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Equality and Rights Alliance

Response on Proposed Merger of the Equality Authority and the Irish Human Rights Commission

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About Equality and Rights Alliance

Equality and Rights Alliance (ERA) is a coalition of 171 members (NGOs, trade unions, academics and individuals) established in August 2008 in response to a proposal to merge five State bodies, including the Equality Authority and Irish Human Rights Commission (IHRC). Initially a coalition of forty members, ERA grew considerably following significant cuts by government to the budgets of the Equality Authority, the Irish Human Rights Commission and the National Consultative Committee on Racism and Interculturalism.¹ The remit of ERA is to defend and strengthen the Irish equality and human rights infrastructure.

The Government has now agreed to merge the IHRC and the Equality Authority to form a combined Human Rights and Equality Commission (HREC). The Minister for Justice, Equality and Defence has appointed a working group to oversee the process of the merger of the Equality Authority and the IHRC and has issued the terms of reference for the working group. It is regrettable that this consultation process has not been broadened out to include civil society stakeholders, therefore, ERA respectfully request that this submission be considered by the working group as part of its deliberations.

ERA is concerned that this process will require significant time and careful consideration and should not be rushed through with unseemly haste, as the establishment of a merged body that is coherent, cohesive and integrated is essential if the body is to function in an efficient and effective manner. There will need, for example, to be a commitment to levelling-up the functions powers and scope if there is to be a coherent cohesive integrated body.

Summary of Key Recommendations

ERA recommends the following in regard to the proposed merger of the IHRC and the Equality Authority:

- The functions of the Equality Authority, in particular its functions in regard to promotion of equality and the provision of independent assistance to victims of discrimination, must be protected and enhanced within the newly established HREC.
- The merger process should include necessary legislative amendments to enhance the promotion of equality and human rights and the prevention of discrimination. ERA recommendations in this regard are outlined in Appendix B of this submission.
- Attention should be given to relevant EU and International provisions (outlined in 2 below) regarding the establishment and operation of equality and human rights bodies.
- Attention should be given to each of the elements outlined in 2.1.1 below, in order to strengthen the independent and accountable functioning of the newly established HREC.
- Attention should be given to the recommendations outlined in 3 below, regarding areas where a levelling-up of the functions and powers of both bodies is required, to ensure that the newly merged body is to operate effectively and cohesively.

¹ ERA members include: 93 NGOs; 7 trade unions; and a number of individual activists, academics and public representatives. A full list of current NGO members is available on our web page www.eracampaign.org/members-1.

1. Merger Proposal

The stated purpose of the decision to merge the IHRC and the Equality Authority is “*to more effectively, efficiently and cohesively champion human rights and equality and to achieve a culture of respect for human rights and equality*”. The Minister has stated that the new body “*must ensure to promote a culture that respects the human rights and equal status of everyone in our society*”² and that “*the essential objective of this body will be to champion human rights, including the right to equality*”.³

A focus on promoting “*a culture that respects the human rights and equal status of everyone in our society*” is important and to be welcomed, as is the goal of championing “*the right to equality*”.

It is unclear, however, if the Minister is referring here to the Constitutional right to equality, which is minimalist and under-developed. The legislative and European concept of equal treatment which is found in the equality legislation and EU Directives is a more rigorous meaningful and dynamic concept, which is more difficult to defend and easier to enforce than the more traditional human rights concept of equality and the under-developed constitutional concept of equality. It is unclear whether this lack of emphasis on the promotion of equality is an oversight or whether it represents a downgrading of the Equality Authority’s functions.

Likewise, encouraging respect for equal status is a less ambitious goal than that of promoting equality of opportunity and represents a diminution in the current function of the Equality Authority which is to promote equality of opportunity and eliminate discrimination.⁴

It is critical that the new HREC be given the explicit task of promoting equal treatment and equality of opportunity as is required by the EU Directives and which is the current function of the Equality Authority, rather than being reduced to a body which promotes respect for equal status or a body which champions the minimalist ‘right to equality’. The HREC needs to unequivocally promote equality of opportunity/equal treatment as a core function.

It is also noted that the new body will play a key role in:

- Encouraging State authorities to put respect for human rights and equality at the heart of their policies and practices;
- Monitoring compliance with international and constitutional human rights standards;
- Helping people to understand what their rights are and how to protect them;
- Promoting political debate on human rights and equality issues, in particular by providing consultative opinions on proposed legislation;
- Appearing before the superior courts as amicus curiae to assist the courts with the interpretation of human rights standards in specific cases;
- Investigating human rights and equality concerns, and publishing and promoting research and reports on human rights and equality issues.⁵

² Department of Justice, Equality and Defence press release Oct 6th 2011.

³ Department of Justice, Equality and Defence press release Sept 9th 2011

⁴ The EU Directives also require Member States to have specialised bodies for the promotion of equal treatment

⁵ ibid

From the above details that have emerged so far, it would appear that there are a number of gaps, including:

- The lack of emphasis on equality, and in particular the current function of the Equality Authority in relation to the promotion of equality of opportunity,
- The lack of emphasis on victims of discrimination,
- The failure to identify or commit to protect and enhance the core function of a specialised equality body: to provide independent legal assistance to victims of discrimination.

It is important to ensure that any merged body would avoid having a skewed focus favouring traditional human rights and the culture and practice of the IHRC than on the promotion of legislative or European equality of opportunity/equal treatment.

ERA recommends that the functions of the Equality Authority, in particular its functions in regard to promotion of equality and the provision of independent assistance to victims of discrimination, must be protected and enhanced within the newly established Human Rights and Equality Commission.

1.2 Merger Working Group Terms of Reference

The terms of reference guiding the merger process require comment since they are deficient in some respects, yet over-prescriptive in other areas. ERA is concerned that some of the matters contained in the terms of reference allow for micro-management of the HREC and concern matters that should be left for the HREC to decide. This level of over-prescription may be in breach of ECRI Recommendation No 2,⁶ which provides that:

“specialised bodies should function without interference from the state and with all the guarantees necessary for their independence including the freedom to appoint their own staff, to manage their resources as they think fit and to express their views publicly”

The specific issues raised by ERA in regard to the working group terms of reference are detailed in Appendix A of this submission.

1.2.1 Review of Legislation and Commitment to Enhanced Legislation.

It is very disappointing that there is no ambition in the terms of reference to review the current legislation to provide for enhanced and more effective approaches to addressing discrimination and to enhance the promotion of human rights and equality. The establishment of the HREC will require amending legislation and therefore provides opportunity to review and amend existing provision and introduce necessary technical amendments to strengthen the equality and human rights infrastructure.

⁶ These recommendations set out basic principles concerning specialised bodies to combat racism etc including the functions and responsibilities of specialised bodies, the administration and functioning of specialised bodies, independence and accountability accessibility and style and operation of specialised bodies. http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n2/Rec02en.pdf

Appendix B of this submission outlines ERA’s proposals for legislative amendments that should be contained in any amending legislation.

2. Relevant EU and International Provisions and Implications for the Merger Process and the amending legislation

2.1 UN Paris Principles,⁷

The Minister for Justice has noted his intention that the newly merged HREC will “*unequivocally keep faith with the Paris Principles*”, international standards for the operation of human rights institutions. This is to be welcomed. Key features of the Paris Principles relate to the independence of specialised bodies:

2.1.1 Independence

The Paris Principles note the following in regard to the independent functioning of national human rights institutions:

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

and

“3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured”.

The Minister has noted his intention to make the HREC accountable to the Oireachtas committee system, something which has been called for by ERA as an important step in enhancing the independence of the body. Independence of specialised equality and human rights bodies, however, encompasses a number of factors addressing both the statutory basis of the body and its practice which are important benchmarks in measuring the *de facto* and *de jure* independence of specialist bodies. The key issues in this regard are:

- Ability to function without interference from the State,
- Allocation of organisational resources as management sees fit and free definition of tasks free appointment of staff ,
- Be in possession of own premises,
- Enjoy adequate and/or sufficient funding,
- Free definition of tasks,
- Clear legal mandates and legal terms of reference,
- Pluralist representation of commissions and/or board,

⁷ <http://www2.ohchr.org/english/law/parisprinciples.htm>

- Ability to communicate freely with the larger public,
- Transparency⁸

The Paris Principles, therefore, are a minimum set of principles regarding the independent functioning of human rights institutes. This issue has been underscored by the EU Fundamental Rights Agency (FRA), which notes:

“The Paris Principles should be taken as the very minimum standard for NHRIs in the European Union”⁹

The FRA goes on to elaborate on the key elements against which the independent functioning of national human rights institutes should be benchmarked:

“NHRIs must be fully independent and guaranteed a sufficient infrastructure with adequate funding so as to ensure the highest attainable level of operations irrespective of changes in the political leanings of successive governments, economic downturns, or perceived sensitivity of the matters they address. NHRIs should have a separate budget line and legislative prescription of adequate resources, with clear goals and measurement of performance. In this way, NHRIs are equipped for efficient promotion and protection of human rights..... An NHRI should have the capacity to select and employ its own staff; secondment should not be the dominant feature, particularly with regards to senior posts”¹⁰

Research commissioned by ERA, in 2009, found that the appointments process regarding the boards of both the Equality Authority and the IHRC did not meet the standards set out in the ECRI Recommendation 2, or the Paris Principles. In addition, a significant portion of the Equality Authority staff are civil servants seconded from the parent Department, with the Authority having autonomy to recruit only a small number of specified posts.¹¹

A further step in enhancing the independence of the HREC would be to ensure that appointments to the body are made through an open procedure, with clear criteria, and to allow the body to recruit its own staff, particularly at senior level, thus ending the process of secondment from the Civil Service.

A further issue is the manner in which the accountability of the HREC is structured should reflect its independence. ERA, in our recently published, *‘Roadmap for A Strengthened Equality & Human Rights Infrastructure’* makes the following recommendations in this regard:

This accountability needs to be structured to encompass:

- *An accountability to the Oireachtas through the presentation of strategic plans, annual business plans and annual reports of both bodies to the Oireachtas Committee for questioning and debate,*
- *An accountability to the Comptroller and Auditor General for annual budgets,*

⁸ Yesilkagit et al (2008) *Between Impartiality and Responsiveness: Equality Bodies and the practices of independence*, pg19, Equinet (European network of specialist equality bodies), Brussels.

⁹ (2010) *National Human Rights Institutions in the EU Member States: Strengthening the fundamental rights architecture in the EU I*, pg 9, EU Fundamental Rights Agency

¹⁰ Ibid pg 9

¹¹ Harvey B, and Walsh K (2009) ‘Downgrading Equality and Human Rights- Assessing the Impact’, Equality & Rights Alliance.

- *An accountability to civil society stakeholder organisations, through the presentation and debate of strategic plans, annual business plans and annual reports.*¹²

ERA recommends that attention is given to each of the above elements in order to strengthen the independence and accountability of the HREC

2.2 EU Treaty.-Gender equality-overarching provisions

Equality between men and women is a fundamental principle of Community law. Articles 2 and 3(2) of the Treaty proclaim it to be a ‘task’ and ‘aim’ and impose a positive obligation to promote it in all its activities. This aim of promoting equality between men and women should be explicitly stated as one of the functions of the merged body.

2.3 Gender mainstreaming

Article 29 of the Recast Gender Directive imposes an obligation on Member States to take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in the Gender Recast Directive. One of the areas referred to in the Recast Gender Directive is the requirement on Member States to have an equality body for the promotion of gender equal treatment analysis, monitoring and support. This requirement of gender mainstreaming should be borne in mind in relation to the merger of the Equality Authority and the IHRC.

Article 22 of the Charter of Fundamental Rights of the European Union provides that Equality between women and men must be ensured in all areas, including work and pay. The process of the merger and the establishment of the merged body should be ‘equality proofed’. One practical way of seeking to ensure this would be to have representation from the National Women’s Council of Ireland on the new Commission.

2.4 EU Directives

A number of EU anti-discrimination Directives require Member States to have specialised equality bodies for the promotion of equal treatment without discrimination on a number of specified discriminatory grounds: the Race Directive¹³ (Art. 13); The Gender Equal Treatment Employment Directives¹⁴ (art. 7 inserting art. 8a.); the Gender Directive (recast)¹⁵ (art. 20); and the Gender Goods and Services Directive¹⁶(art. 12).

¹² Crowley, Niall (2011) *Roadmap for A Strengthened Equality & Human Rights Infrastructure*, Equality & Rights Alliance, Dublin.

¹³ Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial and ethnic origin,

¹⁴ Directive 2002/73/EC amending Council Directive 76/207/EEC (Gender Equality Directive) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions,

¹⁵ Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation,

¹⁶ Directive 2004/113/EC implementing the principles of equal treatment between men and women in the access to and supply of goods and services,

The Equality Authority is the national specialised equality body for Ireland. The newly merged body will need to have the explicit function of promoting equal treatment without discrimination on the discriminatory grounds (named in the legislation) in order to comply with the requirements of these Directives.

2.4.1 Functions of Specialised Bodies

EU Directives set out the functions that specialised bodies must have. Member States must ensure that the competencies of the specialised bodies include the following:

- Providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- Conducting independent surveys concerning discrimination,
- Publishing independent reports and making recommendations on any issue relating to such discrimination,
- In relation to gender, at the appropriate level, exchanging available information with corresponding European bodies such as any future European Institute for Gender Equality.

The Equality Authority currently has these functions (although some of them may be expressed as powers rather than functions).

ERA recommends that the HREC should have the functions expressly required by the Directives.

2.4.2 Dialogue with NGOs and Social partners.

The EU Equal Treatment Directives oblige Member States to encourage dialogue with appropriate NGOs with a legitimate interest in contributing to the fight against discrimination with a view to promoting the principle.¹⁷

There are similar provisions requiring Member States to take adequate steps to promote social dialogue with the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experience and good practices.¹⁸

ERA recommends that NGOs and social partners should be given a more formal role in the operation of the HREC.

2.5 European Commission against Racism and Intolerance general policy recommendation no 2,¹⁹

This recommendation codifies best practice on enforcement bodies and provides a useful benchmark to inform the merger process. It sets out the recommended functions and responsibilities of a specialised body. These include:

¹⁷ Article 13 of the Race Directive, Article 14 of the Framework Employment Directive, Article 12 of the recast Gender Directive.

¹⁸ Article 12 of the Race Directive, article 13 of the Framework Employment Directive and article 11 of the gender recast Directive.

¹⁹ These recommendations set out basic principles concerning specialised bodies to combat racism etc including the functions and responsibilities of specialised bodies, the administration and functioning of specialised bodies, independence and accountability accessibility and style and operation of specialised bodies. http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n2/Rec02en.pdf

“a. To work towards the elimination of the various form of discrimination set out in the preamble and to promote equality of opportunity and good relations between persons belonging to all the different groups in society” and,

“c. to provide aid and assistance to victims, including legal aid, in order to secure their rights before institutions and the courts.”

ERA recommends that these form part of the core functions of the HREC

2.6 EU Charter-legal aid

Article 47 of the EU Charter provides that legal aid should be made available to those who lack sufficient resources, in so far as such aid is necessary to ensure effective access to justice. The enforcement of equality legislation may involve complex issues of law, statutory interpretation including constitutional, EU and convention law and the compliance and/or interpretation of EU law. A claim could result in a significant impact on a person’s circumstances and rights.

Any person who considers that they have been discriminated against can apply to the Equality Authority for assistance in bringing proceedings under equality legislation and the Intoxicating Liquor Act 2003.²⁰ The Authority has discretion to grant assistance if it is satisfied that the case raises an important point of principle or it appears to the Authority that it is not reasonable to expect the person to adequately represent the case without assistance. There is no explicit statutory obligation placed on the Equality Authority to provide assistance to victims of discrimination to ensure effective access to justice.

At present there is no statutory entitlement to legal aid for the majority of claims under the equality legislation. While it is open to the Minister for Justice, Equality and Defence to extend the Civil Legal Aid scheme to the Equality Tribunal and the Labour Court²¹ this has not occurred. The scheme cannot provide legal aid for discrimination claims brought to the District Court under the Intoxicating Liquor Act 2003 as the Civil Legal Aid Act 1995 excludes licensing matters from its scope²² and there is a lack of clarity as to the extent to which housing matters will be granted legal aid.²³

It may be, at least theoretically, possible to obtain legal aid in respect of an appeal under the Equal Status Acts to the Circuit Court or in a gender discrimination claim which commences in the Circuit Court. In certain appropriate complex discrimination claims (particularly those involving the application or interpretation of EU derived rights) it is arguable that victims of discrimination have an entitlement to legal aid.²⁴ The Irish Human Rights Commission also has equivalent powers in relation to the granting of assistance to individuals.

ERA recommends that in the absence of a statutory entitlement to legal aid for the majority of claims under equality legislation, it would be vital that a specialised body

²⁰ Section 67 Employment Equality Act as amended by paragraph 1 of the schedule to the Equal Status acts 2000-2008 and section 19 of the intoxicating Liquor Act 2003

²¹ Section 27(2) b of the Civil Legal Aid Act 1995

²² Section 28(9) 4

²³ Civil Legal Aid In Ireland, Forty Years On, Free Legal Advice Centres, April 2009 provides an overview of the current position of legal aid in Ireland today.

²⁴ Relying on a combination of convention case law on legal aid, Article 47 and the provisions in the Directives requiring specialised bodies to provide independent assistance to victims of discrimination.

would be given the explicit function of providing assistance to victims of discrimination in so far as such aid is necessary to ensure access to justice.

3. A Comparison of the Current Functions, Powers and Scope of the Equality Authority and the Irish Human Rights Commission.

The Minister for Justice, Equality and Defence has positioned the merger of the Equality Authority and the IHRC in terms of both bodies having over-lapping roles. ERA is, therefore, concerned at the apparent lack of appreciation of the major and significant differences that exist between the two bodies in terms of : core functions and powers; scope and remit of the respective legislation; governing EU and Convention requirements; concepts of equality, definitions of discrimination, defences to discrimination, remedies, onus of proof etc.

In this context, the merger is a very complex and difficult task. While there are a number of similarities in the functions of the Equality Authority and the IHRC, there are significant differences which have clearly impacted upon the manner in which the bodies have operated to date. The functions of the Equality Authority are more active, developmental and promotional (reflecting the requirements of the EU Directives) There is also an enforcement aspect to these functions. These are set out in section 39 of the Employment Equality Act. These core functions of the Equality Authority are to promote equality of opportunity in employment and in matters covered by the Equal Status Acts 2000-2011 and to work towards the elimination of discrimination in employment and in matters covered by the Equal Status Acts.

Below we have set out a number of key areas where the core functions and powers of both bodies are different and our recommendations regarding the levelling-up of powers and coherence of functions across the equality and human rights agendas.

3.1 Promotional Function

The promotional function of the IHRC, in comparison to that of the Equality Authority, is more passive and limited to “*promote understanding and awareness of the importance of human rights in the State*” rather than promoting a society where human rights are championed or protected. Similarly it does not have the function of eliminating human rights abuses in the areas that come within its remit. As stated earlier, the promotional and enforcement functions of the Equality Authority are required by a number of the EU Directives and will have to be maintained in the merged body.

ERA recommends that the HREC would be given the explicit function of promoting equality of opportunity and human rights in the areas that come within its remit, in order to ensure a coherent and cohesive approach in this area. The HREC should also be given the function of seeking to eliminate discrimination and human rights abuses in the areas that come within its remit. These should be core functions of the HREC.

3.2 Law Review

The Equality Authority has a more limited law review function than that of the IHRC .The former has the function of keeping under review and making proposals for reform in relation

to the Employment Equality Acts 1998-2011, the Equal Status Acts 2000-2011, the Maternity Protection Act 1994, the Adoptive Leave Act 1995 and the Pensions Act 1990.²⁵

In contrast the IHRC has far more extensive law review functions. These are set down in section 8 of the Human Rights Commission Act 2000:

- (a) to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights,
- (b) if requested by a Minister of the Government, to examine any legislative proposal and report its views on any implications of such proposal for human rights,

ERA recommends that the HREC would have the function of keeping under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and the promotion of equality and the elimination of discrimination and, if requested by a Minister, to examine any legislative proposal and report its views on any implications of such proposals for human rights, the promotion of equality and the elimination of discrimination.

3.3 Information Function

The IHRC has a much more limited function than the Equality Authority in relation to the provision of information to the public on the operation of the legislation. Section 8 of the Human Rights Commission Act 2000 gives the IHRC the function:

“to promote understanding and awareness of the importance of human rights in the State and, for those purposes, to undertake, sponsor or commission, or provide financial or other assistance for, research and educational activities”

In contrast the Equality Authority has a much more specific and explicit public information function in relation to the provision of information in relation to the operation of the Employment Equality Acts 2000-2011 the Equal Status Acts 2000-2011, the Maternity Protection Act, 1994, the Adoptive Leave Act, 1995 and 2005, and the Parental leave Acts 1998 and 2006. To that end it has established a dedicated Public Information Centre.

The information function in relation to employment equality legislation would in any event have to be reviewed in the light of the proposed merger of the employment rights bodies, proposed by the Minister for Jobs, Enterprise and Innovation. Irrespective of any merger of employment rights bodies, there will still be a need for the provision of operation of the Equal Status Acts 2000-2011

ERA recommends that the information function of the HREC would be reviewed in the light of any proposal concerning the amalgamation of the employment rights bodies and the role of NERA. The HREC should maintain an information function on the operation of the Equal Status Acts 2000- 2011.

3.4 Assistance to Victims of Discrimination

²⁵ There are certain difficulties in making meaningful law reform proposals in relation to the Pensions Act as the Equality Authority does not have an information function or power to grant assistance in relation to it.

The Equality Authority and the IHRC have similar but not identical powers to grant assistance.

In the case of the IHRC, a person can apply for assistance in relation to a very wide range of *'legal proceedings involving law or practice relating to the protection of human rights which a person has instituted or wishes to institute'* or *'legal proceedings in the course of which a person relies or wishes to rely on such law or practice'*.

There are however a number of preconditions imposed by the IHRC regarding the granting of legal assistance.²⁶ These preconditions place quite a hurdle before a potential applicant as they may have to satisfy the IHRC that they have applied for and been refused civil legal aid. This is not necessarily an easy matter for an applicant to prove, as often an applicant may be put on a waiting list when applying for legal aid and/or may have difficulties establishing that they have applied for and been refused civil legal aid. In addition it may take considerable time for an applicant to apply for and be refused legal aid.

If the applicant can establish that they cannot obtain assistance by any other means then the IHRC has discretion to grant assistance on a number of grounds:

- (a) the matter to which the legal proceedings concerned relate (“the matter concerned”) raises a question of principle,
- (b) it would be unreasonable to expect the person to deal with the matter concerned without assistance of the kind referred to in *subsection (5)* because of its complexity or for any other reason,
- (c) there are other special circumstances which make it appropriate for the Commission to grant such assistance.

The assistance can be in the form of legal advice or legal representation or other appropriate assistance and the IHRC can include a provision for the recovery of expenses incurred on behalf of the Commission. The Human Rights Commission Act provides the Commission with discretion in relation to the provision of assistance. It is not a discretion that has often been exercised by the IHRC. In the 11 years of operation, the IHRC’s has granted assistance in only five instances.²⁷

It is unclear why the IHRC has granted assistance in so few cases and the extent to which the preconditions operate as a bar to the granting of assistance in otherwise appropriate cases.

Unlike the Equality Authority, there are no over-arching provisions which require the IHRC to grant assistance to individuals.

Any person who considers that that they have been discriminated against can apply to the Equality Authority for assistance in bringing proceedings under the equality legislation and the Intoxicating Liquor Act 2003.²⁸ The Equality Authority can only provide assistance in relation to proceedings brought under the equality legislation and therefore its remit in this regard is narrower than that of the IHRC. Unlike the IHRC the Equality Authority is not

²⁶ IHRC cannot grant assistance in the following circumstances: (a) the assistance sought could be obtained by the applicant: (i) under the Civil Legal Aid Act, 1995; (ii) under the Criminal Justice (Legal Aid) Act, 1962, or (iii) by any other means, whether or not provided for by or under any enactment; or

(b) powers to award redress or grant relief in relation to the matter to which the proceedings relate stand vested in any tribunal or other person and the matter could, in the opinion of the Commission, be more effectively or conveniently dealt with by that tribunal or other person,

²⁷ Harvey and Walsh (2009) op cit, pg 62

²⁸ Section 67 Employment Equality Act as amended by paragraph 1 of the schedule to the Equal Status acts 2000-2008 and section 19 of the intoxicating Liquor Act 2003

bound by the statutory preconditions which govern the granting of assistance by the IHRC. The Authority has discretion to grant assistance if it is satisfied that the case raises an important point of principle or it appears to the Authority that it is not reasonable to expect the person to adequately represent the case without assistance.

There is no explicit statutory obligation placed on the Equality Authority to provide assistance to victims of discrimination to ensure effective access to justice. However the Equality Authority in exercising its discretion would have to be mindful of the provisions in the EU Directives which require specialised equality bodies to have the competency to grant assistance to victims of discrimination. While both statutes grant the IHRC and the Equality Authority discretion in relation to the granting of assistance, the overarching EU provisions reduce the level of discretion available to the Authority, particularly in cases involving complex points of statutory interpretation or application of EU law.

In certain appropriate complex discrimination claims (particularly those involving the application or interpretation of EU derived rights) it is arguable that victims of discrimination have an entitlement to legal aid.²⁹ It would be more difficult for the Equality Authority to justify a refusal of assistance particularly in circumstances where there is no legal aid available.

ERA recommends that the granting of assistance to victims of discrimination is a core function of a specialised equality body and the HREC must be given this express function.

3.4.1 Assistance to organisations/groups

While the Equality Authority and the IHRC can provide legal representation to individuals, they are not empowered to provide assistance to NGOs or trade unions. It may be a very effective use of limited resources for a specialised body to be able to provide legal representation to such entities.

The EU Equal Treatment Directives require Member States to ensure that organisations, associations, or other legal entities that have a legitimate interest in ensuring that the provisions of the Directive are complied with, may engage either on behalf of or in support of a complainant. The Equal Status Acts and the Employment Equality Acts not allow for this and the legislation needs to be amended in this regard.

ERA recommends that the HREC is given the power to grant legal assistance to groups/NGOs and trade unions.

3.5 Creating a Culture of Compliance

The taking of cases is an important tool both for the promotion of equality, the protection of human rights and the elimination of discrimination. A culture of compliance is one where a potential respondent believes that it is probable that a case may be taken against him/her if he/she commits a breach and changes behaviour accordingly to avoid a breach and potential lawsuit.

²⁹ Relying on a combination of convention case law on legal aid, Article 47 and the provisions in the Directives requiring specialised bodies to provide independent assistance to victims of discrimination.

A single case can have impact way beyond the individual litigants involved by acting as a catalyst for change in society. The HREC should be provided with resources to take sufficient cases to establish a culture of compliance in relation to equality and human rights.

ERA recommends that the HREC should be provided with resources to take sufficient cases which will establish a culture of compliance in relation to equality and human rights norms, and which will be of assistance in the drafting of authoritative Codes of Practice (see section on codes of practice)

3.4 Institution of Proceedings in Own Name

Both the IHRC and the Equality Authority have the power to institute proceedings in their own name.³⁰ The power to institute proceedings has not been used often by either body. The Equality Authority has instituted proceedings in its own name in relation to discriminatory advertising (EA V Ryan Air)³¹ and in relation to discriminatory clubs (EA V Portmarnock Golf Club).

Notwithstanding that it is not a power that has been used often, nonetheless it is an important power and should be retained by the HREC.

ERA recommends that the HREC should be given the composite function of the IHRC and the Equality Authority in relation to the institution of proceedings in its own name and that this power should apply to all matters that come within the scope of the HREC.

3.5 Amicus Curiae

Both the Equality Authority and the IHRC have the power to apply to appear before the Superior Courts as *amicus curiae* in relevant cases.³² The role of *amicus curiae* is valuable as it can help to ensure that the court has all relevant legal arguments and submissions before it, particularly in areas where the specialised body has a unique expertise.

Due to budget restrictions, however, the IHRC has been unable to pay their counsels who appear on its behalf in amicus cases. This is undesirable and it is a cause of concern that a State body would have to rely on counsel acting for free.

An *amicus curiae* application is usually made before the High Court or Supreme Court. It may in certain instances have been more beneficial if the interventions had occurred at an earlier stage such as before the Equality Tribunal and Labour Court. The ability to make

³⁰ The IHRC has a wider power in that it may institute proceedings in its own name in any court of competence for the purpose of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights of any person or class of person. Section 11 of the Human Rights Commission Act 2000. The Equality Authority has a narrower power in this regard. It may institute proceedings in its own name where there is a general practice of discrimination, where an individual has not referred a complaint and where it is not reasonable to expect the person to refer a claim. S 85 EEA and S 23 of the ESA. The Authority can institute proceedings where there is discriminatory advertising and in relation to a discriminatory club. S10 EEA and S 12 of the ESA and section 9 of the ESA. It is a power that the IHRC has used on a number of occasions. The Equality Authority has uses it on fewer occasions than the IHRC.

³¹ DEC- E/ 2001/14

³² The IHRC is given the power to apply to appear as an *amicus curiae* by virtue of section 8 of the Human Rights Commission Act. The Supreme Court found that the Equality Authority had an implied power to apply to appear in certain cases by virtue of its role in promoting equality.

effective *amicus curiae* interventions is dependent on other parties being in a position to bring cases as far as the High Court or Supreme Court. Very few cases involving the Employment Equality Acts and the Equal Status Acts end up before the High Court or Supreme Court.

ERA recommends that the HREC be given explicit power to apply to all levels of the Courts and quasi judicial bodies to appear as amicus curiae.

3.6 Codes of Practice

The Equality Authority may prepare Codes of Practice which, if approved by the Minister, are admissible in evidence.³³ The IHRC does not have an equivalent power. The Authority has prepared one code of practice to date.³⁴ It is regularly cited in cases before the Tribunal and Labour Court and acts as a valuable benchmark.

ERA recommends that the HREC be given the power to prepare Codes of Practice in relation to matters that comes within its remit.

3.7 Equality Reviews and Action Plans

The Equality Authority has the power to conduct equality reviews and action plans.³⁵ It may invite organisations to voluntarily carry out an equality review and prepare an action plan, or may itself carry out an equality review or prepare an action plans.

An equality review and action plan can be done on a voluntary basis or on an enforcement basis. A number of equality reviews have been carried out on a voluntary basis and great interest has been expressed by employers. Such plans have been carried out with many key organisations such as: Aer Rianta; University College Dublin; Galway City Partnership; Dublin Port; The Irish Aviation Authority; An Bord Pleanála; Iarnród Éireann; Leitrim County Council; and Siemens Business Services.

ERA recommend that the HREC be given the power to carry out equality and human rights reviews and prepare action plans on either a voluntary or compulsory way in relation to matters that come within its scope.

3.8 Research

Both the IHRC and the Equality Authority have similar research powers. The Equality Authority has a broad power to undertake or sponsor such research as it considers necessary and as appears expedient for the performance of any of its functions.³⁶ The EU Equal Treatment Directives provide that one of the core competencies of a specialised equality bodies include conducting independent surveys concerning discrimination and publishing independent report.

³³ Section 56 of the EEA as amended by paragraph g of the schedule to the ESA

³⁴ Code of Practice on Sexual Harassment and Harassment at Work S.I No 78 Of 2002.

³⁵ Sections 68 and 69 EEA, as amended by paragraph n of the Schedule to the ESA

³⁶ S 57 EEA

The IHRC may, for the purpose of promoting understanding and awareness of the importance of human rights in the state, undertake, sponsor, commission, or provide financial or other assistance for research and educational activities. The research activities of the Equality Authority and IHRC are renowned and very highly respected.

ERA recommends that the HREC should have the composite power of both bodies in relation to research and this power should apply to all matters that come within its remit.

3.9 Inquiries

The Equality Authority and the IHRC have broad powers to carry out inquiries.³⁷ The carrying out of an inquiry requires significant resources. It is a particularly useful power in situations where potential claimants may be very vulnerable or where there is a dearth of information. The statutory powers of the Equality Authority to carry out inquiries are set out in sections 58-66 of the Employment Equality Acts. The powers are cumbersome and awkward. The powers of the IHRC, in contrast, are less complicated and more effective.

ERA recommends that the current powers of the IHRC in relation to inquiries be given to the HREC and that these would apply to all matters that come within the remit of HREC

3.10 Scope

There are significant differences in relation to the scope /remit of human rights norms and matters covered by the Equal Status Acts 2000-2011. Human rights norms extend to all areas of State functions and activities. However the scope of the Equal Status Acts is confined to State functions that can be described as the provision of goods and services. It does not extend to the functions of the State that cannot be described as state services such as immigration and policing. In addition section 14 of the Equal Status Acts excludes from the prohibition on discrimination the taking of any action that is required by another enactment. The effect of this exemption is to subordinate the Equal Status Acts to other statutory provisions and remove large swathes of public activity from the remit of the Equal Status Acts. The Equality Act 2004 also removes the treatment of non-Irish nationals by a very wide range of public authorities from the remit of the prohibition on discrimination.

ERA recommends that equality legislation be amended to ensure that the full scope and remit of the HREC will extend to all the function and activities of the Irish State, in all of the areas that come within its remit.

³⁷ S 58 EEA and section 9 of the Human Rights Commission Act 2000, The IHRC has carried out a three Inquiries. The Equality Authority has not carried out any inquiries to date.

Appendix A

Terms of Reference for the Working Group on the new Human Rights and Equality Commission (HREC): specific concerns:

Item two of the terms of reference notes that the working group will:

“identify the functions and areas of work of the existing bodies to be merged; what new functions should be added and the functions, if any, that should cease”.

It is essential that the core function of a specialised equality body to promote equality of opportunity and to provide independent assistance to victims of discrimination should be explicitly identified and provided for in the terms of reference and in the legislation governing the HREC.

Item four of the terms of reference notes that the working group will:

“advise on what new methods the HREC might employ in carrying out its functions of providing information, education and so forth in the light of the experience gained by both organisations, bearing in mind the overall economic position and the costs of campaigns run to date”.

The methods that the HREC might employ in carrying out its functions of providing information and undertaking education are matters that should be decided by the HREC. The HREC has to have the autonomy to decide on what campaigns it chooses to run, to express its views publicly and to manage its resources as it sees fit.

Item nine of the terms of reference notes that the working group will:

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

The content of this term of reference is a matter that should be left for an independent HREC to decide. The HREC should be able to manage its resources as it sees fit and decide itself what is the best approach on achieving change. The HREC should be able to decide on the balance between codes of practice and other functions bearing in mind the EU required function of providing independent assistance to victims of discrimination. National equality bodies are required to have the competency of providing assistance to victims of discrimination.

Codes of practice are a valuable tool but they have their limitations. It is significant that the Equality Authority, to date, has only prepared one code of practice and this was in an area where there had been a significant body of case law built up over considerable time. A code of practice to be effective but requires ‘buy-in’ from people who will be affected by it. If there is not buy-in to a code of practice by the group of people potentially affected by it (for example if they did not participate in its development) or if they object to the existence of a code of practice, this will ultimately reduce its effectiveness. Also unless there is a substantial

body of case law to draw on, to flesh out the content of a code of practice, then the code will constitute little more than a simplistic statement of the law and may have limited effect. Greater uses of codes of practice cannot be viewed as either an effective or appropriate substitute for the provision of assistance to victims of discrimination.

In addition to the above, the terms of reference do not refer to:

- The current statutory function of the Equality Authority to promote equality of opportunity,
- The EU Equal Treatment Directives and the requirement on Member States to designate a body for the promotion of equal treatment in certain areas,
- The EU Equal Treatment Directives and the requirement on Member States to ensure the competencies of these bodies include the essential function of providing independent assistance to victims of discrimination legal representation in pursuing their complaints of about discrimination, conducting independent surveys concerning discrimination publishing independent reports and making recommendations on any issue relating to such discrimination,
- The European Commission against Racism and Intolerance Recommendation No. 2 on Specialised Bodies to combat Racism, Xenophobia, Anti-Semitism and Intolerance at National Level,

Appendix B

ERA in our ‘Roadmap to a Strengthened Equality and Human Rights Infrastructure’, have set out a number of legislative changes required to enhance the promotion of equality and human rights and prevent discrimination:

INTERNATIONAL INSTRUMENTS

Ratification and implementation of:

- a) The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families.
- b) The Convention on the Rights of Persons with Disabilities.
- c) Protocol 12 to the European Convention on Human Rights.
- d) The optional protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- e) The optional protocols that enable individual complaints mechanisms under the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities.

EQUALITY LEGISLATION

Enhance equality legislation in the following areas:

- Introduce a duty on public sector organisations to have due regard to equality and human rights in carrying out their functions. While the Minister references the equivalence requirements of the Good Friday agreement, the terms of reference do not, for example, contain any commitment to the introduction of an equivalent positive duty on public bodies to promote equality (despite the fact that there is a commitment in the ‘Programme for Government 2011’ to ‘*require all public bodies to take due note of equality and human rights in carrying out their functions*’).
- Introduce a duty on public sector organisations to implement positive action measures to achieve full equality in practice in employment and service provision.
- Introduce a duty on private sector organisations to be planned and systematic in their approach to equality and human rights.
- Expand the equality grounds to include the following grounds: socio-economic status; criminal conviction; transgender; and political opinion.
- Expand the definition of ‘carer’ under the family status ground to encompass the full diversity of carers (resident and non-resident carers, and carers providing continuing or intermittent care).

- Redefine the age ground, without age limits, to include people under eighteen.
- Expand the scope of the Equal Status Acts 2000 to 2011 to explicitly include the functions of the state. The legislation would thus cover the role of the state in exercising its powers in areas such as policing, immigration controls, social protection, education and housing.
- Remove the ceilings on compensation made in cases under the equality legislation so that sanctions could be effective, proportionate and dissuasive.
- Remove the exemption in the Equal Status Acts for actions required under other legislation.
- Amend the exemptions in relation to religious ethos in the equality legislation to ensure that they are not a source of discrimination on other grounds, in particular on the grounds of sexual orientation and family status.
- Apply the provisions under the Employment Equality and Equal Status Acts, which require adjustments and reasonable accommodation for people under the disability ground, to all grounds covered by the equality legislation. An exemption in relation to these provisions, under both Acts, would ensure that they were not a source of disproportionate burden on the employer or service provider.
- Amend the definitions of discrimination in the equality legislation so that they are based on prohibition of treatment that disadvantages a person on the basis of their membership of one of the grounds.
- Extend the time limit within which a claimant under the Equal Status Acts has to notify the person they are making the claim against, from two months to six months.
- Empower trade unions and non-governmental organisations to take cases in their own name.
- Allow the HREC power to grant legal assistance to groups/NGOs and trade unions.