

Proposed Amendments to the Heads of Irish Human Rights and Equality Commission Bill

Introduction

The two fundamental standards recognized internationally as the key benchmarks for human rights and equality institutions are: independence and effectiveness¹.

The Equality and Rights Alliance (ERA) has identified seven areas where the Heads of Bill require amendment to secure the independence and effectiveness of the new Irish Human Rights and Equality Commission (HREC) thus ensuring that the HREC is fully compliant with the UN Paris Principles.

Under the benchmark of “Independence”, we propose amendments in respect of the following areas:

1. Accountability (accountability of the body to the Oireachtas and financial accountability)
2. Appointments (staff)

Under the benchmark of “effectiveness”, we propose amendments in respect of the following areas:

3. Definition of ‘equality’
4. Application of narrow definition of human rights
5. Application of a ‘sliding-scale’ to all enforcement powers and functions
6. Levelling-up of powers
7. Positive Duty
8. Engagement with civil society

¹ The UN Paris Principles provide a set of standards for the effective and independent functioning of Human Rights Institutions, against which HRIs are measured for accreditation by the UN. The UN Belgrade Principles adopted in 2012 provide a framework on how the interaction and cooperation between NHRIs and Parliament should be developed.

Independence:

1. Accountability

The Heads of Bill propose that the HREC will form part of the Department of Justice and Equality and will be accountable to the Minister of that Department. The Heads of Bill propose that the HREC would have a merely symbolic accountability to the Oireachtas, with minimal linkages to the Oireachtas outlined in Heads 12 and 27. In addition, Heads 26 and 28 propose that the Minister for Justice would continue to retain financial control over the body.

These provisions raise concerns as regards compliance with the UN Paris Principles which emphasise the need for national human rights institutions to be independent from the executive and to be more directly accountable to national parliaments.

The Equality and Rights Alliance proposes that the model developed for the Office of the Ombudsman and for the Ombudsman for Children could usefully be deployed in relation to the HREC. This model has worked well in terms of accountability and conforms to the highest standards for the independence of these bodies.

Proposed amendments

Accountability to the Oireachtas

Retain current Heads 12 and 27², and add the following:

Subject to [the requirements of Heads 12 and 27 as eventually given statutory expression], the Director shall at the request in writing of an Oireachtas Committee attend before it to give account for the general administration of the Commission and the exercise of its functions under this Act, including the strategic plans and reports duly laid before the Houses of the Oireachtas³.

The Director shall not be required to account to an Oireachtas Committee for any matter which is or has been or may at a future time be the subject of proceedings before a court or tribunal in the State⁴.

Financial Accountability

In place of proposed Heads 26 and 28⁵ and insert the following:

² Head 12 relates to the preparation of strategic plans of the IHREC and presentation of same to the Oireachtas. Head 27 relates to the preparation of annual reports of the IHREC and presentation of same to the Oireachtas.

³ This provision is taken in modified form from s. 19 of the Ombudsman for Children Act 2002.

⁴ This provision is taken from s. 19 of the Ombudsman for Children Act 2002, which contains further detailed provisions regulating the circumstances in which the Ombudsman for Children may decline to account to an Oireachtas Committee for how a particular case has been handled.

⁵ Head 26 relates to the accounts and audit of the Commission. Head 28 relates to the grants payable to the Commission

1. The resources to ensure that the Commission can carry out each of its functions effectively shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas⁶.
2. The Director shall be the accounting officer for the appropriation accounts of the Commission for the purposes of the Exchequer and Audit Departments Acts 1866 and 1921 and the Comptroller and Auditor General (Amendment) Act 1993⁷.
3. The Director shall, whenever required to do so by the Committee of Dáil Éireann established under the Standing Orders of Dáil Éireann to examine and report to Dáil Éireann on the appropriation accounts and reports of the Comptroller and Auditor General, give evidence to that Committee on—
 - i. the regularity and propriety of the transactions recorded or required to be recorded in any book or other record of account subject to audit by the Comptroller and Auditor General which the Director is required to prepare under this Act;
 - ii. the systems, procedures and practices employed by the Director under the direction of the Commission for the purposes of evaluating the effectiveness of the operation of the Commission and its economy and efficiency in the use of resources;
 - iii. any matter affecting the Commission referred to in a special report of the Comptroller and Auditor General under section 11 (2) of the Comptroller and Auditor General (Amendment) Act, 1993, or in any other report of the Comptroller and Auditor General (in so far as it relates to a matter specified in paragraph (a), (b) or (c)) that is laid before Dáil Éireann⁸.

2. Appointments

Head 17 stipulates that the first Director of the HREC will be the current Chief Executive of the Equality Authority. This removes autonomy from the Commission to appoint its own Director (as recommended by the working group reporting to the Minister on the merger. Ability to appoint own staff, also being a key standard under the Paris Principles).

Proposed amendment

⁶ Wording taken from existing Heads of Bill and from s. 11 of the Ombudsman Act 1980.

⁷ Taken from s. 29 of the Public Service Management (Recruitment and Appointments) Act

⁸ Taken from s. 18 of the Ombudsman for Children Act 2002.

Delete Head 17 and make provision for the HREC to have autonomy to appoint staff at every level from the start of its operations, through an open and transparent appointments process and without reliance on civil service secondments.

Effectiveness:

3. Definition of Equality

The definition of equality in Head 3 is unduly narrow, insofar as it only covers equality in relation to ‘dignity, rights and responsibilities’. This narrower definition will constrain the promotional work of the Commission. There is no definition of equality in the current equality legislation and this has meant that the promotional work of the current Equality Authority has not been curtailed and the Equality Authority has been able to advance a range of good practice models that have served policy makers, employers and service providers.

Proposed amendment

Remove the current definition of equality from the Bill.

Or

Amend Head 3 to define equality as follows:

“Equality” means that all persons are entitled to participate as equals in dignity and status in the economic, political, social and cultural life of society. Ensuring full equality in practice requires the elimination of discrimination, the reasonable accommodation of diversity and the adoption of specific measures to prevent or compensate for disadvantage⁹.

4. Application of narrow definition of ‘human rights’

There are two definitions of human rights in the Heads of Bill, one in Head 3 and a narrower definition in Head 30. All of the enforcement and compliance functions of the Commission (Heads 30-36) have been brought under the narrower definition of human rights set out in Head 30. The narrower definition requires that the human rights in question would only be those that are enshrined in law within the State or within the Constitution. Bringing *all* of the enforcement powers of the Commission under this narrower definition represents a diminution of the current powers of the Irish Human Rights Commission. In the current Human Rights Commission Act 2000, the narrower definition only applies to the taking of cases.

Proposed amendment

The definition of human rights as outlined in Head 3, *or* as currently set out in S. 2 of the Human Rights Commission Act 2000, should be applied to all of the legal and enforcement powers of the IHREC, with the exception of the providing legal assistance or taking proceedings in the name of the HREC (B vii) to which the narrower definition should apply.

⁹ The phrase ‘ensuring full equality in practice’ and the final part of the second sentence are taken directly from EU Directives.

5. Application of a 'sliding-scale' to all enforcement powers and functions

Head 30 (C) places a “*general obligation*” on the Commission to view all of its enforcement powers and functions as being on a “*sliding scale*” and “*to chose the intervention that is most commensurate with the scale or nature of the complaint or perceived problem and, within that, a specific obligation on the Commission to consider whether an issue can be resolved by mediation before taking a decision to institute legal proceedings under subsection vii of this Head*”.

The obligation to apply a sliding scale relates to the full range of possible interventions open to the Commission where it believes there may be an infringement of human rights or equality legislation. This obligation and the obligation to consider mediation prior to deploying other enforcement powers constrain the Commission inappropriately and unnecessarily in applying its enforcement powers.

Proposed amendment

Delete Head 30 section C

6. Levelling-up of functions and powers

The Heads of Bill establishes an important coherence of functions and powers between the human rights and equality mandates of the HREC. This is reflected in the manner in which Head 11 is set out. There are four areas (a,b,c,d below), however, where more coherence between the human rights and equality functions and powers is required to facilitate an integrated approach across the two mandates and to allow for coherence and effectiveness:

a. Equality Grounds

A fundamental incoherence exists where the equality mandate is bounded by the nine grounds named in current equality legislation. This contrasts with the broad and unbounded focus of human rights. This will diminish the effectiveness of the Commission as it will not be possible to deploy its full set of functions and powers with coherence to combat discrimination and to protect human rights in the necessary integrated manner.

Proposed amendment

In order to achieve coherence in protection from discrimination and from human rights abuses the approach already developed in a number of Member States should be used:

- a) The ground of ‘socio-economic status’ should be included in the grounds protected from discrimination.
- b) The ground of ‘any other status’ should be introduced in the protection afforded from discrimination.

b. Proceedings in own name

Head 30.B outlines the range of interventions open to the IHREC where there has been a breach of equality or human rights legislation. Section vii (1) refers to the Commission's power to institute proceedings in its own name. The wording of this section only refers to matters pertaining to the 'human rights' of persons. There does not appear to be any other provision set out for the Commission to take cases in its own name in relation to matters pertaining to equality and non-discrimination. This is a significant diminution of the current powers of the Equality Authority and is particularly serious in a context of significant levels of under-reporting of discrimination.

Proposed amendment

Head 30.B vii(1) should include specific reference to matters pertaining to equality and discrimination.

c. Equality Reviews and Action Plans

Head 32 refers to the current powers of the Equality Authority to conduct equality reviews within businesses and organisations. In terms of coherence in the powers of the IHREC across its equality and human rights functions, it is necessary for this power to extend to human rights matters.

Proposed amendment

Head 32 should include the power to conduct equality and human rights reviews and action plans

d. Provision of legal assistance

Head 33 proposes to re-enact section 10 of the Human Rights Commission Act to ensure that the HREC retains current powers regarding provision of legal assistance. The operation of the IHRC over the last decade provides evidence of a significant restriction in the Human Rights Commission Act in Sec 10(3)(a): the criterion for assessing whether the IHRC can grant legal assistance. This criterion has resulted in a barrier to taking cases and should be deleted.

Proposed amendment

Delete S.10(3)(a) of the Human Rights Commission Act as transcribed for the purposes of Head 33 of the IHREC Bill.

7. A Public Sector Duty

An innovative and welcome duty on public bodies is provided for in Head 36 of the Heads of Bill.

Public sector equality duties have been introduced in a number of jurisdictions¹⁰. The two most prominent such duties are the Northern Irish equality duty (set out in s. 75 of the Northern Ireland Act 1998) and the positive duty in Britain (set out in s. 149 of the Equality Act 2010 (which replaced previous race, gender and disability duties)). Compliance with both these duties is primarily enforced by national equality and human rights bodies – namely the Equality Commission for Northern Ireland and the UK Equality and Human Rights Commission.

The s. 75 duty in Northern Ireland imposes more onerous reporting duties on public authorities than is the case with the s. 149 duty in Britain. The UK Duty is also

¹⁰ for example: Northern Ireland, UK, Norway, Finland, Canada

considered to be more outcome focused than the NI duty. The duties in Norway and Canada are largely considered to be too vague and therefore less effective in mainstreaming an approach to equality within public authorities.

With these considerations in mind, the proposed amendment set out below makes provision for the introduction of a positive duty to promote equality and protect human rights that is modeled on the s. 149 duty that exists in Britain. It differs from the existing Heads of Bill in that it:

- (i) requires public authorities to prepare equality schemes,
- (ii) includes private bodies that carry out public functions,
- (iii) makes provision for the IHREC to play an enforcement role in monitoring compliance with the duty.

The s. 149 duty has been selected in preference to the s. 75 Northern Irish duty as a ‘base model’, on the grounds that its provisions impose fewer procedural requirements on public authorities. The enforcement model used in Britain and set out in the provision of the Equality Act 2006 is also preferred to that in Northern Ireland, on the same basis.

The duty on public bodies set out in the Heads of Bill requires public bodies to have due regard to the elimination of discrimination, the promotion of equality of opportunity and the protection of human rights in the exercise of its functions. Due regard is defined in a minimal way as “*giving consideration to*” equality and human rights in planning and execution of policies and actions, strategic plans and reporting. This structures the duty primarily in terms of adhering to a procedure rather than in terms of achieving progressive outcomes.

There is no enforcement mechanism to ensure compliance with the duty provided for in the Heads of Bill.

Proposed amendment

Amend Head 36 as follows:

The Public Sector Equality and Human Rights Duty

- (1) A public authority¹¹ shall, in the exercise of its functions, take such steps as are necessary and proportionate to —
 - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Employment Equality Act 1998 and the Equal Status Act 2000 [and associated legislation];
 - (b) advance equality between persons who share a relevant protected characteristic and persons who do not have it;

¹¹ A Schedule should be attached to the Bill that would list all public authorities subject to the duty. This is done in Northern Ireland and Britain. A model for this list in the Irish context is Schedule 1 to the Ombudsman Act 1980, as amended by the Ombudsman (Amendment) Act 2012. The Minister should also be given the power to add to the list of bodies by secondary legislation, and the list could also include list private bodies performing public functions and therefore coming within the proposed sub-section (2) .

(c) protect the human rights of, and advance the fulfillment of the human rights of all persons [as set out in Head 3 of the Heads of Bill.]

(2) A person is not a public authority but who perform functions of a public character shall, in the exercise of those functions, take such steps as are necessary and proportionate to implement the matters mentioned in (relevant section above).

Equality Schemes

1. Any public authority or person who perform functions of a public character to whom (relevant section above) applies shall, before the end of the period of one year beginning with the commencement of (relevant section above), publish a scheme showing how it proposes to fulfill the duties imposed by (relevant section above). This scheme will be reviewed and re-published every three years.
2. An equality scheme shall state, in particular, the authority's arrangements –
 - (a) for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on eliminating discrimination, harassment and victimization, advancing equality, protecting human rights, and advancing the fulfillment of human rights as defined in (relevant section);
 - (b) for monitoring, consulting on, and addressing any adverse impact of policies adopted by the authority on equality and human rights;
3. Before publishing such a scheme, a public authority shall consult persons who are likely to be affected by the scheme, in accordance with guidelines issued by the Irish Human Rights and Equality Commission.
4. A scheme published in accordance with the requirements of this section shall accord to any guidelines as to form or content that are issued by the Irish Human Rights and Equality Commission.

Enforcement and Compliance

1. The Irish Human Rights and Equality Commission may assess the extent to which a public authority or a person performing functions of a public character has complied with the duties under (relevant section above).
2. Where the Commission thinks that a public authority or a person otherwise performing functions of a public character has failed to comply with a duty

under (relevant section above), it may issue a notice requiring that authority **or person** to

- (i) comply with the duty, and
 - (ii) to give the Commission, within 28 days beginning with the date on which the authority **or person** receives the notice, written information of steps taken or proposed to be taken for the purpose of complying with the duty.
3. A notice under this section may require a public authority **or person otherwise performing functions of a public character** to give the Commission information required by the Commission for the purposes of assessing compliance with the duty; in which case the notice shall specify—
 - i. the period within which the information is to be given (which shall begin with the date on which the notice is received and shall not exceed three months), and
 - ii. the manner and form in which the information is to be given.
 4. A person who receives a notice under this section shall comply with it.
 5. A notice under this section shall not oblige a person to give information—
 - i. that he is prohibited from disclosing by virtue of an enactment, or
 - ii. that he could not be compelled to give in proceedings before a court.
 6. If the Commission thinks that a person, to whom a notice under this section has been given, has failed to comply with a requirement of the notice, the Commission may apply to the Circuit Court for an order requiring the person to comply.

7. Engagement with civil society

One of the key elements of the UN Paris Principles is that national human rights institutions have a responsibility to work with key stakeholders, including civil society. Engagement with civil society is further emphasised by the UN ICC Sub-Committee on Accreditation.

The importance of collaboration with civil society is also noted in the report of the working group to advise the Minister on the merger. The report notes: “*the legislation should allow IHREC to establish subcommittees of the Commission to enable representatives of a wide range of interests to contribute in an advisory capacity*”¹².

¹² Working Group Report pg 56: 4.8

It is regrettable, therefore, that the Heads of Bill do not contain a specific provision on the need for the HREC to collaborate with civil society.

Proposed amendment

Include provisions to require the HREC to establish a standing sub-committee representative of the range of interests protected by the HREC Act to advise the Commission and to establish time limited advisory committees that involve relevant stakeholders to advise the commission on matters being considered by the Commission as and when deemed necessary by the Commission