

Response of the Law Society of Ireland's Employment & Equality Law Committee to the Working Group on the Establishment of the Human Rights and Equality Commission

Introduction

The Employment and Equality Law Committee of the Law Society welcomes the opportunity to make this submission to the Working Group on the establishment of the Human Rights and Equality Commission ('HREC'). The Committee is of the view that the work of the Equality Authority to-date has made a very significant contribution to the area of equality law in regard to the promotion of equality and the enforcement of equality legislation namely, the Employment Equality Acts, 1998 to 2011 and the Equal Status Acts, 2000 to 2011. The Committee is concerned that, as a result of the merger between the Equality Authority and the Irish Human Rights Commission, that the Equality Authority would not suffer a reduction in terms of its functions and powers. This submission is in response to the following questions posed by the Working Group on the functions, features and priorities of the new HREC.

A. What do people want the new body to do?

It is the view of the Employment and Equality Law Committee that the current functions as carried out by the Equality Authority should be protected and enhanced by the newly created body. The Equality Authority currently carries out various functions in the promotion of equality such as the provision of information to the public on equality legislation and other pieces of legislation as outlined below, conducting research and the provision of independent assistance to victims of discrimination. A fuller outline of all functions is provided below. The Committee is of the view that all of the current functions of the Equality Authority are necessary to promote equality and combat discrimination in the workplace and in the provision of goods and services. However, it is submitted that the provision of legal assistance to victims of discrimination is a key function of the Authority and one that must be maintained and enhanced by the newly formed body. It is the view of the Committee that at a minimum the current level of service provided in this area must be maintained if not enhanced by the merger of the two bodies.

B. What features and functions does it need to do these things?

Independence & Accountability

It is essential that the new HREC will be independent, in accordance with international standards for the operation of human rights institutions. At the very minimum, the newly merged body must operate in compliance with the *Paris Principles* which are the guidelines that States are expected to follow when establishing and maintaining a National Human Rights Institution. The *Paris Principles* contain two specific requirements to ensure independence.

Firstly, the Institution must be provided with the necessary infrastructure to run smoothly, particularly the provision of adequate funding. An Institution should have enough funding to afford its own staff and premises, both separate from Government Institutions.

Secondly, members of the Institution should be appointed by an official act that gives their appointment a specific duration. This ensures that a member's appointment is stable and Government interference in the actions of members is less likely. Institutions must have their mandate, composition and responsibilities clearly laid out either in a legislative or a constitutional text. This is important for the independence of the organisation, because the better established its mandate is, the less able the Government is to change or challenge that mandate.

It is to be welcomed that the Minister has stated his intention that the HREC would be made accountable to the Oireachtas Committee system. This is certainly consistent with the requirement for independence as set out in the *Paris Principles*.

Going beyond the points identified in the *Paris Principles*, it is submitted that the following factors should also be taken into account in order to ensure the independence of HREC:

- An ability to function without interference from the State.
- Allocation of organisation resources as management sees fit.
- Free definition of tasks.
- Free appointment of staff.
- Possession of own premises.
- Adequate or/sufficient funding.
- Clear legal mandates and legal terms of reference.
- Pluralist representation on Commissions and/or Board.
- Ability to communicate freely with the larger public.
- Transparency.

A point particularly identified by the EU Fundamental Rights Agency is that a National Human Rights Institutions should have the capacity to select and employ its own staff and secondments should not be the dominant feature, particularly with regard to senior posts. The independence of the HREC would be greatly enhanced by the stipulation that appointments to the newly merged body are made through an open procedure, to allow the body to recruit its own staff, particularly at senior level, thus eliminating the established practice of seconding staff from the Civil Service.

Current Functions of the Equality Authority

The current functions of the Equality Authority can be summarised as follows:

- To work towards the elimination of discrimination in relation to the areas covered by the Employment Equality Acts, 1998 to 2011 and the Equal Status Acts, 2000 to 2011.
- To promote equality of opportunity in relation to employment and vocational training and in relation to the provision of goods and services, accommodation and education.
- To provide information to the public on the working of the Employment Equality Acts, 1998 to 2011; the Equal Status Acts, 2000 to 2011; the Maternity Protection Acts, 1994 to 2004; and the Adoptive Leave Acts, 1995 to 2005. The Parental Leave Acts, 1998 to 2006 also accords the Equality Authority an information role on the provisions of the legislation.
- To keep under review the workings of the Employment Equality Acts, 2000 to 2011; the Equal Status Acts, 2000 to 2011; the Maternity Protection Acts, 1994 to 2004; and the Adoptive Leave Acts, 1995 to 2005 and to make recommendations for necessary change to the Minister for Justice, Equality and Defence.

The equality legislation provides the Equality Authority with a range of explicit powers to implement these functions. It is submitted by the Committee that the functions of the Authority would be protected and enhanced within the newly established body and that there would be no diminution of the functions and powers currently held by the Equality Authority. Particular attention is drawn to the following points:

Provision of Independent Assistance

It is noted by the Committee that various EU Directives oblige Member States to have specialised equality bodies with the aim of promoting equal treatment on a number of specified discriminatory grounds. In particular it is noted that the Race Directive (Art 13), the Gender Equal Treatment Employment Directives (Article 7 inserting Article 8a), the Recast Gender Directive and the Gender Goods and Services Directive (Article 12) all require Member States to have in place specialised equality bodies. These Directives set out the functions of the specialised bodies, one of which includes the provision of independent assistance to victims of discrimination. In view of the obligation upon the State under EU Law to provide independent legal assistance to victims of discrimination, it is the Committee's view that this express function should be provided to the newly established body and should form a core function of the HREC.

The area of equality law involves complex issues of law regarding the application and interpretation of national and EU law. However despite the complexity of this area and the importance of the rights at issue for those who are subjected to discrimination there is no provision for legal aid under the Civil Legal Aid Act, 1995 for the majority of claims under equality legislation. Under the 1995 Act the Minister for Justice Equality and Defence is required to prescribe the Equality Tribunal and Labour Court for the purposes of the Act. To-date the Minister has not made such an order. In this regard it is noted that Article 47 of the Charter of Fundamental Rights of the European Union 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.

Currently a very small number of discrimination claims which are heard before the Circuit Court (an appeal under the Equal Status Acts, 2000 to 2011 and claims for gender discrimination commenced in the Circuit Court) can avail of legal aid. The Equality Authority provides independent assistance to victims of discrimination on the basis of the criteria already set out.

In light of the lack of provision for legal aid in respect of the majority of discrimination claims under equality legislation and to ensure access to justice for those who, for want of means, cannot afford legal services themselves, it is the Committee's view that the newly formed body should be given the explicit function of providing legal assistance to victims of discrimination.

Promotional Function

It is imperative that the Equality Authority's key promotional function, to promote equality of opportunity in employment and in matters covered by the Equal Status Acts, 2000 to 2011 and to strive towards the elimination of discrimination in employment and in matters covered by the Equal Status Acts, 2000 to 2011 is maintained and enhanced in the merged body. It is of considerable concern that the Terms of Reference of the Working Group on the HREC do not refer to the current statutory function of the Equality Authority to promote equality of opportunity.

Law Review

The merger presents an opportunity to enhance the Equality Authority's existing law review function which is limited to the Employment Equality Acts, 1998 to 2011; the Maternity Protection Act, 1994 to 2004; the Adoptive Leave Acts, 1995 to 2005; and the Pensions Act, 1990. The opportunity presents to have the function extended to reflect the law review functions currently enjoyed by the Irish Human Rights Commission, namely, the review of the adequacy and effectiveness of the law and practice in the State relating to the promotion of equality and the elimination of discrimination, and if requested by the relevant Minister, to examine any legislative proposal and to report its views on any implications of such a proposal with regard to the promotion of equality and the elimination of discrimination.

Information Function

The Equality Authority's function in relation to the provision of information regarding the operation of the Employment Equality Acts, 1998 to 2011; the Equal Status Acts, 2000 to 2011; the Maternity Protection Act, 1994 to 2004; the Adoptive Leave Acts, 1995 to 2005; and the Parental Leave Acts, 1998 to 2006 due to the proposed merger of the Employment Rights Bodies, will need to be reviewed. However, it is the Committee's view that the HREC should still maintain an information function on the operation of the Equal Status Acts, 2000 to 2011.

Amicus curiae

The Equality Authority currently has the power to apply to appear before the Superior Courts as *amicus curiae* in certain cases. The Authority has the power to 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. The Authority also has power to institute proceedings where there is discriminatory advertising and in relation to a discriminatory club. It is essential that the role of *amicus curiae* is maintained as it is an effective means of ensuring that the Court has the benefit of the expertise of the specialised body in making its decision.

Most *amicus curiae* applications have been made before the High Court or the Supreme Court. It is submitted that in the newly merged body, that the HREC would be given explicit power to make an *amicus curiae* application to all level of the Courts and quasi judicial bodies.

Codes of practice

The Equality Authority's function of preparing Codes of Practice should continue in the merged body.

Equality Reviews and Action Plans

The Equality Authority's power to conduct equality reviews and action plans should continue in the new body. Currently it has the power to invite organisations to carry out an equality review on a voluntary basis and prepare an action plan, or on its own initiative, carry out an equality review or prepare action plans.

Research

The Equality Authority currently has the power to undertake or sponsor such research as it considers necessary and expedient for the purpose of performing any of its functions. It is submitted that this function should continue in the newly merged body.

Inquiries

The Equality Authority currently has the power to carry out enquiries. This important function should be maintained by the newly merged body.

C. How should it be structured and what working methods should it use to achieve the above?

One of the key questions being considered by the Working Group is how the newly merged HREC should be structured and what working methods should be used to best achieve its aims and carry out its functions. This is a matter outside of the sphere of knowledge and experience of the Employment and Equality Law Committee and for this reason the Committee does not propose making submissions on this point.

End.