly merged body, at least in the short term. However, this likely falls short of a more ideal and penetrating transitional arrangement. In turn, fears have been expressed that the imposition of the current EA CEO into this role will inevitably ensure the post-2008 EA ethos and culture dominates in the IHREC. For many observers, it would be preferable to ensure that a neutral and manifestly independent leadership was installed from the outset

212 Irish Times, 'Rights body should have bigger impact', 11 July 2011.

213 IHRC, IHRC to respond to Magdalene Laundries Report [press release], 5 February 2013.

214 Niall Crowley, former CEO of the EA, in interview with author, 11 October 2012.

and appointed through an open and transparent recruitment process. Beyond concerns regarding leadership and independence, many equality advocates voice deep misgivings at the loss of the original ethos of the EA which explicitly saw itself as an agent of social change, in a manner quite distinct to the ethos implicitly endorsed by state officials and the EA leadership post-2008 – especially in relation to enforcement.

The EA from the outset, taking its lead from EU Directives, devised a strategic plan which emphasised two key objectives: (1) promotion of equality of opportunity and (2) elimination of discrimination. In practice, this meant channelling significant resources into two areas: legal enforcement of equality legislation through providing assistance to claimants and investigating cases of discrimination and developmental activities aimed at raising awareness of rights under legislation in the wider Irish society. The EA established a development department as well as a legal office to pursue these objectives. The organisational culture was informed by these twin objectives, which were framed by the CEO as mutually reinforcing. For instance, the EA regularly issued good practice guidelines on how to achieve equality as opposed to the more limited negative obligations which arise from non-discrimination. The general consensus is that both areas of the EA were high capacity, effectively working with varied stakeholders and equipped with highly qualified personnel.<sup>215</sup> On the legal side, the emphasis was on stimulating a culture of compliance by pursuing sufficient casework to incentivise public and private actors to adopt a preventive attitude towards discrimination in the workplace. Importantly, the emphasis was on supporting a steady stream of cases, not every individual discrimination claim.

The IHRC – although empowered to undertake legal casework – has never pursued a case in its own right. Relying instead on *amicus curiae* submissions before the courts and expert legal opinions, some observers suggest that culturally the IHRC never saw its role as “eliminating human rights abuses”. Certainly, the Commission has been reluctant to pursue legal action. Although it has, on occasion, granted legal aid to claimants,<sup>216</sup> Possible rationales for this neglect range from an inability of the veto players within the IHRC leadership to agree on which cases to authorise, to the prohibitive financial costs

215 It is material to note that the EA employed a practising lawyer as the Legal Director.

216 In 2011 three applications for legal aid to the IHRC were approved. In 2012, there were nine applications with four approved. The IHRC is restricted by Section 10(3) of the IHRC to granting legal aid only when it cannot be obtained by other means. The Commission has requested this restriction be removed in the IHREC legislation.

of failed legal actions,<sup>217</sup> and the varied character of human rights claims which do not necessarily lend themselves to court action on narrow justiciable grounds. In turn, the EA had recourse to a specialised Equality Tribunal (currently also undergoing protracted reform).<sup>218</sup> No equivalent body exists for human rights violations in Ireland. For some observers, *amicus curiae* briefs therefore may be a more appropriate and cost-effective tool for human rights interventions. This is an important debate which the new institutions will need to address directly.

Some equality advocates suspect that the legal function of the EA, actively pursued up to the events of 2008 and vociferously opposed by senior DOJ officials at the time, will be diminished in the new body. This fear is fuelled not only by the uncertainty of fusing different organisational cultures but also differences of emphasis placed on 'strategic litigation' by government officials, the Working Group and other stakeholders. The exact meaning of this phrase is open to interpretation. However, guidance can be found, for instance, in the report of the COE Commissioner for Human Rights (2011, 16) who understands it to mean dealing 'with a sufficient number of cases so that [the equality structure's] legal work can make an impact on key issues of discrimination'. The Commissioner also emphasises the need to stimulate a 'culture of compliance'. The Working Group's (2012, 17) directive 'to provide assistance at its discretion to those who consider they have been discriminated against if there is an important point of principle involved or if it is unreasonable to expect the person to represent themselves' appears to reflect a similarly pragmatic approach.

Advocates for a more narrow strategic approach were a vocal minority on the WG, arguing that that the EA had taken on too many cases and that it would be more resource-efficient to focus on soft compliance measures. However, this restrictive position is represented not so much in the provisions surrounding strategic litigation as those pertaining to the sliding scale of enforcement. Observers have identified the WG recommendation of a legal obligation on the IHREC to view its enforcement options 'as being on a 'sliding scale' as potentially highly problematic in practice. This obligation has subsequently been reproduced in Head 30(C) of the HOB. It remains to be seen how the IHREC leadership

217 There was no cost implication for the EA in pursuing legal actions before the Equality Tribunal. In contrast, the IHRC was not indemnified against the potentially high costs arising from a failed court action.

218 The removal of discrimination cases against licensed premises from the jurisdiction of the Equality Tribunal to the district courts has been widely viewed as undermining the 2000 Equal Status Act and particularly impacting upon the Traveller community.

will interpret its enforcement mandate – including legal enforcement. There is the risk that an emphasis on strategic or ‘precedent-setting’ litigation, coupled with very limited resources, could inhibit the ability of the IHREC to advance a culture of compliance. However, the new body retains in the Heads of Bill the formal powers and duties of the precursor bodies. As such, whether strategic litigation is pursued effectively by the IHREC in the fulfilment of its duties under domestic and international law is likely to hinge more on individual leadership by the Chief Commissioner than the IHREC’s formal attributes, or lack thereof.

This is important. The COE Commissioner for Human Rights (COE 2011, 9) reports significant under-reporting of discrimination and harassment and a low level of awareness of national structures for promoting equality. Despite blithe claims by some domestic observers that the Irish equality structure has outlived its purpose,<sup>219</sup> the evidence would suggest otherwise. In 2010, the Irish Central Statistics Office published a survey which found that just under 12 percent of the population aged 18 years and over had experienced discrimination in the preceding two years (EA-ESRI 2012, 6). Victims of discrimination are often among the most marginalised and least visible sectors in Irish society. As such, they may be ill-equipped to articulate legal claims or access legal aid. Lawyers in the private sector lament the progressive disappearance of the EA’s legal work since 2008, especially on cases of equal status (for instance in education, public services, and housing) which offer no economic return to private practice.<sup>220</sup> The risk is that those suffering discrimination at the hands of public authorities or private employers now find they have little recourse to justice. It is imperative that the new IHREC meet this core obligation under domestic and international equality law.

219 Mary Cleary, associated with the Irish organisation Amen, stated in 2008: “I would imagine there probably was a good reason to set up the Equality Authority when it was set up. However, maybe they have fulfilled whatever they set out to do”. Quoted in Irish Times, ‘Human rights body queries merger proposal’, 19 August 2008.

220 The maximum remedy for a violation of equal status legislation in Ireland is just over €6000 so there is no financial incentive for the private sector to take on such cases.

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