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Equality and Human Rights Commissions in the UK and Ireland:

Challenges and Opportunities Compared

Colin Harvey and Sarah Spencer

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November 2011

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1. INTRODUCTION

This paper provides background information on the statutory human rights and equality bodies in Ireland, Northern Ireland, Scotland and Britain, and analysis of the factors that impact on their operation. It draws on literature relating to these bodies and to National Human Rights Institutions (NHRIs) more widely; on seven interviews and a round table residential seminar in Kent in March 2011, supported by the Joseph Rowntree Charitable Trust, involving 17 experts (including the authors) with direct experience of the operation of the human rights and equality bodies in Ireland and the UK.

There are six statutory bodies established in Ireland and the UK to promote and enforce human rights or a key dimension of human rights and equality: the Irish Human Rights Commission (IHRC) and Equality Authority of Ireland (EA); the Northern Ireland Human Rights Commission (NIHRC) and Equality Commission for Northern Ireland (ECNI); the Scottish Human Rights Commission (SHRC) and the Equality and Human Rights Commission (EHRC, covering England, Wales and Scotland). While the timing of the establishment of these bodies over the past 12 years has primarily reflected developments within these islands, there is an international context in their proliferation in the past two decades encouraged by the United Nations (UN), Council of Europe and Commonwealth Secretariat.

Domestically there was significant support within civil society in Ireland and in the UK for the establishment of the commissions, albeit some differences of view reflecting political contexts: not least the background to the Good Friday Agreement which preceded the establishment of the Northern Ireland Commissions, and fallout from the closure of precursor bodies. In each case the organisations have undertaken activities and secured outcomes that have been welcomed, but there have also been some concerns about their operation and the limits of what they have been able to achieve. While the most recent Commission, the Scottish HRC, was established only in 2008, each has sufficient experience to begin an assessment of the factors that have impacted on their achievements and the difficulties they have faced. Each has a distinctive remit and role but share enough in common for a useful discussion on lessons learnt so far and potential future reforms to strengthen their contribution.

The discussion is timely given current developments. Prior to the 2010 election in Ireland, the then Government undertook a review of the functions of the human rights and equality bodies and a merger of these bodies has now been proposed by the new coalition government.¹ In Britain, the Government proposes to amend the EHRC's statute to adjust its roles and accountability arrangements. Its remit would be narrowed, some functions removed, and it would be subject to tighter reporting requirements in

¹ A Working Group on the establishment of a new, enhanced Human Rights and Equality Commission was appointed on 6 October 2011 with the aim of having the new Commission in place by the end of February 2012. A consultation was launched in November 2011 to encourage public input into the process. See Angela Kerins, outgoing chair of Equality Authority, *Irish Times*, 12 August 2011 http://www.irishtimes.com/newspaper/opinion/2011/0812/1224302299543_pf.html and Carol Coulter, *Irish Times*, 23 April 2011 http://www.irishtimes.com/newspaper/ireland/2011/0423/1224295311869_pf.html, and Carol Coulter, *Irish Times*, 9 September 2011 <http://www.irishtimes.com/newspaper/ireland/2011/0909/1224303758897.html>

relation to its business plan and financial affairs.² The Commission has, like its Irish counterparts, recently been subject to a substantial cut in its resources. Meanwhile in Northern Ireland, the Equality Commission will be co-located and share some office services with the new Northern Ireland Commissioner for Older People³ the Commission for Children and Young People and the Commission for Victims and Survivors, heralded as a cost-saving measure while retaining separate statutory remits.⁴ Like the Northern Ireland Human Rights Commission, it is entering a new phase with the appointment of a new Chief Commissioner in 2011-12

It is well recognised that globally National Human Rights Institutions (NHRIs) have faced significant challenges.⁵ A survey of 61 such bodies in 2009 found many reporting concerns relating to the appointment procedures for their board, government influence on budgets, shortage of resources and weakness in management structures, as well as issues relating to their relationships with stakeholders and lack of responsiveness of governments to their recommendations.⁶ A recent report from the EU Fundamental Rights Agency expressed concern that European NHRI's lacked sufficient political support, were insufficiently independent and effective, and that bodies within one country had overlapping mandates but also gaps that made it more difficult for those seeking redress to know where to turn.⁷ An analysis of the factors impacting on the performance of the statutory human rights and equality bodies in Ireland and the UK thus has a global relevance despite the differing contexts in which they work.

In this paper we look first at that global context and briefly at the issues that have been raised in academic and policy debates relevant to our discussion.⁸ We then outline the history, mandates, powers, duties, accountability and governance arrangements and resources of the six bodies before considering whether and how these factors impact on their operation. In that analysis we draw on the views of the seminar participants and interviewees whom we have consulted (see Appendix 1) and on our own experience working within and alongside some of the commissions and their precursor bodies. We do not attempt to evaluate the performance of the commissions, only to throw light on some of the factors which appear to impact on it.

² Consultation paper, March 2011, <http://www.homeoffice.gov.uk/media-centre/news/ehrc-reform>

³ The first commissioner is Claire Keatinge, appointed from 14 November 2011.

⁴ Announced by Minister Jonathan Bell MLA in June 2011, http://www.equalityni.org/sections/Default.asp?cms=News_News&cmsid=1_2&id=285&secid=1_1

⁵ See generally, International Council on Human Rights Policy (2004) *Performance and Legitimacy: National Human Rights Institutions*, Versoix, Switzerland; Amnesty International, *National Human Rights Institutions: Recommendations on Effective Promotion and Protection of Human Rights* (2002, AI); Stephen Livingstone, Rachel Murray, Anne Smith, *Evaluating the Effectiveness of National Human Rights Institutions: The Northern Ireland Human Rights Commission with Comparisons from South Africa* (2005).

⁶ OHCHR (2009) *Survey on National Human Rights Institutions: Report on the Findings and Recommendations of a Questionnaire addressed to NHRIs worldwide* <http://www.nhri.net/2009/Questionnaire%20-%20Complete%20Report%20FINAL-edited.pdf>

⁷ *National Human Rights Institutions in the EU Member States: strengthening the fundamental rights architecture in the EU I*, 7 May 2010, http://fra.europa.eu/fraWebsite/attachments/NHRI_en.pdf

⁸ For an examination of the spread of NHRIs see Pegram, T (2010) 'Diffusion Across Political Systems: The Global Spread of NHRIs' 32 *Human Rights Quarterly* 729. See also, Smith, A (2006) 'The Unique Role of National Human Rights Institutions: A Mixed Blessing' 8 *Human Rights Quarterly* 904.

2. CONTEXT

With the exception of France, the first statutory bodies for the protection of human rights were established in the 1970s but the rapid expansion in their number has been seen only in the last two decades. Support for their establishment reflected recognition of the limited impact of the international human rights machinery and the need for a mechanism that could react more quickly and directly to developments at the national level.

Concerned that the authority of such bodies could be undermined if some were seen to lack independence from government or the powers to be effective, the UN General Assembly endorsed a base-line standard covering the competence, responsibilities, composition and independence of national human rights institutions, the Paris Principles, in 1993.⁹ The Principles allow states some latitude in deciding what kind of institution is appropriate but carry authority in requiring that a broad mandate and sphere of competence should be set down in the country's Constitution or statute; and that the responsibilities of the institution should include the right, acting on its own initiative or by request 'to freely consider any questions falling within its competence', to submit proposals, reports and recommendations to Parliament, government and other competent authorities on any human rights issue, and to make public its views through the press including 'expressing an opinion on the positions and reactions of the government'. It should be able to examine existing and proposed legislation for conformity to international human rights principles, to contribute to reports that states submit to the UN supervisory bodies; to recommend new legislation and to have the power to hear any person and obtain any information or documentation necessary for assessing situations within its competence.

The Paris Principles state that national human rights institutions may also be authorised to hear and resolve complaints and should be able to carry out research and contribute to teaching and to promoting awareness of human rights, including discrimination. They should be composed of people broadly representative of civil society (in which unions, lawyers, professionals, academics and NGOs are specifically mentioned); and have their own staff and premises in order to be independent of government. Nor should they be subject to financial controls which might affect that independence. There is much, nevertheless, that is not specified in the Principles, including key matters such as enforcement powers, the precise nature of the commission's independence from government, or need for transparency in their operation. Hence it is argued that:

'While the Paris Principles laid out the foundational objectives and operational functions of NHRIs, the Principles fail to provide a legal basis for the autonomous existence of the NHRIs, the standards for achievement, and the measures to ensure the effectiveness of the recommendations made by the NHRIs. ...Thus the Paris Principles are, at best, a good starting point

⁹ *Principles relating to the status of National Institutions for the promotion and protection of Human Rights*, General Assembly Resolution 48/134 of 20 December 1993. UN Doc A/RES/48/134.

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

for discussions relating to the formation of NHRIs but it is not in the human rights' movements' best interest to give them more importance than they deserve in light of their weaknesses and limited nature.'¹⁰

The UN Human Rights Centre published guidance giving some flesh to the principles¹¹ and provides support to States establishing such bodies. An International Coordinating Committee (ICC) of NHRIs verifies whether (and at what level) a body qualifies for National Human Rights Institution status. As of December 2010 there were 67 fully accredited NHRIs and a further 15 deemed to comply in part with the Paris Principles.¹² The status of the EHRC was subject to a special review in 2010 and the NIHRC subject to its periodic review in May 2011. The Sub-Committee of the ICC responsible for accreditation produces General Observations on interpretation of the Paris Principles, the process for which is under review. The UN currently provides technical assistance to NHRIs in more than 60 countries and the Office of the High Commissioner for Human Rights together with the UN Development Programme has recently produced a comprehensive toolkit on NHRIs to facilitate collaboration.¹³

The Council of Europe has similarly encouraged member states to establish NHRIs since the mid 1990s and has helped to coordinate their activities¹⁴, as has the Commonwealth Secretariat. There is recent guidance from the Council of Europe's Commissioner for Human Rights on national structures for promoting equality¹⁵, and from its Commission against Racism and Intolerance on the establishment of bodies addressing racism, xenophobia and anti-semitism. There are requirements in European Union anti discrimination law in relation to statutory equality bodies.¹⁶ Equinet, the network of European equality bodies established in 2007 develops cooperation and facilitates information exchange among its 33 member organisations, including those which also have a human rights remit.¹⁷

There are now NHRIs in many parts of the world, taking varying forms from Human Rights Commissions with a broad mandate to 'Ombuds' that have a focus on fairness and legality in public service and specialised bodies focusing on the rights of a particular

¹⁰ Kumar, C (2003) 'National Human Rights Institutions: Good Governance Perspectives on Institutionalisation of Human Rights', 19 *American University International Law Review*, p274-5

¹¹ UN Centre for Human Rights (1995) *National Human Rights Institutions, A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*. Professional training series No 4.

¹² Accreditation, since 1998, has accorded A status to those that comply with the Paris Principles, B status to those that comply in part and C status to those that do not, www.nhri.net

¹³ UNDP-OHCHR Toolkit for Collaboration with NHRIs (December 2010), <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>

¹⁴ Council of Europe Rec. No. R(97) 14, 30 September 1997 and Council of Europe Res. (97) 11, 30 September 1997. See Carver, M (2011), 'One NHRI or Many? How many institutions does it take to protect human rights – lessons from the European experience' 3 *Journal of Human Rights Practice* 1.

¹⁵ Council of Europe, Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality, 21 March 2011, CommDH(2011)2.

¹⁶ The framework of law and guidance on equality bodies in Europe is set out in Gay Moon (2007), 'Enforcement Bodies', in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* edited by Dagmar Scheik, Lisa Waddington and Mark Bell, Hart Publications

¹⁷ <http://www.equineteurope.org/>

vulnerable group, including those established on race as a result of the EU Race Directive in 2000.¹⁸

3. SELECTED ACADEMIC LITERATURE

Academic and policy analysis of the operation of NHRIs globally and of equality commissions (in Europe in particular) has highlighted relevant issues including the tension between independence and accountability, matters of remit and composition, and the impact of external factors.

In relation to independence and accountability, scholars have seen NHRIs as occupying a distinct space, separate from government and from civil society, while having to establish working relationships and levels of accountability to both. There have to be mechanisms to appoint those in charge, call them to account for their actions and for their use of public money, which nevertheless do not interfere with their operational independence. Likewise, the credibility of the institution depends both on responsiveness to civil society and on visible independence from it. It has been argued that it is only by teasing out the differing levels of independence (legal and operational; financial, responsibility for appointments and dismissals; and composition and plurality) and likewise separating the layers of accountability (to parliament or government as the appointing body; to the public and to civil society; and accountability, in turn, *of* the appointing body) that we can understand the difficulties that many NHRIs experience and can hope to resolve them.

A report for the Commonwealth Secretariat identified some common factors found to have threatened the independence of NHRIs within the Commonwealth including funding arrangements or budgetary procedures determined by government; the method of appointment or termination of Commissioners' period of office; and the relationship with government departments on operational matters. While arguing that it is not possible to separate completely NHRIs from the Executive, strong procedural safeguards were seen to be critical: 'A perceived or actual lack of independence will undermine the work, authority and legitimacy of these organisations'.¹⁹ Where precisely the line between independence and appropriate accountability should fall in practice, however, and how to assess its operation in practice, is not straightforward: 'Independence itself is a relative matter'.²⁰

The plurality of the board of NHRIs has been a further focus of analysis given some lack of clarity in the Paris Principles on the extent to which the board should itself reflect civil society or have the capacity to engage with it. The literature also suggests that

¹⁸ OHCHR *National Institutions for the Promotion and Protection of Human Rights*, Fact Sheet No 19 <http://www.ohchr.org/Documents/Publications/FactSheet19en.pdf>. The notable exception is the US, see Catherine Powell, *Human Rights at Home: A Domestic Policy Blueprint for the New Administration* (2009, American Constitutional Society for Law and Policy).

¹⁹ Commonwealth Secretariat (2007) *Comparative Study of National Human Rights Institutions in the Commonwealth* (author Catherine Meredith cited internally), Commonwealth Secretariat, London.

²⁰ Moon, Gay (2007) above n 16.

there may be a trade-off between a large, representative body on the one hand and its operational independence and the cost of maintaining the board and efficiency in decision making. There can be merit in exploring differing models - plurality achieved in a non executive Council (as in Denmark) for instance coupled with a smaller executive with operational responsibility. A further point of analysis is the respective roles of Government and Legislatures, UN guidance advocating appointments by and accountability to Parliament rather than to a government Minister.²¹

Research has also highlighted the paradox that most NHRIs are too weak to provide much protection from human rights violations while at the same time creating unprecedented demand for that protection. This divergence is explained (from examples in the Asia Pacific region) by government motivation in establishing such bodies being to meet international expectations rather than a perceived need to address domestic human rights issues.²² The limits on the mandates of NHRIs are one focus of analysis, including the regular omission of economic, social and cultural rights²³; as is the relationship with civil society. While civil society is potentially of considerable value in providing information, profile and experience, and in calling the institution to account, NHRIs and civil society nevertheless have distinct roles and may legitimately differ in their perspectives on the course of action to take.²⁴

Finally, research has highlighted the importance of the local political context to the operation of human rights institutions, one study of five NHRIs (including the NIHRC) suggests that an institution with a limited mandate may have a demonstrable effect on human rights issues while a lavishly resourced body can be dismissed as irrelevant: 'Ultimately, domestic human rights bodies are only as good as the local political and economic contexts permit them to be'.²⁵ The external environment impinges in two ways: in the demands placed on the NHRI, their compatibility with its core functions and hence the degree of domestic support it enjoys; and in the nature and extent of stakeholder participation. Here the degree of human rights literacy is a key factor in whether voluntary organisations contribute to the institution's capacity to deliver or create a road block in its path.²⁶

Recent analysis of equality commissions in Europe provides useful insight.²⁷ There is clearly significant diversity but several themes surface in the literature. Almost all bodies

²¹ De Beco, G (2007) 'National Human Rights Institutions in Europe', *Human Rights Law Review* 7(2): 331-370.

²² Cardenas, Sonia (2004) 'Adaptive States: the Proliferation of National Human Rights Institutions', Carr Center for Human Rights Policy Paper T-01-04.

²³ Kumar, C (2006) 'National Human Rights Institutions (NHRIs) and Economic, Social and Cultural Rights: Towards the Institutionalisation and Developmentalization of Human Rights', *Human Rights Quarterly* 28(3).

²⁴ Kumar, C (2003) 'National Human Rights Institutions: Good Governance Perspectives on Institutionalisation of Human Rights', 19 *American University International Law Review* 259.

²⁵ Mertus, Julia (2009) *Human Rights Matters: Local politics and National Human Rights Institutions*, Stanford University Press, Stanford California, p. 2.

²⁶ *Ibid* p. 138.

²⁷ See Ammer, M et al, *Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC* (October 2010, Human European Consultancy and Ludwig Boltzmann Institute for Human Rights).

complain about a lack of resources, and it appears evident that the problem of under-reporting of discrimination (particularly on sexual orientation and religion) is endemic across Europe. In addition to all the familiar political, legal, structural and institutional factors, independence recurs in these studies as a key element of an effective equality body, and the Equinet study on precisely this issue is of particular value.²⁸ Yesilkagit and Snijders list managerial independence, policy independence, structural independence and legal independence as the central elements and use these to frame their assessment. Their study reports reasonable levels of financial independence, a fair level of independence on personnel management, with virtually all having full policy independence on assistance, hearing cases and issuing reports. Their focus on leadership in counter-framing is instructive²⁹, and links to the suggestion that *de facto* independence will often depend on strong leadership and good internal management.³⁰ The guidance for equality bodies is now providing genuine evidence-based insight into comparative experience and examples of good practice on which to base future work.

4. COMMISSIONS IN THE UK AND IRELAND

The aim in this section is to take each institution and outline in broad terms the position in relation to five areas: the establishment of the body, its role and remit, duties and powers, arrangements for independence and accountability, and finally its internal governance, structure, budget and staffing. This is provided not as definitive guidance on the precise legal powers and duties of each body but as background only to the more significant discussion on the respective relevance (if any) of these factors on performance.

1. Northern Ireland Human Rights Commission

The NIHRC was established by the Northern Ireland Act 1998 (an Act of the Westminster Parliament), and launched on 1 March 1999. It replaced the Standing Advisory Commission on Human Rights (SACHR), and the context was firmly linked to the Good Friday Agreement 1998. The Agreement makes clear that the NIHRC is intended to have enhanced powers in comparison with SACHR, and the Commission was created to be a more effective, independent and representative institution designed to advance human rights in the post-conflict context. Its mission is to:

‘...work vigorously and independently to ensure that the human rights of everyone in Northern Ireland are fully and firmly protected in law, policy and practice. To that end the Commission will measure law, policy and practice in Northern Ireland against internationally accepted rules and principles for the protection of human rights and will exercise to the full the functions conferred upon it to ensure that those rules and principles are promoted, adopted and applied throughout Northern Ireland’.³¹

‘Human rights’ are not confined to ECHR ‘Convention rights’, and the NIHRC regularly

²⁸ Yesilkagit, K and Snijders, B, *Between Impartiality and Responsiveness – Equal Bodies and Practices of Independence* (December 2008: Equinet).

²⁹ *Ibid* p 9.

³⁰ Ammer et al.

³¹ <http://www.nihrc.org/>

refers to international human rights standards and to the work of bodies like the UN and Council of Europe.

The Commission's strategic plan 2009-2011 lists three aims: building and embedding a human rights culture; challenging and seeking to prevent human rights abuses; and ensuring organisational effectiveness and efficiency.³² The NIHRC must keep the adequacy and effectiveness of law and practice in Northern Ireland under review³³, and was given the power under the 1998 Act to make recommendations for improvement in terms of its own functions and powers within two years of establishment.³⁴ The Commission has the power to advise the Secretary of State, Executive, and Assembly on human rights matters, of its own initiative or after receiving a request.³⁵ The Commission can provide assistance to individuals, and bring legal proceedings.³⁶ It is required to promote understanding and awareness of human rights and to that end can develop research and educational activities.³⁷ The Secretary of State was also placed under an obligation to request 'Bill of Rights' advice from the Commission.³⁸ The Commission's powers of investigation were subject to considerable discussion, and were amended.³⁹ The NIHRC has the power to investigate places of detention, and many predictable restrictions are placed around this.⁴⁰

Commissioners, including the Chief Commissioner, are appointed by the Secretary of State who must: 'In making appointments under this section... as far as practicable secure that the Commissioners, as a group, are representative of the community in Northern Ireland'.⁴¹ The number of Commissioners is not prescribed. The Commission is permitted to employ its own staff subject to the approval of the Secretary of State.⁴² The Commission's Annual Report is delivered to the Secretary of State, who is required to lay a copy before Parliament.⁴³ The Chief Commissioner will not be appointed for more than five years at a time, and Commissioners for three years.⁴⁴

The Commission can employ staff, subject to the Secretary of State's approval⁴⁵, with budget allocation and accountability flowing in the same direction (to the Comptroller and Auditor General⁴⁶). A statement of accounts and report are laid before Parliament. The staff (21.3 FTE) are divided into three teams: Education and Information;

³² Northern Ireland Human Rights Commission, *Draft Strategic Plan 2011-2013* (NIHRC, 2010- 2011).

³³ Northern Ireland Act 1998, s. 69(1).

³⁴ Northern Ireland Act 1998, s. 69(2). See: NIHRC, *Report on the Commission's Effectiveness 1999-2001* (February 2001); and for the government response see: NIO, *The Government's Response to the NIHRC Review of Powers Recommendations* (May 2002).

³⁵ Northern Ireland Act 1998, s. 69.

³⁶ Northern Ireland Act 1998, s. 70.

³⁷ Northern Ireland Act 1998, s. 69(6).

³⁸ Northern Ireland 1998, s.69(7).

³⁹ By the Justice and Security Act 2007.

⁴⁰ Northern Ireland Act 1998, ss. 68 and 69.

⁴¹ Northern Ireland Act 1998, s. 68(3).

⁴² Northern Ireland Act, sch. 7, para. 4

⁴³ Northern Ireland Act sch. 7, para. 5.

⁴⁴ Northern Ireland Act 1998, sch. 7, para. 2.

⁴⁵ Northern Ireland Act 1998, sch. 7, para. 4.

⁴⁶ Northern Ireland Act 1998, sch. 7.

Legal, Policy and Research; and Corporate Services. The annual budget (£1.69m - £1m of which is spent on staffing and commissioners) of the Commission has recently been subjected to a reduction over a four-year period of 25%.

2. Equality Commission for Northern Ireland

The ECNI was established by the Northern Ireland Act 1998 (an Act of the Westminster Parliament), and launched on 1 October 1999. The Act dissolved the Fair Employment Commission for Northern Ireland, the Equal Opportunities Commission (NI), the Commission for Racial Equality (NI) and the Northern Ireland Disability Council, their functions now being undertaken by the ECNI. The ECNI was thus established as a merger of existing equality bodies, with a view to ensuring a more coherent and integrated approach. In addition to the existing functions and powers, the ECNI acquired substantial new responsibilities with respect to section 75 of the Act (new positive duties on the public sector in relation to equality and good relations).

The ECNI describes its vision ‘of Northern Ireland as a shared, integrated and inclusive place, a society where difference is respected and valued, based on equality and fairness for the entire community’.⁴⁷ Its mission is stated to be: ‘To advance equality, promote equality of opportunity, encourage good relations and challenge discrimination through promotion, advice and enforcement’.⁴⁸ The work of the Commission includes promoting affirmative/positive action, overseeing relevant statutory duties, as well as keeping legislation under review. It produces a corporate plan every three years.⁴⁹

The duties and powers of the ECNI are an amalgamation of the pre-existing regimes, and the powers and duties legislated for since its establishment. The absence of a Single Equality Act in Northern Ireland makes for a complex legal and policy picture.⁵⁰ The ECNI powers include: advice and assistance to complainants; investigation and enforcement; promotion of equality and good relations; research; overseeing the public sector statutory duty (S75); and reviewing equality legislation.⁵¹ The scope, scale and extent of these powers are considerable (but also familiar in terms of other similarly placed institutions), so a few themes will be drawn out here.

First, as no harmonisation has taken place, powers differ depending on the equality ground, for example, areas where a formal investigation may be undertaken. An understanding of the law surrounding each area is thus required before assessing the Commission’s duties and powers. Second, the fair employment regime in Northern Ireland consists of several distinctive features, with respect to equality in the composition of workforces and the requirements on employers. Third, the positive duties placed on public authorities by S75 are overseen by the Commission (including the option of investigation), and while the general public law remedy of judicial review cannot be ruled

⁴⁷ <http://www.equalityni.org/>

⁴⁸ <http://www.equalityni.org/>

⁴⁹ Equality Commission for Northern Ireland, *Corporate Plan 2009-2012* (ECNI, 2009).

⁵⁰ The extensive legislative framework can be found at: <http://www.equalityni.org/>

⁵¹ <http://www.equalityni.org/>

out (and has been used), the regime appears to envisage ultimate enforcement resting with the Secretary of State for Northern Ireland.

Commissioners, including the Chief Commissioner, are appointed by the Secretary of State, who must: ‘In making appointments under this section... as far as practicable secure that the Commissioners, as a group, are representative of the community in Northern Ireland’.⁵² There is provision for dismissal of a Commissioner, including, ‘that he has without reasonable excuse failed to discharge his functions for a continuous period of three months beginning not earlier than six months before the day of dismissal’.⁵³

The ECNI must have between 14 and 20 Commissioners.⁵⁴ The Chief Commissioner cannot be appointed for more than five years at a time, and Commissioners three years.⁵⁵ The Commissioners are appointed by the Secretary of State.⁵⁶ The ECNI meets in plenary each month, and its Committees include an Audit and Risk Committee. The Commission’s budget plans and expenditure against targets are approved and monitored by the (devolved) Northern Ireland Executive’s Office of the First Minister/deputy First Minister (OFMdfM). Its Annual Report is provided to the Department, laid before the Northern Ireland Assembly, and a copy sent to the Secretary of State.⁵⁷ The annual budget from government is £7.3m.⁵⁸ The Commission may appoint its own staff, subject to approval on numbers and terms and conditions from OFMdfM and the Department of Finance and Personnel.⁵⁹ The Commission employs over 140 staff. Financial accountability is through OFMdfM and the Comptroller and Auditor General, and reports must be laid before the Assembly.⁶⁰

3. Equality and Human Rights Commission (Great Britain)

The EHRC was established by the Equality Act 2006 (an Act of the Westminster Parliament), and launched on 1 October 2007. Its creation led to the dissolution of the Equal Opportunities Commission, the Commission for Racial Equality (which had a race equality and good relations remit) and the Disability Rights Commission. Like all the other such bodies in the UK, it was created during the term of office of a Labour government at Westminster. Its work covers England, Wales and Scotland, with devolution competencies acknowledged and respected (for example, it is not empowered to take human rights action where the Scottish Parliament has legislative competence⁶¹). The overarching political context was the decision to integrate several existing equality bodies, combined with a commitment to an institutional home for equality on grounds of age, religion and belief and sexual orientation (driven by an EU Directive requiring

⁵² Northern Ireland Act 1998, s. 73.

⁵³ Northern Ireland Act 1998, sch. 8, para. 2(4).

⁵⁴ Northern Ireland Act 1998, s. 73.

⁵⁵ Northern Ireland Act 1998, sch. 8, para. 2.

⁵⁶ Above n. 54.

⁵⁷ Above n. 53.

⁵⁸ Northern Ireland Assembly Briefing Document, p. 3; ECNI, *Annual Report and Accounts 2009-2010* (ECNI, 2010).

⁵⁹ Northern Ireland Act 1998, sch. 8, para. 4.

⁶⁰ Northern Ireland Act 1998, sch. 8, para.7.

⁶¹ Equality Act, s. 7.

legislative protection from discrimination on those grounds), and for human rights (for which no statutory body had been established following enactment of the 1998 Human Rights Act). The objective was to produce a more coordinated, effective and efficient approach to equality, human rights and good relations by bringing these bodies within one institutional setting. The new Commission works with an extensive body of law, policy and practice, including the recently enacted Equality Act 2010.

The Equality Act 2006 places a general duty on the EHRC to support the development of a society in which there is respect for several significant principles, including the protection of individual human rights, the dignity and worth of individuals, the equal opportunity to participate in society, and mutual respect between groups based on valuing diversity, human rights and equality.⁶² The Commission must consult and prepare a strategic plan, and review it at least every three years.⁶³ The plan is submitted to the Minister who then must lay a copy before Parliament.⁶⁴ The Commission is clearly directed to focus on a timetable and priorities attached to it, as well as the principles to be used in agreeing these priorities.⁶⁵ The first Strategic Plan was published in 2009 and set out the organisation's principles and priorities, including how it would work with others and what it would deliver.⁶⁶

The EHRC's role and remit initially included seeking a new Equality Act, which was achieved in 2010. It also works to support individuals through specific interventions and cases, runs a grant programme, offers advice and guidance, promotes best practice approaches, and has to produce a triennial review of the state of human rights and equality.⁶⁷ The first such report was published in October 2010, entitled *How Fair is Britain?*⁶⁸

There are several express equality and diversity duties placed on the EHRC, in addition to the general duty on a particular form of society.⁶⁹ These are duties of promotion, encouragement, enforcement and 'working towards'.⁷⁰ This includes: enforcing the equality enactments, and promoting equality of opportunity, understanding and encouraging good practice on equality and diversity, and promoting awareness and understanding of the rights under the equality enactments.⁷¹

In relation to equality of opportunity between disabled persons and others, the Commission is given the power to promote favourable treatment.⁷² The legislation lists obligations which rest on the Commission with respect to members of groups ('group' is

⁶² Equality Act 2006, s. 3.

⁶³ Equality Act, s. 4.

⁶⁴ Equality Act 2006, s. 4(4).

⁶⁵ Equality Act 2006, s. 4(1).

⁶⁶ Equality and Human Rights Commission, *Our Strategic Plan 2009-2012* (2009, EHRC).

⁶⁷ *Ibid.*

⁶⁸ Equality and Human Rights Commission, *How Fair is Britain? The First Triennial Review* (2010, EHRC).

⁶⁹ Equality Act 2006, s. 8.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Equality Act 2006, s. 8(3).

defined in the legislation).⁷³ These include the importance of good relations, as well as encouraging good practice.⁷⁴

On human rights, the Commission has responsibilities of promotion and encouragement, including again raising awareness of human rights and supporting good practice.⁷⁵ In undertaking its equality and diversity duties the Commission is required to take account of relevant human rights.⁷⁶ It is tasked with monitoring the ‘effectiveness of the equality and human rights enactments’⁷⁷, and has the power to advise government and make recommendations on law and policy reform.⁷⁸ The legislation is explicit in terms of monitoring outcomes measured against indicators.⁷⁹ The Commission has information and advice giving powers⁸⁰, and may issue codes of practice.⁸¹ It is empowered to conduct inquiries which relate to any of its duties⁸², as well as investigations.⁸³ An investigation can only be triggered (under the Equality Act 2010) if the Commission suspects (for example, as the result of an inquiry) that a person has committed an unlawful act.⁸⁴ In addition to the potential involvement of courts and tribunals, the Commission has the power to conclude action plans and agreements in this context, to ensure any unlawful action does not continue.⁸⁵ It may provide legal assistance to individuals⁸⁶, and has the capacity to intervene or institute judicial review proceedings, including in its own name. It can also arrange for the provision of conciliation services⁸⁷ and has a grant awarding role.⁸⁸ The public sector duties can be assessed by the Commission, and a compliance notice issued if a person has failed to comply with the equality duty.⁸⁹

The EHRC is a non-departmental public body (NDPB). The sponsoring department is the Government Equalities Office, now situated within the Home Office.⁹⁰ The Commission consists of not less than 10 or more than 15 Commissioners.⁹¹ The Chief Executive is an

⁷³ Equality Act 2006, s. 10, and s. 10(2).

⁷⁴ Above n.69.

⁷⁵ Equality Act 2006, s. 9.

⁷⁶ Equality Act 2006, s. 9(4).

⁷⁷ Equality Act 2006, s. 11(1).

⁷⁸ Equality Act 2006, s. 11(2).

⁷⁹ Equality Act 2006, s. 12.

⁸⁰ Equality Act 2006, s. 13.

⁸¹ Equality Act 2006, s. 14 (not relating to human rights).

⁸² Equality Act 2006, s. 16, Sch. 2.

⁸³ Equality Act 2006, s. 20, Sch. 2. (in relation to its inquiry powers).

⁸⁴ Equality Act 2006, s. 20(2).

⁸⁵ Equality Act 2006, ss. 22 and 23 (in relation to the Equality Act).

⁸⁶ Equality Act 2006, ss. 28 and 29 (in relation to the Equality Act).

⁸⁷ Equality Act 2006, s. 27 (in relation to equality – goods and services/airline accessibility).

⁸⁸ Equality Act 2006, s. 17.

⁸⁹ Equality Act 2006, ss. 31 and 32.

⁹⁰ <http://www.equalityhumanrights.com/>. On the GEO see: <http://www.equalities.gov.uk/>, ‘GEO is a small policy Department employing just over 100 staff, which has responsibility within Government for equality strategy and legislation. GEO takes the lead on issues relating to women, sexual orientation and transgender equality matters. On May 12th 2010, the Prime Minister appointed The Rt Hon Theresa May MP as Minister for Women and Equalities in addition to her appointment as Home Secretary. Lynne Featherstone MP is the Parliamentary Under Secretary of State (Minister for Equalities).

⁹¹ Equality Act 2006, sch.1, para.1.

ex officio Commissioner.⁹² The Minister appoints one person as Chair and one or more persons as Deputy Chair.⁹³ A Commissioner is appointed for not less than two or more than five years, with the possibility of re-appointment. The Minister must think that the individual has experience or knowledge of human rights and non-discrimination, and have regard to the desirability of the Commissioners together having this ‘expertise’. The law provides plenty of scope for the appointment of ‘non-expert’ Commissioners.⁹⁴ The terms of appointment are specified by the Minister, the Chair having the role of presiding over meetings of the Commission.⁹⁵ The Minister has the power to dismiss a Commissioner ‘who is, in the opinion of the Minister, unable, unfit, or unwilling to perform his functions’.⁹⁶

The Commission operates in Britain, but not Northern Ireland. The Commission’s strategic plan must be sent to the Minister, as must its Annual Report, who will lay these before Parliament.⁹⁷ The following provision regarding the Commission’s statutory independence from government merits full citation:

‘(3) The Minister shall have regard to the desirability of ensuring that the Commission is under as few constraints as reasonably possible in determining—
 (a) its activities,
 (b) its timetables, and
 (c) its priorities.’⁹⁸

The Commission can establish Committees, but must ensure that the Chair of each Committee is a Commissioner.⁹⁹ It must establish a Scotland Committee and a Wales Committee, with a Commissioner Chair for each.¹⁰⁰ These have advisory and consultative functions in relation to the Commission’s work in Scotland and Wales. It also is required to create a Disability Committee with an extensive range of delegated powers, with provision for formal review after five years.¹⁰¹ The Commission is required to ensure that these Committees have sufficient resources to exercise their functions.

The Commission is empowered to regulate its own proceedings¹⁰² and to appoint its own staff, with conditions attached.¹⁰³ The Minister’s consent is required for the appointment of the Chief Executive, and ultimately the number of staff and their terms and conditions.¹⁰⁴ The Commission has employed over 400 staff, now subject to extensive cuts. The

⁹² Equality Act 2006, sch.1, para. 1(2).

⁹³ Equality Act 2006, sch. 1, para. 4.

⁹⁴ Equality Act 2006, sch. 1 Part 1, para. 2; Equality Act 2006, sch. 1, para. 3(2) and (3).

⁹⁵ Equality Act 2006, sch. 1, para. 4(2).

⁹⁶ Equality Act 2006, sch. 1, Part 1, para. 3.

⁹⁷ Equality Act 2006, s. 4(4); and sch. 2, para. 32.

⁹⁸ Equality Act 2006, sch. 1, para. 42(3).

⁹⁹ Equality Act 2006, sch. 1, para. 12(3).

¹⁰⁰ Equality Act 2006, sch.1, paras 16-31.

¹⁰¹ Equality Act 2006, sch. 1 Part 5.

¹⁰² Equality Act 2006, part 2, para. 5.

¹⁰³ Equality Act 2006, part 2, para. 7.

¹⁰⁴ *Ibid.*

Commission's Annual Budget is set by government (approved by Parliament) and was at one stage £70m (2009/10) but has since been subject to a substantial reduction. The Minister is responsible for determining the remuneration of the Chair, Deputy Chair and Commissioners as well as travel, pension, allowances or gratuities.¹⁰⁵

The Commission is required to keep proper accounting records, and must prepare a statement of accounts for each financial year and send this to the Minister and the Comptroller and Auditor General.¹⁰⁶ The latter is required to examine and certify the accounts, with the statement and report laid before Parliament.¹⁰⁷

4. Scottish Human Rights Commission

The SHRC was established by the Scottish Commission for Human Rights Act 2006 (an Act of the Scottish Parliament), and launched on UN Human Rights Day, 10th December 2008. Its establishment followed an extensive debate in Scotland, in an expressly devolved legislative context.

The Commission describes its mission as 'to promote and protect everyone's human rights – civil, political, economic, social and cultural – in contemporary Scotland'.¹⁰⁸ Its strategic plan for 2008-2012 lists four goals: 'to build upon an inherent sense of fairness that already exists in Scotland and develop a sustainable human rights culture'; 'to ensure human rights is at the heart of law, policy and practice in Scotland'; 'to implement effective governance within SHRC'; and 'to meet our international responsibilities'.¹⁰⁹ The plan makes every effort to connect its work to international human rights standards.

The SHRC is under a general duty to promote human rights and 'in particular, to encourage best practice in relation to human rights'.¹¹⁰ 'Human rights' refers to rights in the European Convention on Human Rights as well as to those in any relevant treaty that the UK has ratified.¹¹¹ In deciding upon what action to take, the Commission must have regard to the 'rights of those groups in society whose human rights are not, in the Commission's opinion, otherwise being sufficiently promoted'.¹¹² The Commission is empowered to undertake information, guidance, research, education and training roles in relation to its general duty.¹¹³ It can review law and practice with a view to recommendations for change¹¹⁴, but it has no power to assist with claims or with legal proceedings.¹¹⁵ It can intervene in civil proceedings and make submissions¹¹⁶ and has

¹⁰⁵ Equality Act 2006, Part 3.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ Scottish Human Rights Commission, *Strategic Plan 2008-2012* (SHRC, 2008).

¹⁰⁹ *Ibid.* p.7.

¹¹⁰ Scottish Commission for Human Rights Act 2006, s. 2(1).

¹¹¹ Scottish Commission for Human Rights Act 2006, s.2(2).

¹¹² Scottish Commission for Human Rights Act 2006, s. 2(4).

¹¹³ Scottish Commission for Human Rights Act 2006, s. 3.

¹¹⁴ Scottish Human Rights Commission Act 2006, s. 4.

¹¹⁵ Scottish Human Rights Commission Act 2006, s. 6.

¹¹⁶ Scottish Human Rights Commission Act 2006, s. 14.

the power to conduct an inquiry into Scottish public authorities although not to UK authorities in Scotland (such as an immigration detention centre).¹¹⁷ Powers of entry and inspection in relation to places of detention that it is permitted to examine are included.¹¹⁸

The Chair of the Commission is appointed by Her Majesty on the nomination of the Scottish Parliament¹¹⁹, with other members appointed by the Parliament.¹²⁰ The Commission presents its Strategic Plan to the Scottish Parliament¹²¹ The following section merits citation in full:

‘(1) The Commission, in the exercise of its functions, is not to be subject to the direction or control of—
 (a) any member of the Parliament,
 (b) any member of the Scottish Executive, or
 (c) the Parliamentary corporation.’¹²²

However, any member may be removed from office by the Scottish Parliament for a range of listed reasons, including that the Parliament has lost confidence in the member (a special voting procedure applies¹²³). The legislation explicitly states that the Commission can do anything connected to the purpose of the exercise of its functions.¹²⁴ The Commission may appoint its own staff, with numbers and terms and conditions approved by the Parliament.¹²⁵

The SHRC consists of a Chair and up to 4 other members.¹²⁶ Each member is appointed for a single term of eight years and may not be re-appointed.¹²⁷ The Commission met nine times in 2010. The Scottish Parliament is required to pay the costs of the Commission and does so through direct funding from the Scottish Budget Act each year.¹²⁸ Financial accountability is through the Parliament and the Auditor General for Scotland.¹²⁹ For example, the Parliamentary corporation must designate the accountable officer (currently the Chair), and the Commission must seek the approval of the Parliamentary corporation for its budget.¹³⁰ The Commission has an annual budget of £960,000, a reduction on previous years. In addition to the Chair and the Commissioners, the Commission has 9.4 FTE staff, divided into three teams: Legal and Strategy; Communication and Outreach; and Business Management.

¹¹⁷ Scottish Human Rights Commission Act 2006, s. 8 and for the relevant restrictions see s 9.

¹¹⁸ Scottish Commission for Human Rights Act 2006, s. 11.

¹¹⁹ Scottish Commission for Human Rights Act 2006, sch. 1, para. 1

¹²⁰ Scottish Commission for Human Rights Act 2006, sch. 1, para. 1.

¹²¹ Scottish Commission for Human Rights Act 2006, s. 7.

¹²² Scottish Commission for Human Rights Act 2006, sch. 1, para. 3.

¹²³ Scottish Commission for Human Rights Act 2006, sch. 1, para. 5.

¹²⁴ Scottish Commission for Human Rights Act 2006, sch. 1, para. 8(1).

¹²⁵ Scottish Commission for Human Rights Act 2006, sch. 1, para. 11.

¹²⁶ Scottish Commission for Human Rights Act 2006, sch. 1, para. 1.

¹²⁷ Scottish Commission for Human Rights Act 2006, sch. 1, amended by Scottish Parliamentary Commissions and Commissioners etc Act 2010, sch 6.

¹²⁸ Scottish Commission for Human Rights Act 2006, sch 1, para 14

¹²⁹ Scottish Commission for Human Rights Act 2006, s. 15.

¹³⁰ Scottish Commission for Human Rights Act 2006, ss 13-14.

5. Irish Human Rights Commission

The IHRC was established by the Human Rights Commission Act 2000 (an Act of the Irish Parliament, the Oireachtas), as amended by the Human Rights Commission Act 2001. There had been discussion for some time in Ireland (including a Constitution Review Group recommendation in 1996 that such an institution be established), but as with the NIHRC and ECNI the political dynamic for its creation can be directly traced to the Good Friday Agreement 1998, and the commitments undertaken there by the Irish Government. The objective was to create a national human rights institution that would focus on the domestic protection and promotion of human rights. The surrounding context includes the Irish Constitution, with its human rights guarantees, and legislation such as the European Convention on Human Rights Act 2003. The Commission was formally launched in July 2001, following extended discussion of its composition, and disagreement over the initial appointments.

The role of the IHRC is to promote and protect the human rights of everyone in Ireland. The Commission is given a remit which includes the rights, liberties and freedoms in the Irish Constitution as well as international human rights instruments. The priorities of the Commission are reflected in its current strategic plan.¹³¹ The plan states: ‘The mission of the IHRC is to promote and sustain the realisation, protection and awareness of human rights, equally, for all, in law, in policy, and practice’.¹³²

The IHRC is required to keep the adequacy and effectiveness of law under review and, if requested, to provide its views on legislative proposals.¹³³ It may make recommendations to government on improving human rights protection in Ireland.¹³⁴ It has the power to conduct inquiries¹³⁵ and to provide legal assistance to individuals, including legal advice and representation.¹³⁶ It is also able to institute legal proceedings ‘in respect of any matter concerning the human rights of any person or class of persons’, with rights linked to domestic provisions.¹³⁷

The Human Rights Commission Act 2000 provides: ‘The Commission shall, subject to the provisions of this Act, be independent in the performance of its functions’.¹³⁸ The legislation also makes explicit that it shall have all such powers that are necessary or incidental for the performance of its functions.¹³⁹ The Commission is appointed by the Government, the legislation stating that a person shall not be appointed unless ‘suitably qualified for such an appointment’.¹⁴⁰ Special provision is made in relation to

¹³¹ Irish Human Rights Commission, *Promoting and Protecting Human Rights in Ireland, 2007- 2011* (IHRC, 2007). The first strategic plan was published in November 2003.

¹³² *Ibid.*

¹³³ Human Rights Commission Act 2000, s. 8.

¹³⁴ Human Rights Commission Act 2000, s. 8(d).

¹³⁵ Human Rights Commission Act 2000, s. 8(f), and s. 9.

¹³⁶ Human Rights Commission Act 2000, s. 10.

¹³⁷ Human Rights Commission Act 2000, s. 11.

¹³⁸ Human Rights Commission Act 2000, s. 4(2).

¹³⁹ Human Rights Commission Act 2000, s. 4(4).

¹⁴⁰ Human Rights Commission Act 2000, s. 5(4).

judicial appointments to the position of President of the Commission.¹⁴¹ The terms and conditions of appointment are provided by the Government¹⁴² and the ‘Government, in making any appointments under this section, shall have regard to the need to ensure that the members of the Commission broadly reflect the nature of Irish society’.¹⁴³

The Commission must consist of a President and not more than 14 members, with gender balance.¹⁴⁴ The term of office of a Commission member may not exceed five years, with eligibility for re-appointment.¹⁴⁵ The Commission meets once a month, and meets with the NIHRC on the all-Ireland Joint Committee for Human Rights.

The Commission may appoint a Chief Executive, with terms and conditions approved by the Minister (the sponsoring department currently being the Department of Justice and Equality), and the consent of the Minister of Finance.¹⁴⁶ The responsibilities of the Chief Executive are to manage the staff, administration and business of the Commission¹⁴⁷, with responsibility to the Commission for the performance of these functions.¹⁴⁸ The CEO is responsible for reporting to the Public Accounts Committee, and is expressly prohibited when so reporting from expressing an opinion on government policy or a Minister in relation to a policy.¹⁴⁹

The Minister, with the consent of the Minister for Finance, funds the Commission from the departmental budget¹⁵⁰ and, with the consent of the Minister for Finance, is responsible for approving the accounts of the Commission.¹⁵¹ Accounts must be submitted to the Comptroller and Auditor General, with this report provided to the Minister and then laid before the Oireachtas.¹⁵²

The Commission currently has provision for 17 staff (7 posts are frozen, due to cuts, and 3 posts are funded by a philanthropic organization) with two Directors overseeing Enquiries, Legal Services and Administration; and Research Policy and Promotion. In recent years, the budget of the Commission has been cut by around 32%. In 2009, the Commission had an annual budget of approximately €1.5m (compared with €2.3m in 2008 and €1.3m in 2002).

6. Equality Authority, Ireland

The Equality Authority (EA) was established in 1999 under the Employment Equality Act 1999 (an Act of the Oireachtas). It replaced the Employment Equality Agency,

¹⁴¹ Human Rights Commission Act 2000, s. 5(5) and (6).

¹⁴² Human Rights Commission Act 2000, s. 5(8).

¹⁴³ Human Rights Commission Act, s.4(12).

¹⁴⁴ Human Rights Commission Act 2000 (as amended by 2001 Act), s. 5.

¹⁴⁵ Human Rights Commission Act 2000, s. 4(8).

¹⁴⁶ Human Rights Commission Act 2000, s.12(2).

¹⁴⁷ Human Rights Commission Act 2000, s. 13.

¹⁴⁸ Human Rights Commission Act 2000, 13(2).

¹⁴⁹ Human Rights Commission Act 2000, s. 14(2).

¹⁵⁰ Human Rights Commission Act 2000, s. 22.

¹⁵¹ Human Rights Commission Act 2000, s. 16.

¹⁵² Human Rights Commission Act 2000, s. 16.

established in 1977. The functions and powers of the EA have subsequently been amended by a series of legislative measures. The formal context was the aim of raising awareness of equality law and policy, building an evidence base, being proactive with, for example, employers, as well as ensuring enhanced access at the domestic level to anti-discrimination law. The political origins can be traced to the 1980s, with the work of the Labour Party on an Equal Status Bill gaining wider support, and leading to the emergence of a general consensus on the need for such a new institution. The establishment of the separate Equality Tribunal should also be noted as part of both the context and the development of equality law in Ireland.¹⁵³

The EA is required to submit a three year plan for approval to the Minister, addressing objectives, outputs and strategies.¹⁵⁴ The latest strategic plan was published in 2009.¹⁵⁵ The document describes the authority's mission as 'to promote equality of opportunity and to eliminate discrimination'.¹⁵⁶ Its role and remit are set out in the legislative framework and include eliminating discrimination as provided in domestic law, and promoting equality of opportunity in, for example, the provision of goods and services, accommodation and education. It must also keep the relevant legislation under review.¹⁵⁷ One of its strategic goals is to achieve 'an effective and efficient Equality Authority'.¹⁵⁸

The EA may invite a business or groups of businesses to conduct an equality review (an audit and examination of the current situation, practices, procedures and other matters), or it can carry this out itself, and it may request that an equality action plan be prepared (a programmatic indication of change).¹⁵⁹ There is potential judicial enforcement of these provisions.¹⁶⁰ The EA may provide draft codes of practice if requested to do so by the Minister¹⁶¹, and research related to its functions.¹⁶² It may conduct an inquiry, and can be required to do so by the Minister.¹⁶³ Again, as with other bodies, these powers come with tailored procedural requirements¹⁶⁴, as well as the ability to issue non-discrimination notices.¹⁶⁵ The legislation also includes a number of offences in relation to inquiries, for example a failure to supply information.¹⁶⁶

The legislation makes provision for the establishment of a Director of Equality Investigations¹⁶⁷, to whom complaints of discrimination can be taken. The EA is also empowered to refer matters to the Director (for example, that discrimination or

¹⁵³ See www.equalitytribunal.ie

¹⁵⁴ Employment Equality Act 1998, s. 40.

¹⁵⁵ The Equality Authority, *Equality for all in a Time of Change: Strategic Plan 2009-2011* (2009, EA).

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ Employment Equality Act 1998, s. 69.

¹⁶⁰ Employment Equality Act 1998, s. 72.

¹⁶¹ Employment Equality Act 1998, s. 56.

¹⁶² Employment Equality Act 1998, s.57.

¹⁶³ Employment Equality Act 1998, s. 58.

¹⁶⁴ Employment Equality Act 1998, s. 59.

¹⁶⁵ Employment Equality Act 1998, ss. 62-65.

¹⁶⁶ Employment Equality Act 1998, s. 60.

¹⁶⁷ Employment Equality Act 1998, s. 75.

victimisation is being generally practiced against persons).¹⁶⁸ The legislation provides detailed provision for securing relevant information.¹⁶⁹

Members of the EA are appointed by the Minister.¹⁷⁰ The EA's strategic plan must also be submitted to and approved by the Minister, who must lay this before each House of the Oireachtas.¹⁷¹ The terms and conditions of the chair are set by the Minister, (with the consent of the Minister of Finance¹⁷²), and the Minister may remove the chair at any time for 'stated reasons',¹⁷³ conditions for which are provided.¹⁷⁴ Other members of the EA are appointed by the Minister, with provision for sectoral nomination.¹⁷⁵

The EA must consist of 12 members, at least five of whom should be male and five female.¹⁷⁶ The Chair and Vice-Chair are appointed for a period of not more than 4 years, with terms and conditions and remuneration determined by the Minister (with the consent of the Minister for Finance).¹⁷⁷ The EA is empowered to appoint Advisory Committees, and has six.¹⁷⁸ Provision is made for the appointment of a Chief Executive comparable to the Irish Human Rights Commission, with similar accountability and reporting arrangements (with the consent of the Minister required for appointment).¹⁷⁹ The Minister, after consultation with the EA and the approval of the Minister of Finance, is given power of appointment over all staff (currently 35 staff), including grades and number of staff in each grade.¹⁸⁰ The auditing and accounting arrangements are similar to the IHRC.¹⁸¹ The EA has experienced significant budget cuts in recent years, the 2009 Budget reducing its income by 43%: €5,897,000 to €3,333,000.

5. COMMONALITY AND CONTRASTS

It is worth drawing out some commonalities and contrasts from the legal framework sketched above.

Only two of the bodies could be said to be entirely 'new' entities at the time of their creation (SHRC and IHRC). The NIHRC followed on from SACHR, the EA replaced the Employment Equality Agency, and the EHRC and ECNI are primarily the results of mergers. There was therefore much existing experience to draw on in terms of practical lessons learned, but also the challenges associated with merger. Even the 'new' commissions were potentially able to benefit from the experiences of other bodies nationally and internationally.

¹⁶⁸ Employment Equality Act 1998, s. 85.

¹⁶⁹ Employment Equality Act 1998, ss. 94-97.

¹⁷⁰ Employment Equality Act 1998, s. 41.

¹⁷¹ Employment Equality Act 1998, s. 40.

¹⁷² Employment Equality Act 1998, s. 42.

¹⁷³ Employment Equality Act 1998, s. 42(4).

¹⁷⁴ Employment Equality Act 1998, s. 43(3), including that she should be ordinarily resident in the state.

¹⁷⁵ Employment Equality Act 1998, s. 44.

¹⁷⁶ Employment Equality Act 1998, s. 41.

¹⁷⁷ Employment Equality Act 1998, s. 42.

¹⁷⁸ Employment Equality Act 1998, s. 48.

¹⁷⁹ Employment Equality Act 1998, s. 49-50.

¹⁸⁰ Employment Equality Act 1998, s. 51.

¹⁸¹ Employment Equality Act 1998, ss. 53-55.

It may be worth noting on political context that the political parties that led the legislative process that resulted in the creation of these bodies are now, without exception no longer governing parties (in the UK, the Labour Party was replaced by a Conservative-Liberal Democrat Coalition in 2010; in Scotland, the Liberal-Labour coalition that adopted the 2006 Act has been replaced by the Scottish National Party; in Ireland the Fianna Fail led government was in 2011 replaced by a Fine Gael-Labour Party Coalition, and in Northern Ireland the dominant partners in the power-sharing administration – the SDLP and UUP – have been steadily overtaken by Sinn Fein and the DUP).

The SHRC is the only Commission not created by the ‘primary legislature’ in the state (it was established by the devolved Scottish Parliament). In the UK, this potentially has legal and other implications that remain significant. The majority of the bodies (four of six) are accountable to a Minister located again within this legislature (Westminster Parliament and Oireachtas). The ECNI and SHRC are accountable in the devolved setting (OFMdfM and the Scottish Parliament) – with the ECNI in the intriguing position that appointments of the Chief Commissioner and Commissioners are still made by the Secretary of State for Northern Ireland.

All the bodies have ‘boards’ of commissioners appointed for varying and fixed terms, with the Chair usually a full-time appointment. The requirements relating to composition of commissioners range from ‘representative of the community’ in relation to the NIHRC and ECNI, to ‘gender balance’ for the IHRC and EA.

The majority of bodies (with the exception of the Scottish HRC) have budgets determined by the relevant Minister and sponsoring department and executive and all six have been impacted by the current budgetary context (see Appendix 2).

All six share a range of functions on promotion, advice, investigations, inquiries and legal proceedings and the provision of assistance. Although details differ on the scope of each (and there is disagreement on how acceptable the limits are) for the majority of bodies their remit, role, functions and powers range widely and vary primarily in degree. For example, the equality remits tend to be accompanied by more robust enforcement mechanisms.

6. FACTORS IMPACTING ON THE OPERATION OF THE COMMISSIONS

1. Establishment and Context

The first question we addressed is whether the context in which the body was established, and the context in which it has operated since, have had a significant influence on the extent of its ability to deliver on its mandate.

The international and domestic context together with a commission’s institutional history, necessarily impact on its remit, powers, accountability mechanisms and structure. It is also the environment in which it operates in its early days. The question is how determinative that origin has been of its later operation. Questions for

consideration range from the extent to which the international context and the Paris Principles in particular impacted on its powers, independence and accountability mechanisms, to the impact of establishment through a merger of precursor bodies. In subsequent years, has the external context largely remained as it was when the body was established or been transformed in the intervening period? Are there key international and domestic factors which have been formative, and have the commissions been able to influence the environment in which they are operating or proved able to deliver despite its constraints?

In the seminar discussion and interviews we conducted there was some consistency across the jurisdictions in the themes that emerged. The first was that the domestic political context in which a commission is established is highly significant in determining the particular remit, powers and structure of the body. It is also significant in the priority government and stakeholders attach to the differing dimensions of its mandate and expectations to which the commission responds: the NIHRC, with its mandate in the aftermath of the Good Friday Agreement to advise on a Bill of Rights, for instance, expected to focus on that potential future provision rather than exclusively on reforms that the existing (but imperfect) Human Rights Act could deliver. The prior existence of, and political support for, separate equality bodies was a factor in the political context for merged bodies, as for the EHRC, where supporters of the relatively newly established Disability Rights Commission were keen to ensure that people with disabilities continued to control commission policy in their field and secured a statutory disability committee within the EHRC with certain executive powers to that end.¹⁸²

In Northern Ireland, the context for both commissions was set by the Peace Process. Its historical legacy, devolution arrangements and prior institutional architecture resulted in two separate commissions with a-symmetric accountability mechanisms: for the NIHRC entirely to the Westminster government but for the ECNI to Northern Ireland's own Executive (although its Commissioners, counter-intuitively, are appointed by the Westminster government's Northern Ireland Minister). The Good Friday Agreement generated huge expectations for the new bodies, for ECNI compounded by the challenge of merging existing commissions and taking on additional responsibilities in relation to the new duty on the public sector to promote equality, S75. Both commissions faced the challenge that human rights and equality were, for many (particularly within the unionist community), perceived as part of a partisan, nationalist/republican, political agenda.

The Good Friday Agreement was also pivotal in Ireland's decision to establish its Human Rights Commission; albeit that a drive towards modernisation of Irish society and its institutions in that period provided a broader context (as it had for the earlier Equality Authority, giving it a strong popular, all-party mandate). For both Irish bodies, the advocacy of civil society was, as in other jurisdictions, a factor. In Scotland, the decision to enshrine human rights within the devolution settlement meant that the Scottish Executive and Parliament have arguably had a stronger sense of owning a human rights mandate than their counterparts elsewhere. The politics of the relationship between Scotland and the Westminster government, and tendency of Scottish nationalists in

¹⁸² Spencer, S (2008) 'Equality and Human Rights Commission: a decade in the making', *The Political Quarterly*, 79(1)

particular to emphasise Scotland's role on the international stage, has provided a supportive political environment for the Scottish Human Rights Commission's emphasis on UN human rights standards and institutions as the context in which it works.

International context

The need for governments to be seen to respect the Paris Principles was a factor in decisions on the mandate and governance of all of the bodies which have a human rights remit (and remains a factor, as evident in the UK Government's reference to them in current plans to reform the EHRC). In the establishment of the Scottish HRC there was direct engagement by senior UN representatives, contributing to the parliament's vision for the body as an institution set within an international context and informed by the Paris Principles to a greater extent than might otherwise have been the case. The lack of specificity in the Principles has however left each government considerable room for manoeuvre in determining the form that the body will take, a matter on which we found contrasting views. While some participants argued it was time to review the Paris Principles, others argued that they did not constrain governments willing to establish an effective body nor limit an ambitious NHRI delivering on a broader canvas. The European context has also been a factor: the requirement in EU law that discrimination law in member states be extended to cover age, religion and belief and sexual orientation was a key driver for the merger of the UK equality bodies, there being neither appetite nor resources to establish three further equality bodies. In that sense, establishing the EHRC was, in part, a pragmatic response to an external pressure.

A further factor can be the limited role played by a body that preceded the commission. The mandate of the Standing Advisory Commission on Human Rights in Northern Ireland, for instance, had not enabled it to play a sufficiently effective role nor to comply with the Paris Principles. In other circumstances, a merger could (in theory) be used by a government to remove an organisation seen to be too critical of government itself. Alternatively, as the Equality Authority in Ireland experienced, a severe budget cut could be used to the same effect.

Mergers

A second, dominant theme is the additional challenges which, in practice, new commissions face if established through the merger of existing bodies. Merger – whether characterized as dissolution and replacement or as the bringing together of existing bodies – brings tensions (internally and in external relations) that can prove divisive. As one participant who had lived through a merger put it:

‘The problem with ‘mergers’ as a process is that they cause competition to retain the features of the previous bodies, and this overwhelms thinking which has gone into the new one. Subsequently, those who move across, and the stakeholders of the previous bodies, look for evidence of the old body within the new, or make that their benchmark’.

If not well managed, merger can lead to a dilution of the good work of a predecessor body, reinforcing the concerns of those who resisted merger and failing to meet the expectations of those who supported it. Civil society groups may have expectations only

in relation to their own separate identities rather than in relation to the cross cutting mandate of the commission as a whole; a factor which can lead a commission, post-merger, to maintain separate staff units on issues such as disability which reflect that model. The merged bodies may have had little prior experience of working in partnership. Some may be less willing than others to merge (as was the case for the Commission for Racial Equality (CRE) prior to the EHRC), and hence less engaged in the long term planning and re-envisioning merger requires. There may also be very differing institutional cultures and staffing practices and staff and commissioner profiles: a stronger focus in equality bodies on personnel with experience as equality and diversity practitioners, for instance, relative to the emphasis in human rights commissions on those with legal expertise.

The EHRC in Scotland may have had a more conducive start than its counterpart in England, for instance, because the staff of the three commissions in Scotland had worked together prior to the merger; because of the smaller number of bodies with which it had to maintain working relationships (just 32 local authorities, for instance); and because the three commissions had for some time worked in partnership with NGOs within a coordinating group, so that positive, collective relationships were already established and there was less resistance to merger as a result.

The new body may inherit many of the staff of the previous commissions and lack resources to appoint staff with skills relating to new responsibilities, potentially leading to a skills mismatch. As one contributor to our study said of a merged body:

‘We did not determine skill sets. People locked themselves into the areas of their comfort zone. It was like repackaging three entities that dominate; new concepts, like age and sexual orientation, didn’t get a hearing. It was a continuation of the old, and of old bad habits’.

On the other hand, voluntary severance arrangements could leave a whole tier of management without any staff from the merged commissions, a gap in expertise sorely felt in the initial phase when the work of those commissions needed to continue as well as new directions to be set.

In the case of the EHRC, the inclusion of human rights was for government, in contrast to many of its counterparts abroad, an afterthought to the core business of creating a single equality body; a marginal position which has not yet been entirely overcome. Human rights was not its ‘default setting’ as one contributor put it. This had the consequence that its parent department in government is the Government Equalities Office (now in the Home Office), not the department responsible for human rights, the Ministry of Justice. Merger of the equality grounds within the EHRC, on the other hand, had proved the catalyst for securing harmonisation of equality legislation through the 2006 and 2010 Equality Acts, an untenable hierarchy of levels of protection for different sections of society being politically exposed by the juxtaposition of issues in one body.

The ECNI’s larger precursor commissions, the Fair Employment Commission (FEC) and Equal Opportunities Commission (EOC), had differing strategies and working practices,

in part reflecting their differing powers: in broad terms, the FEC having a significant monitoring role in relation to employment outcomes, with some focus on formal investigations and voluntary undertakings to deliver change in employment practices, relative to a stronger focus in the EOC on evidence based agenda setting to secure policy reform. It took some time to achieve read-across from the differing approaches to all equality strands, not least because of the retention of separate staff units, reflecting external expectations and the differing expertise of the staff themselves.

Operating environment

The third theme was that the external context – political, economic and demographic - has in all cases been a significant factor in the subsequent operation of the body: the political context, in the extent of support or opposition to its activity; and the economic context in setting constraints not only on the commissions' budgets but on those of the organisations on which they rely for delivery. Demographically two factors have dominated: the ageing of the population (and hence greater awareness of the need to address issues related to older people including age discrimination and social care) and the significant growth in the migrant population in all four jurisdictions over the past decade – although the latter appears to have had only limited impact on the commissions' focus.

In Northern Ireland, the commissions have faced high expectations of their transformative potential among some stakeholders but also a significant degree of scepticism, particularly but not exclusively among Unionist politicians, on the need for change and on the motivations of those who seek it. There is no political consensus on the goals at the heart of the work of either commission. It has not been possible, for instance, for the ECNI to secure approval from its government department, OFMdFM, for its corporate plan (2009-2011). Building public and political support for their work remains one of the commissions' greatest challenges. For the ECNI and the NIHRC, that political context consistently leads to challenge by elected representatives (and from time to time from among their own commissioners). Exercising its regulatory powers on a regular basis, the ECNI has to be acutely aware of the need to demonstrate that each step that it takes is within its statutory remit and powers, to avoid both political and legal challenge. This absorbs considerable staff time and can seem over cautious to supporters that would like to see it take a more ambitious approach.

The NIHRC's efforts over ten years to secure a Bill of Rights for Northern Ireland demonstrate the impact both of high expectations and of those political divides. In its day to day work it has from time to time been the subject of heated criticism and personal attack, so that its commissioners and staff have felt a gulf between the regard in which the Commission is held abroad and their treatment at home. The relationship with officials in the Northern Ireland office, in its early years, was difficult. In contrast, the Scottish Human Rights Commission has operated in a political environment with considerably greater consensus on its role. The political context of all of the commissions had accorded greater priority to addressing equality issues than broader human rights, evident in the resources and enforcement powers given to the equality bodies or to the equality dimension of combined institutions. The latter may reflect the concern of governments that enforcement action would be taken against their own decisions whereas equality law is targeted more broadly on employers and service providers across the private, public and

voluntary sectors.

There have been circumstances in which expectations that the political context *would* have an impact has proved unfounded: as in the expectation that developments in Ireland and Northern Ireland would be mutually reinforcing, pulling each other forwards because of the requirement of the parity principle in the Good Friday Agreement. That this has not happened may point to the importance of a commission working to retain the supportive elements of the context in which it was created (as well as the imperative of addressing lack of support in other respects), and the need for accountability mechanisms beyond those relating to the performance of the body itself.

Two of the commissions have related particularly strongly to the international context in which they work: the NIHRC and the Scottish HRC. International human rights standards and visible interest by UN and Council of Europe supervisory bodies have provided valuable legitimacy to the NIHRC's work when consistently challenged in Northern Ireland; arguably at times encouraging commission personnel to spend a little too much time abroad in its early years, where the Commission's experience is greatly valued. In Scotland, situating the HRC in an international context has matched the aspirations of those who want Scotland 'to be best in class' on the international scene, the Commission providing opportunities for Scotland to earn international recognition in the way that a Scottish office of a Britain (GB) wide body does not. As one contributor put it.:

'Whereas debates in London on a 'British Bill of Rights' might be said to be looking inwards and backwards to the magna carta, Scotland is looking to the rest of the world.'

Devolution also creates a sense that Scotland can do things differently from the way they have been done before and can look beyond the UK for inspiration. The fact that coalition government has been the norm (albeit not currently) has also made a difference – the commission finding effective support among minority parties such as the Greens that have leverage beyond their size.

While the context for the establishment of the commissions and their subsequent operation is thus highly significant ('if it wasn't for the Good Friday Agreement we would not have got the ECHR Act in Ireland in 2003'), many of those consulted nevertheless argued that it is not determinant. Commissions were not only influenced by the context in which they were operating but had the capacity to shape that context in some respects, including public expectations, the level of political and public support they could attract, and how well they manage a merger process. A single catalyzing event, such as the racist murder of Stephen Lawrence in London (which preceded strengthening of race equality legislation), or a change in government, could provide an unexpected opportunity to secure policy change if a commission were strategic in its response (although events can also set off a negative discourse on an issue from which a commission can struggle to emerge).

2. Role and Remit

In relation to the remit and roles of the commissions, a key question was whether, in those bodies that did embrace both equality and a broader human rights remit, this had proved an

effective approach. Wherever the institutional boundaries are drawn, statutory responsibility for some human rights issues nevertheless remains separate, in Children's Commissioners for instance, raising issues of separate or overlapping remits and how these can be most effectively addressed. A related question was the implications of including within some of the commissions a responsibility for community relations.

Beyond the remit set down in statute, the question also arose whether the way in which the different bodies have *interpreted* their roles has been a significant factor in what they have been able to achieve, for instance in the extent to which they have seen human rights as a matter of compliance with international standards or more broadly in relation to promoting a human rights culture. Despite similar remits in many respects, were we seeing significant differences of emphasis, for instance between awareness raising and promotion of good practice on equality, on the one hand, and enforcement action on the other? Do these differences reflect differing perspectives on how to bring about social change, whether implicit in the decisions taken or through conscious articulation in a strategic planning process?

Regulatory role?

The UK government's recent proposals for reform of the EHRC suggested that it should 'return to' what is perceived as its core role as a regulatory body, prompting discussion among participants on the nature of that role and its relationship with the broader advisory and awareness raising responsibilities of an NHRI to develop a human rights culture. The latter role could come close to lobbying, which a regulatory body could not do: hence there could be a tension:

'Is it right to see them as social change bodies or regulatory bodies? Managing inequality is regulatory; promoting equality is making change happen'.

It was suggested that a regulatory body also had to be careful not to tread on the remit of another regulator (e.g., to challenge a policing practice that was being investigated by an Inspectorate), even if the matter raised human rights concerns; but that, where an issue did not touch on its role as a regulator, a commission had greater space in which to play an awareness-raising role. Regulation nevertheless included promotion of good practice – hence the boundaries of that role were open to debate. It should not be interpreted as a narrow, law enforcement remit. There was a fear that the proposed reform of the EHRC would not only curtail its promotional role but limit its flexibility to choose the approach most likely to deliver change. The term 'regulatory body' might thus be counter-productive in securing public support: it is unhelpful, one contributor suggested, for the EHRC 'to be treated by Ministers as a body setting gas prices'.¹⁸³ In Scotland, we were told, when the HRC consulted on its role,

'there was incredible good will when people saw how the Human Rights

¹⁸³ The regulatory functions of the EHRC are listed as subject to the relevant sections of the Legislative and Regulatory Reform Act 2006, see Legislative and Regulatory Reform (Regulatory Functions) Order 2007 SI No. 3544. The EHRC's enforcement and compliance policy (May 2009) makes express reference to the 2006 Act and the Hampton Review and Principles 2005. The Commission makes frequent use of the language of 'regulation' as a result.

Commission was approaching its work, on a culture of human rights, building capacity to put rights into practice – not acting as a regulator but as an enabler; empowering people and embedding human rights in mainstream accountability arrangements in the public sector’.

Institutional architecture

The institutional architecture of the commissions relative to other statutory bodies was seen as a significant factor at an operational level. There was, first of all, the devolution factor – creating complexity in designing institutions that take account of devolved and non devolved matters. In Scotland this had resulted in an institutional arrangement in which ‘nobody is sure what their remit is’ as every issue will have a devolved dimension. There is some scope for the bodies to resolve the areas of overlap by working together. The devolution of legislative responsibility for equality to Northern Ireland, resulting in differing legislation from the rest of the UK, had until recently led to stronger provision in Northern Ireland but now finds it lagging behind the provisions of the Equality Act 2010 in Britain: that single equality Act providing near parity of provisions across equality grounds at a time when political momentum for such a measure in Northern Ireland is no longer apparent.

A second key issue in Ireland, Northern Ireland and Scotland is the institutional separation between equality and human rights commissions, (reflecting the dominant influence in the development of equality and human rights law, in both countries, in domestic and international contexts respectively). Separating out these mandates into two bodies led to some overlapping responsibilities in practice and, in relation to one such separation we were told ‘it definitely causes confusion as to where people should turn to if they have a query or need support’. There are, moreover, significant synergies between related human rights and equality issues which cannot be fully explored, for instance when conducting an inquiry, where the commission’s mandate does not embrace both issues. Continuing separation inhibited an effective human rights remit, including the separation of children’s rights commissions and bodies addressing freedom of information, for instance, and those addressing poverty: ‘that fragmentation has been very damaging. If you take out one key dimension, society gets fragmented, and policy makers get fragmented’, as one participant put it. Another argued:

‘Equality is a human right. Might it not be conceivable that it is precisely through bringing together in a unitary situation, in a properly managed transition, that we could provide the leadership required to bring an end to the fragmentation?’.

The challenge that some merged equality and human rights bodies had experienced, nevertheless, reflected a number of factors including a lack of expertise on parts of its mandate (requiring commissioners, in some instances, to play a more extensive role to compensate), differing cultures and working practices in relation to equality and human rights law (within the commissions and externally), and poor management of the merger, rather than an inherent incompatibility. A key factor in relation to the EHRC, may be the asymmetry in the powers relating to the equality and human rights functions. As one participant told us:

‘the HRA is a very limited tool compared with the Equality Act in terms of achieving transformative change, hence the scope for legal intervention on human rights is limited by both the EHRC’s powers and by the scope of the HRA itself’.

The cost effectiveness of separate bodies must also be a consideration: could more not be achieved by merger (or could that simply result in governments taking the opportunity to provide less?).

Some argued against further mergers on the grounds that they were disruptive (‘mergers are horrible affairs’) and time consuming. The benefits of collaboration could be drawn from closer linkage between separate bodies without full integration. Moreover, the reality of differing approaches on equality and human rights did not lend itself to a smooth transition. There have been some decades of experience operating equality legislation but far less experience putting human rights into practice. There is still less experience in fitting equality and human rights together: when working with public bodies for instance commissions can find some mutual understanding on what they are expected to do in relation to equality but that is not the case on human rights practice, nor is there the same underlying acceptance that human rights are for the benefit of all: ‘Unifying a philosophical vision should be the first priority’. There are also historic, ongoing tensions and divisions within the constituency of support for human rights and equality that cannot be ignored:

‘Within civil society there are fears and ongoing perceptions of a hierarchy of priority, fear of agendas being diverted, fear that equality might be one minor value in wider human rights’.

In Northern Ireland in particular, although there have been instances where a single institution could have been more effective – in reporting with one voice to international human rights supervisory committees for instance – the levers which the NIHRC has been given to secure change are so different and limited relative to those of the ECNI that bringing human rights and equality objectives together within one set of working practices would in practice be a major challenge. The fact that the current arrangements are so closely linked to the Good Friday Agreement, including its intergovernmental dynamics, also raises the prospect of further provoking political tensions if merger were to be pursued. This would not prevent, however, further discussions in Northern Ireland about how practical co-operation could be enhanced and unhelpful ‘institutional rivalry’ avoided.

Community relations

Where commissions also had a remit covering community relations it had not been at the forefront of their work and, in relation to the EHRC, the question whether it should lose that responsibility is now on the agenda. It was argued that a human rights remit provides a framework for resolving conflicts of rights, and that good relations are the context in which an equality and human rights agenda could be furthered. In the context of the current backlash against multi-culturalism and against migrants, it could be counter-productive to disempower commissions from engaging in that debate. On the other hand, a broad mandate could dissipate focus and resources, reducing the impact of the body

overall.

In Northern Ireland, the experience had been that the responsibility of public bodies to promote good relations had been used explicitly to undermine their responsibility to promote equality (for instance to reject a proposal to house more Catholics in Protestant areas of Belfast on the grounds that it would be detrimental to good relations). The question was whether having an Equality Commission responsible for oversight of both dimensions (notwithstanding the existence of a separate Community Relations Council) was then important in enabling that tension to be resolved. If the commissions lost the good relations remit, in which the relevance to the whole community is perhaps most evident, is there a greater danger that their work would be seen to be a minority concern? A distinction should perhaps be drawn between having a broad remit, which is enabling, and capacity nevertheless to develop a focused agenda: a difference between what you can do, and must do.

More broadly among the commissions' differing roles it was argued that there is considerable scope to reassess priorities. Is it good use of staff time to be engaged for long periods in writing statutory codes of practice on the equality legislation for instance, or should that be a government responsibility? In each jurisdiction, with the exception of Scotland, there had been limited engagement by the legislature in the way in which the commissions had interpreted their remit. The Joint Committee on Human Rights (JCHR) in the UK Parliament had been a strong advocate of a single human rights and equality commission for instance but had then been only intermittently engaged in receiving reports on its work. There was no consistent reporting or scrutiny relationship that would have facilitated that engagement.

Across the EU there is no consistent pattern of remits or roles across the equality bodies (a minority of which, six out of the 33 members of the umbrella network Equinet, have a broader human rights remit); nor expansive debates on what those roles should be. Statutory bodies fulfil their legal duties, often revolving around handling complaints of discrimination, rather than being expected to make a broader contribution. Equinet is currently considering the pros and cons of bringing equality and human rights together within one body. One perceived barrier in the breadth of remit that would ensue is that equality bodies rarely address matters of criminal law but a human rights body needs to do so.

3. Duties and Powers

The core question addressed here was whether the differing statutory duties and powers of the bodies have been a significant factor in their interpretation of their role and what they have achieved. Are there particular duties and powers which a commission has which have in practice proved significant in enabling it to deliver, or conversely where the lack of a power has inhibited action which it might otherwise have taken. Might there be instances where enforcement powers have proved a barrier to working with external bodies, where partnership could have delivered broader outcomes, (whether deterring the body itself or others, such as business, with whom it might want to work)?

In the seminar discussion and interviews, four themes emerged.

First, it was apparent that the powers of a commission were not determinative of the influence that it could have. Powers could be essential in some circumstances – in securing entry to a closed facility for instance or in being able to conduct a formal investigation. A body lacking a full tool kit of powers, for instance the SHRC in its lack of power to take cases, was inhibited in the action it could take, and the opportunities for profile-raising they provide. It could nevertheless bring about change in other respects through working in partnership with the bodies that needed to change their practices – where there is a willingness *to* change. ‘Impact is more than just a matter of legal powers’ we were told, ‘most of an agenda moving forward is winning hearts and minds rather than taking people to court’. Use of powers can raise levels of resistance, and powers in relation to handling individual complaints can swamp a body with few resources, limiting its capacity for strategic action. A body with fewer powers has to use its limited powers more effectively and may be much clearer about what it can and cannot achieve. If it cannot rely on enforcement it must rely on promotion, inquiries and partnership working.

On the other hand, where there is significant resistance to change, little might be achieved without powers to require action. As one participant put it, ‘While the extent of statutory powers does not determine effectiveness, in a politically hostile environment they can be critical’. It is possible to cite instances where litigation has forced changes in practice that would not otherwise have happened. Resistance has historically been the experience in many respects in Northern Ireland - yet it is notable that the challenges faced by the NIHRC have only marginally related to its powers (for example, that its Bill of Rights advice exceeded the remit provided). Leaving aside some restrictions it has faced in the scope of its investigative powers, it is judged to have the powers that it needs – but not the resources (and at times in its history the staff expertise) to use them. The Scottish HRC also has some restrictions on its investigation powers yet it may be its lack of resources to conduct an inquiry that is the principal deterrent. A broad range of powers could create unrealistic expectations which in practice, given resource constraints, could not be met.

The impact of a formal investigation into the Crown Prosecution Service (CPS) in Britain (by the former Commission for Racial Equality) was cited as an example where the use of investigation powers could drive change. The CPS was required to report every six months for a period after the investigation (into racially segregated workplaces in one of its offices) so that reform became a mainstream management commitment that was transformative in its effect. Yet these investigatory powers have in practice been used rarely by commissions, in part because of the cost and time they consume, in some cases a lack of relevant expertise, an ever-present fear of challenge in the courts, and because they can produce a climate in which people are defensive rather than cooperative, even where they recognise the need for change. It was necessary for each body to consider what could be achieved through taking cases, conducting formal investigations and other enforcement activity relative to other levers for change: ‘the test of a power is how far it is a catalyst for change’.

The optimal position, as one participant put it, is for a commission to have a range of powers that provide flexibility in achieving its objectives: ‘Having a range of powers does not mean that they all have to be used. Commissions need to be strategic with them and

manage expectations where certain powers are not being used’.

Commissions need to have a cogent theory of change with clarity on what could be achieved using different approaches but this was not always evident in practice in the way the commissions worked. It was also necessary to communicate to the public how and why a power was being used. The power to comment on the legislative process, used comprehensively by the Irish HRC for instance, had not been highly effective in securing change, despite the quality of the analysis.

Gap between responsibilities and powers

The second theme was that the differing regulatory frameworks related to equality and human rights, and the ‘distinctly more limited’ powers in respect of the latter, create an imbalance in the impact that a commission could have. There could in this and other respects be a gap between a commission’s responsibilities and its powers: this was equally true in Ireland’s Equality Authority, for instance, between its distinct powers in relation to discrimination but lack of powers on the promotion of equality. Constraints on powers in relation to tackling discrimination could also limit effectiveness, for instance in restrictions relating to discrimination by the state in the exercise of its functions. In the UK, the Hampton principles on regulation require that a commission use the least intrusive approach to achieve its objective. Yet that could present practical difficulties: the time-scale in which a judicial review could be launched, for instance, meant that it could not be left as the action of last resort. In that sense the Hampton regulatory principles might not be entirely appropriate for statutory bodies in this field.

In a European context the UK and Irish bodies were nevertheless distinct in having broader duties and powers than most of their counterparts, many of which are quasi-judicial bodies focusing on cases, providing a more limited means for securing publicity for issues or driving changes in practice.

International responsibilities

Third, the significance of the powers relating to the international context should not be entirely overlooked: responsibilities relating to the UN Convention on the Rights of Persons with Disabilities (CRPD), for instance, was emphasised as one example. That Convention requires governments to establish a framework to ‘promote, protect and monitor implementation’ (Article 33(2)), a responsibility variously given to some of the commissions within our consideration, and that they must ensure that civil society representatives (in particular people with disabilities) are able to participate fully in that process. The Scottish HRC, together with the EHRC, had thus, for instance, used web-casting to engage some 300 people across Scotland, prior to preparing their National Action Plan. Designation as the responsible body (under Article 33(2) of the Convention) thus brings responsibilities domestically and to engage at the international level, in turn creating opportunities to use the Convention as a lever for change (a position evident also in the Optional Protocol to the UN Convention against Torture and the development of national preventative mechanisms). It can nevertheless create unrealistic expectations, which must be managed, and the erroneous presumption that the commission is the body responsible for implementation itself. Fulfilling these new responsibilities under the CRPD were complicated by the fact that in some cases responsibility had been given to

more than one body: no less than four designated bodies in the UK; and no new resources were in that case made available to do so.

Transparency

Finally, the impact which a commission could have in fulfilling its responsibilities was crucially affected by the extent to which those whom it was regulating were required to be transparent about their operation. If organisations were not required to make public information on their employment and service provision, for instance, it was difficult for a commission to be strategic in taking action against the poorest performers, or those most failing to protect the human rights of vulnerable people. A duty on institutions to make public such information in a timely manner would significantly increase the capacity of the commissions to make effective interventions.

4. Independence and Accountability

A core issue that emerges in the literature, confirmed in our consultation, is a tension between a commission's operational autonomy and its accountability for use of its powers and public money. We explored the question 'independent from whom?' (not only from government but also civil society) and likewise 'accountability to whom?', looking in particular at the potential role of parliament here relative to a government department. The literature had suggested value in teasing out differing modes of accountability (for financial propriety, for instance, separately from use of legal powers or engagement with civil society) and we explored the grounds on which one might judge an optimal balance in such arrangements in the context of the independence the Paris Principles proscribe.

There are nuances in such relationships for which it is difficult to make provision in legislation; a fine line, for instance, between a regulatory body that appropriately advises on the course of action government should take and one that actively campaigns against the government's position. Relationships also depend on personalities, for which legislation cannot prescribe, but which independence and accountability mechanisms need to be sufficiently robust to address.

In the discussion and interviews three themes emerged.

There was, first, a debate on what is meant by independence and by accountability and on what was deemed the 'irreducible tension' between them. The Paris Principles provided inadequate guidance on this, so that a commission could have 'A' status at the UN but lack the substance of compliance on either independence or accountability, even if the mechanisms were there on paper. The need for differing forms of independence and accountability, and the detail of how they should operate effectively, had not been sufficiently considered when the commissions were established: in the case of the EHRC despite extensive debates within the Taskforce and subsequent Steering Group that preceded it.

A lack of consensus on appropriate boundaries meant that what felt to a sponsoring department like appropriate scrutiny could be experienced as inappropriate interference by a commission. While there was concern that there were instances where governments

had overstepped their role (on substantive issues and through micro-managing the operation of day to day matters), it was also the case that commissions had not always shown due regard to the need for accountability: the unwillingness in 2010 of the Irish HRC to make the minutes of its meetings public since 2007 was cited as one instance; and the Public Account's Committee's need to take the EHRC to task for its failure to manage its finances appropriately, as a significant failure. Participants emphasised the pivotal role of good governance in relation to a commission's relationship with government, citing experience in Northern Ireland as well as in other parts of the UK:

‘It is fundamental that independent organisations take financial and governance accountability very seriously, as if you are completely clean on all aspects of governance and seek efficiencies all the time without prompting, then it is totally possible to push at the policy boundaries with confidence and rigour – a government that wants to rein you in will first and foremost look for weaknesses in governance’.

A lack of consensus on appropriate boundaries lay behind some of the tensions that had arisen between commissions and governments, including current proposals to change the EHRC's accountability framework. S3 of the 2006 Equality Act stated that the EHRC should be subject to as little interference as possible; but controversy over its handling of its finances had weakened its authority in resisting reform. The fact that the commission is accountable to government rather than to Parliament, and hence that a Minister has to answer to Parliament for a commission's performance, creates an incentive in government to micro-manage that is not present where that accountability is direct to Parliament, as in Scotland.

A grey area is the appropriate day to day operating relationship of the staff of a commission with government officials (keeping in mind that neither commissions nor government departments are monolithic entities). For a commission to operate effectively it was essential that its staff be able to engage on a regular basis with officials responsible for policy and practice relevant to equality and human rights, without the independence of the commission being compromised or its positions undermined, or thought to be compromised or undermined, by that relationship. Where that relationship broke down the capacity of the commission to inform policy developments was weakened. At a European level there was a greater span of experience and expectations on this relationship, an Equinet survey in 2007 finding that some commissions see themselves as part of government and staffed by civil servants.¹⁸⁴ In Ireland the chief executives of both commissions are now former civil servants: this means that they are well placed to know how to secure changes in government policy. Former civil servants could nevertheless - in theory if not in practice - feel constrained by the unwritten rules on how civil servants should behave towards the government of the day. There is also the matter of how Commissioners perceive the staff of the body and their implementation of existing policy and practice.

There is an inherent tension in the relationship between a regulatory body and the

¹⁸⁴ The survey was subsequently reported in a study commissioned by Equinet: Yesilkagit, K and Snijders, B (2008) above n. 28.

government where the body has a responsibility to challenge government decisions, if necessary in court. The sponsoring department needed itself to be held accountable for the way in which it managed that relationship – but who would call the department to account when the relationship between its staff and the commission breaks down or when custom and practice emerges that provides unhelpful levels of constraint?

Relationship to legislature

An alternative option is that a commission's primary relationship of accountability is not to a government department but to the legislature. The strong relationship of the Scottish HRC to the Scottish Parliament was contrasted to the limited engagement there has been for the commissions in other jurisdictions with their respective Parliaments or Assemblies. There were thought to be clear advantages in regular dialogue with, and being called to report to, a parliamentary committee. This was an appropriate means to assess a commission's priorities and question effectiveness in delivery, but also a necessary counterweight to the influence of government which could be overbearing. However, it was also suggested that having direct access to a Minister potentially offers much needed practical leverage and status.

In Scotland, it is significant that the HRC's reporting mechanism for its annual report, strategic plan and finances is to a non-political administrative board, the Parliamentary Corporate Body, quite separate from any advocacy the commission might undertake with other committees on legislative matters. Its accountability to parliament is seen to leave it free to scrutinize the actions of the Scottish government without fear that this could have ramifications for its own operation.

In Northern Ireland, a relationship between the NIHRC and the Assembly could balance the direct relationship of accountability to the Westminster government. An Assembly committee could more appropriately have questioned the NIHRC's priorities and decisions than, as happened in practice, Members of the Assembly 'shouting at it' from the touch line. In Britain, the lack of a regular relationship with the JCHR had perhaps contributed to the force with which the committee was critical when it did inquire into the performance of the commission on human rights in 2010 in the context of a series of resignations by commissioners.¹⁸⁵ Increased accountability to democratically elected representatives could increase the legitimacy of commissions in the eyes of those representatives and of the public. The solution may be that a commission should not be exclusively accountable *either* to government *or* Parliament but that there should be different forms of accountability, not just one, 'and not just to the one that pays the bill'.

On the infrastructure of accountability to government a further complication arises from the commissions' multiple mandates where those mandates do not all fall within the remit of a single government department. In Britain, the Government Equality Office in the Home Office is the sole sponsoring department, marginalising the role of the Ministry of Justice despite its responsibility for human rights (and indeed the departments responsible for core issues such as race and disability). Human rights Ministers are thus not central to debates on the reform of the commission nor in calling it

¹⁸⁵ Thirteenth Report Session 2009-2010, *The Equality and Human Rights Commission*, HL 72/HC 183 <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/72/7202.htm>

to account, despite its significance to delivery in their own role.

In the final analysis, independence and accountability are nevertheless a state of mind as well as a set of rules. A legal framework for relationships could not determine definitively how those relationships would play out: personalities would play a part in outcomes, and the way in which those relationships were managed by the leaders of the respective organisations was a significant factor in the balance of independence and accountability that evolved over time.

Relationship to civil society

The relationship between the commissions and civil society was a further tension: a statutory body should work with civil society but not be captured by it; nor should civil society organisations be so close to the commission that they could not act as a constructive critic. Where the relationship between a commission and its sponsoring department was poor, it was noted that civil society organisations could be disempowered – unable to challenge the commission on its performance for fear of giving weight to government criticisms that might weaken it further.

There had at times been some ambiguity in whether a commission spoke *for* a disadvantaged community, representing its interests: the perception during periods in the history of the CRE, for instance, in relation to minority ethnic communities. That was not appropriate for a statutory body, required to act in the public interest, but it raised the question of what a commission's relationship should be with the people whose rights it exists to protect. If a commission saw a close relationship with people with disabilities as compromising its independence, for instance, that could damage confidence in the body. There was however a tangible difference between a regulatory body operating in isolation from civil society, on the one hand, and a body that identified too closely with civil society voices: a commission needed to find an appropriate balance between these poles. A commission could also lose credibility with civil society groups if it raised expectations, mobilising them to support a policy reform, and then failed to deliver; or if it consulted widely on its priorities but then failed to be clear on the priorities or strategy it had decided to pursue.

A commission's relationship with civil society is broader than only with groups representing those whose rights need to be protected. Civil society groups can also be employers and service providers and hence subject to the commission's powers in the same way as organisations in the private and public sectors. Less attention appears to have been given by commissions or in academic analysis to optimal ways to manage this relationship, and with a broader range of stakeholders, at a structural level. The EHRC in Scotland and in Wales, has a statutory advisory committee in addition to commissioners, including members with local authority, health sector and NGO backgrounds, 'responsible for ensuring the overall work of the Commission reflects the needs and priorities of Scotland. The Committee sets strategic direction and steers the Commission's work in Scotland', within parameters set by the national body. That structure, in providing direct connections to stakeholders in addition to the expertise brought in by commissioners, is said to anchor the body and its priorities more closely with the organisations with whom it needs effective relationships, a model not replicated

in the structure of the other commissions.

5. Internal Governance, Structure, Staffing and Budget

The Paris Principles require pluralism in the make-up of the body but this can take many forms. We considered whether the executive Commission model is optimal or whether alternatives, such as Ombudsmen or a single Commissioner with an advisory board, should be considered. We explored whether there are particular issues arising from the full or part time role of the Chair relative to the role of the chief executive and whether this relationship has been a central or marginal factor in any difficulties in the management of the bodies that have arisen. A significant question was the extent to which the commissions' very different budgets per capita have been a factor in the priorities and performance of the bodies and whether the severe budget cuts recently experienced were likely to prove a major constraint.

In the discussion and interviews a number of themes emerged.

First, it was clear that while commissions might have a similar structure (a part time chair and non executive board, for instance) they could work in very different ways: hence structure is not determinant of outcomes. The former CRE and EOC were cited as examples. One factor in that case was a high turnover of chief executives in one case and not in the other. The way commissioners were treated by the organisation and empowered (or not) to make an effective contribution was a further factor. A commission had some autonomy in how it organised its staff and in the extent to which it operated through committees engaging commissioners and external expertise, all of which could be factors in its effective operation. The 'software' of the organisation was largely not set down by statute but a matter for the chair and the commissioners themselves. As one consultee put it:

‘with a half-decent infrastructure, the right people with vision and strategic approach, most structures can deliver.’

The role of non executive commissioners was a significant point of contention. Commissioners do not always feel that they have much control over the way the organisation runs, while staff can feel that this is where control lies. In some cases it was suggested that the boundary between commissioner and staff responsibility was insufficiently clear, commissioners overruling work that staff had already undertaken and the chair involved in operational decisions as well as the CEO. In another case it was suggested that commissioners saw their role as holding the chair and staff to account rather than that they are themselves the commission and share collective responsibility for its work.

Combining the role of chair and CEO, as had happened for periods in the life of more than one of the former commissions, could blur the chair's strategic and operational/line management roles; but the SHRC demonstrated that it could be a workable model in a small commission. A chair who engaged too directly in operational matters despite the existence of a CEO could make it difficult for staff to know whom to approach for a decision and for commissioners to know whom to call to account. Where staff could by-

pass the CEO to get a decision from the chair, the CEO's authority could be severely undermined, to the detriment of the effective management of the commission's work. Commissioners could also effectively get drawn into executive roles where staff (or their line managers) lacked expertise on a particular issue or through their own motivation to play a more extensive executive role.

The commissioner model meant that high level expertise was available as a resource to the commission. Nevertheless there was some attraction in a single Commissioner/Ombudsman model in which the responsibility for decisions was thought to be clearer. In practice, it would seem that any of these models can work, depending on who is appointed to fill the positions, and the skill of the chair in leading the team. If commissioners do not gel as a group, much time and energy can be dissipated in resolving disagreements, including staff time in provision of the papers on which such discussions can focus.

Chair and commissioners did not always have a full understanding of appropriate governance arrangements, for instance on financial matters, creating challenges for a CEO responsible as Accounting Officer for the proper handling of public funds. There had been a tendency in some of the human rights (as opposed to equality) commissions to appoint commissioners who were almost entirely people with expertise on human rights issues (albeit often with sharply differing views) rather than including some people with political skills or expertise valuable in the operation of the commission such as governance, finance or communication skills. In one instance where commissioners were predominantly people with great expertise on the issues addressed by the commission we were told:

‘There were bitter differences between people, all experts, convinced they were right, quite unaware that the public were not relating to the debates in the terms they were having them.’

At a later stage in that commission's life a greater breadth of commissioners had been appointed, but the result was that some were not able to engage in debates on human rights issues as they were insufficiently knowledgeable: ‘you need people with human rights expertise *and* political skills’. The tendency in Northern Ireland to interpret the statutory requirement that commissioners are ‘as a group...representative of the community’ to include political appointees from across the community divide has exacerbated the challenge of securing consensus.

The ability of the chair to articulate a vision that brought commissioners and staff together, to engender respect and trust among the board, to carry authority externally and to fulfil the role without impinging on the role of the chief executive, were seen as of the utmost importance for which no statutory mandate nor budget could compensate. The chair needed to be able to convey that vision to people with no expertise on human rights or equality, but needed the expertise to carry authority when questioned or in presenting to expert audiences. As one of those we consulted recounted:

‘When [one chair] spoke on a public platform, s/he was very impressive but you

could see that s/he was talking above people's heads. When [a subsequent chair] spoke, when first appointed, s/he said things about human rights that were simply not accurate – but s/he had huge appeal. You need both'.

In the staffing and committee structure there was a tension between mainstreaming equality and human rights issues across the body, or separating them out to ensure a focus that accords some priority to an issue: a separate disability committee for instance or staff unit exclusively addressing that issue.

A further theme was structure relative to the geography of the country – whether a regional presence was needed to ensure impact in parts of the country facing particular issues or in remote places. An organisation based in London or even in Glasgow, it was said, cannot know what is happening in the Western Isles. A commission needs some mechanism for making that connection, resources precluding even a regional presence on a significant scale.

One further issue that we did not have scope to explore was the remuneration of chair and commissioners which may be a factor, among other considerations, in public perceptions of a commission and the value for money it represents.

Resources and staffing

Resources were essential to carry out some functions hence the size of the budget was undoubtedly important. Where a commission has statutory functions that procedurally are resource intensive, not least those of ECNI in relation to monitoring compliance of each public body with their S75 responsibilities for instance, staffing (and hence budget) has to reflect those roles (see Appendix 2). In relation to other responsibilities, a tight budget can encourage partnership working which in some respects could bring results. There is thus no necessary correlation between budget and outcomes. It was also a matter of how a commission chose to spend its budget: the Irish Council for Civil Liberties had a similar budget to the Irish HRC, but whereas ICCL had a significant programme budget, the Commission had used its resources largely for staff. Some commissions were more effective than others in using the media to build a positive public profile – a matter of skill more than resources (once a certain threshold of staff capacity has been passed). As one participant argued,

‘Whilst additional resources can certainly increase the potential for impact, big is not always beautiful here and the profile of the Commission, the capacity it has (including crucially the staff profiles) is more important than the budget’.

A large budget could reflect a role as a service provider, handler of complaints (or in the case of the ECNI, a monitoring role in relation to equality schemes), rather than an advocacy organisation that punches above its weight. Budget cuts could in part be addressed through reassessment of strategy and priorities. Nevertheless, loss of staff could seriously damage the morale and capacity of an organisation and imbalance the skills available to it.

Finally, the expertise of staff was cited as a crucial factor in effectiveness: the breadth of expertise across the commission's mandate and depth to a level that carried authority with those whom the commission sought to influence. Staff also needed political judgement, in relation to people in power and in assessing the most effective means to build public support. With hindsight, one former staff member of a commission thought that part of the difficulty it had faced was a lack of that judgement:

‘We were motivated by what was right and wrong, not by what was strategic and politically clever. We needed to discuss the political implications of what we wanted to do, but we didn't. The mantra was that human rights are unpopular, but we must act anyway’.

There was also self criticism, with hindsight, of the way in which the work of another commission had been conveyed to those whose support they needed:

‘We didn't make the work relevant to politicians or those they were there to serve. It was legalistic, formulaic – an intellectual approach not about the impact on the vulnerability of the individual. It was always missing emotional intelligence, the human element. As a result the public would not defend [the Commission] if politicians suggested abolishing it..... Lawyers were paramount. Their view of the world held. The biggest gap was engagement at the political level’.

The Chief Executive's judgement in this respect, and capacity to manage staff and resources effectively, is seen as pivotal to the effectiveness of the commission in all cases. Fulfilling that role within a commission, accountable to a chair and non executive board, in a politically sensitive high profile field, can require different skills from the equivalent role in another setting and not all CEOs have adapted well to that role.

7. MEASURING OUTCOMES AND EFFECTIVENESS

In assessing the impact of differing factors on the performance of commissions we have consciously not addressed a key underlying question: by what criteria should we judge the impact of these bodies and with what indexes could that impact be measured. Who, moreover, should conduct evaluations? And if such evaluations have not been conducted, are there nevertheless criteria we can use now to compare impact – or is such an exercise not valid given the very different political contexts in which the bodies are working and remits they have been given?

Some of the commissions were giving increasing attention to evaluation of their own interventions. There was agreement, amongst those consulted, that there was no simple way to capture the effectiveness of the body given the many other factors influencing equality and human rights outcomes. Process measures are the most straightforward: had the commission done, for instance, what it said in its business plan that it would do? The EHRC Triennial Review reports, monitoring equality and human rights outcomes, was an invaluable aid to assessing progress in those agendas, but not of the performance of the Commission itself or of the impact of equality and human rights law. A survey of

stakeholders to assess satisfaction with its performance would be one measure, meaningful over time, but limited, not least because stakeholders would themselves have only partial knowledge on what the body had achieved. This difficulty in assessing impact was no different from that faced by many other bodies: the JCHR for instance was currently engaged in tackling the same question. For that body, one measure was the extent to which government had implemented each of its recommendations over the life of one Parliament but even that question posed methodological challenges. It was even more difficult to assess whether the committee had improved the quality of debates on human rights in Parliament and raised the level of human rights literacy.

A commission needed to conduct its own regular assessment of its impact in addition to external scrutiny. An annual report could be presented to Parliament or legislative assembly where the basis of that assessment could appropriately be challenged. The Scottish HRC was aware of the need to report substantively to Parliament after its first three years to secure support for future funding. Parliamentary scrutiny serves the dual impact of raising the profile of the issues concerned. Commissions should avoid the danger nevertheless of adopting a series of short term targets that then become the drivers, distorting priorities towards what is measurable.

Comparing the effectiveness of commissions presented a near insurmountable challenge given their different remits. Partial measures could be used such as measuring name recognition, as it cannot be effective if the public do not know that it exists. There would be less agreement on using a measure of how often the body uses its powers as that could equally be judged an indicator of failure to succeed through persuasion; or how many cases are brought to its helpline, as that could indicate a rising problem rather than any greater confidence that the body will be able to address it.

8. CONCLUSION

The controversy that not infrequently surrounds each of the six commissions within our focus (with the possible exception of the Scottish HRC, still in its early years) raises the question which this paper has sought to address: what are the factors that influence performance and which of them are within the control of the commission itself? An understanding of these factors is fundamental to any debates on reform or merger of these bodies and to any wider discussion on European and international guidance on NHRIs and statutory equality bodies.

We found, first, that the domestic and international context in which the commissions were established had necessarily been highly significant in determining their remit, powers and institutional form; and that that context had continued to be formative in their operation. Mergers of former bodies had proved a challenging start, particularly if the precursor bodies had little experience of working together, had differing internal cultures, if merger had resulted in a mismatch of staff skills with the new commission's remit, or if the merger was not well managed. European and international human rights standards, as an operating context, provided a valuable yardstick and legitimacy, albeit more powerful in some domestic political contexts

than others. Domestic political settings had proved more conducive for some commissions than others; had set expectations to which commissions had to respond; and influenced priorities and internal structures. Opposition, where it led to repeated challenge, could have a chilling effect and absorb disproportionate staff resources. Commissions tread a fine line when deciding when to challenge and when to hold back: repeated challenge may weaken public or political support but failure to challenge may undermine confidence in the commission and the morale of its staff and supporters. In most cases the economic climate had recently contributed to budget cuts, without evident public concern. Notwithstanding the significance of these external factors they need not be determinant of performance. Some aspects of the environment were open to influence by the commission, including public expectations and support, and a commission with a clear vision, strategic leadership, a little courage and appropriate skill sets could make an impact despite the constraints. Commissions may need to refresh their message in order to build public support, adopting broader arguments and addressing the concerns of sceptics, rather than assuming that clearer communication of an existing message will prove persuasive.

The experience of the commissions provided evidence for and against the case for a broad remit. A broad remit, in particular embracing human rights and equality but also arising in these islands in relation to children, age equality and community relations, could enable a commission to address related issues effectively and to resolve tensions (e.g. between competing equality rights or between equality and good relations). Fragmentation into separate institutions, whether a result of devolution (in the UK) or separate development, created a level of complexity and confusion for individuals seeking assistance, avoided within a single institution. That could, however, bring disadvantages if there were tensions arising from differing remits or a dissipation of focus and resources. Equality, human rights and community relations approaches differ and may not easily be reconciled in practice. However defined, a statutory remit nevertheless left some scope for differing interpretation of roles, priorities and working relationships with statutory partners so that the remit itself could not be deemed solely responsible for impact.

In this discussion on remit the current focus on the ‘core regulatory responsibilities’ of the EHRC raised the question how narrowly or broadly a regulatory body might define its role, whether narrowly on enforcement or more broadly to embrace promotion of awareness and good practice. If narrowly defined, ‘regulatory body’ might not be appropriate terminology for an NHRI for which raising awareness and understanding of human rights is a primary function.

In relation to the powers of a commission we saw some common themes emerge. First, it was apparent that the powers of a commission were not determinative of the influence that it could have. Powers were essential in some circumstances and where lacking a commission is undoubtedly inhibited in the action it can take. It could nevertheless bring about change in other respects through guidance or working in partnership, where there is a willingness *to* change. A full suite of powers can raise expectations which a commission, lacking resources or facing other obstacles to use of those powers, may be unable to fulfil. Commissions need to have a cogent theory of change with clarity on what could be

achieved using different approaches but this was not always evident in practice. It was also necessary to communicate to the public how and why a power was being used. The impact which a commission could have in fulfilling its responsibilities was also affected by the extent to which those whom it was regulating were required to be transparent about their operation. A duty on institutions to make public such information in a timely manner would significantly increase the capacity of the commissions to make effective interventions.

Turning to the ‘irreducible tension’ between independence and accountability, there has historically been insufficient guidance on the complexity of these crucial relationships in the Paris Principles (remedied to some extent by the practical work of the ICC, and guidance that has emerged on equality bodies) nor was sufficient thought always given to the architecture needed prior to the commissions being established. A lack of consensus on the appropriate boundaries of the commission-government relationship (where there is a sponsoring department) had often been the source of tensions but there were also instances where governments had overstepped the line, and where commissions had been insufficiently accountable for their actions. The operation of the accountability mechanism could be distorted where the commission’s mandate stretched beyond the sponsoring department. A commission’s relationship with the legislative body was an important counterweight to government interference, but also an important means in its own right to assess a commission’s priorities and performance. There were times when a parliamentary forum for regular dialogue might have avoided the sharp criticism that members of the legislature have individually voiced. The relationship with civil society is also a matter of balance: sufficiently close to listen and give account, not so close as to compromise independence or the commission’s stature as a statutory body. The statutory provision for the EHRC in Scotland and Wales to have an advisory committee made up of representatives from key sectors in addition to commissioners had brought advantages unavailable in that form to the other commissions. Notwithstanding the pros and cons of different models, independence and accountability are in part a state of mind for which the statute cannot legislate. Responsibility for managing the relationship successfully falls to the leaders of the commissions and to that of the scrutiny bodies concerned.

In relation to governance and structure, it was evident that commissions with similar arrangements could in practice work in very differing ways: the software of an organisation is not prescribed by statute. A lack of clarity in respective roles of commissioners and staff was one fault line identified, part time commissioners not always having sufficient engagement with the work of the commission to exercise their responsibility while at other times stepping beyond the non-executive role. Their expertise could be invaluable, nevertheless the model of a single full time commissioner merited consideration, although the plurality rightly required by the Paris Principles would then need to be assured in other ways. The breadth and depth of expertise of the staff were identified as crucial to each dimension of a commission’s mandate – whether its authority in promoting good practice or legal skill in litigation and enforcement. Among commissioners and senior staff, expertise on human rights and equality issues also had to be complemented by political judgement if the commission was to use its powers and resources strategically in light of the

opportunities and constraints it faced. In that judgement and in managing the staff and resources of the organisation, the Chief Executive's role was crucial. The leadership of the chair and capacity to convey vision and authority was also a pre-requisite for which no structure or resources could compensate if lacking. That leadership was crucial to a commission's external relationships, and to ensuring that the commission is strategic in steering the most effective course of action, not simply reacting to circumstances as they arise.

Significant resources are essential to carry out some of a commission's functions, including formal investigations and litigation. There is nevertheless no correlation between budget and outcomes. In an encouraging climate, progress could be made in some (but not all) respects through partnership working. There is no simple way to measure the effectiveness of commissions, albeit easier to measure process than outcomes. There are partial measures that can be identified. A commission needs to conduct regular assessments of its own performance as well as to be subject to external scrutiny.

In essence, it is evident that there is no single factor that can account for the performance of a commission: it is not a reflection of its remit, powers, structure, resources, staff or leadership, alone. A commission operates within an environment of constraints and opportunities, some of which it has greater capacity to influence than others, the outcome of its efforts thus dependent only in part on how well it marshals its resources and manages its work. Nevertheless, the evidence suggests that there remains significant scope for strong leadership, sound management, political judgement and staff expertise to make a substantive difference in the performance of the commissions so that they are a catalyst for change. The commissions may take some comfort from the fact that it is those factors which are within their control.

Appendix 1: List of those consulted in the course of researching this paper, through participation at a round table seminar in March 2011, individually through interview between February and August 2011, and through comments on a draft of this paper.

Amanda Ariss	Equality and Diversity Forum; formerly at Equal Opportunities Commission (EOC)
Mohammed Aziz	Faithwise; former Commissioner, Commission for Racial Equality (CRE) and EOC
Niall Crowley	Formerly, Equality Authority, Ireland
Marije Davidson	RADAR-The Disability Network
Neil Crowther	Equality and Human Rights Commission (EHRC)
Kay Hampton	Glasgow Caledonian University; Commissioner, Scottish Human Rights Commission; former Commissioner at EHRC and CRE
Murray Hunt	Legal Advisor to the Joint Committee on Human Rights, UK Parliament
Mark Kelly	Irish Council for Civil Liberties
Tamas Kadar	EQUINET
Antoinette McKeown	Consumer Council, Northern Ireland; formerly, Equality Commission Northern Ireland (ECNI)
Gay Moon	Fellow, Joseph Rowntree Charitable Trust
Rachel Murray	University of Bristol
Colm O'Cinneide	University College London
Mike Ritchie	Committee on the Administration of Justice (CAJ), Northern Ireland
Muriel Robison	Formerly at EOC and EHRC, Scotland
Kieran Rose	Board Member, Equality Authority, Ireland
Paddy Sloan	BBC Children in Need, Northern Ireland; formerly, Northern Ireland Human Rights Commission (NIHRC)
Seamus Taylor	National University of Ireland, Maynooth; formerly, Commission for Racial Equality, GB
Geraldine Van Bueren	Queen Mary University, London; Commissioner, EHRC
John Wilkes	Scottish Refugee Council; formerly at EOC, Scotland
Duncan Wilson	Scottish Human Rights Commission
Katherine Zappone	Commissioner, Irish Human Rights Commission

Appendix 2: Staffing and annual budgets

Direct comparison of staffing levels and budgets is not possible as the commissions have, as we have shown, vastly differing statutory responsibilities, including some, as in the case of the Equality Commission for Northern Ireland, that are necessarily labour intensive. Given those differences, it would be erroneous to suggest that each commission should have roughly comparable staffing and budget levels. We therefore include the table below only as a contribution to debate on resources, including consideration of the basis on which appropriate resource allocation should be made.

NHRI	Area	Number of staff and commissioners	Annual budget	Budget per capita	Financial Year	Source
Equality and Human Rights Commission	England, Wales and Scotland	EHRC Annual Report 2009-2010, p. 42 states: "On 31 March 2010 452 individuals were directly employed by the Commission". 14 Commissioners, including Chief and one Deputy Chief Commissioner (EHRC website accessed on 29/9/11).	The Government Equality Office Annual Report and Accounts 2010-11 (p.15) states: "£60m resource and £2m capital was allocated to the Equality and Human Rights Commission. Following the deficit reductions introduced by the new administration [...] the Commission's budget was £53m resource and £2m capital. " "The annual budget for 2009/10 was £70m.	2010-11: £0.89 per person (based on UK population of 62 million). 2009-10: £1.13 per person	2009/10 and 2010-11	Annual Budget: http://www.homeoffice.gov.uk/publications/equalities/annual-report?view=Binary Staff: 2009/10 Annual Report http://www.equalityhumanrights.com/uploaded_files/aboutus/annual_report_and_accounts_2009_10.pdf Commissioners: http://www.equalityhumanrights.com/about-us/the-commissioners/
Scottish Human Rights Commission	Scotland	9.4 FTE staff and four Commissioners, including Chair (SHRC website accessed on 29/9/11).	SHRC Annual Report 2009-10 (p. 1) states that "The Scottish Parliament awarded SCHR a cash budget of £1m for financial year 2009-10", since cut to £960,000	2010-11: £0.18 per person (based on Scottish population of 5.2 million)	2010-11	Annual Report 2009/10: http://www.scottishhumanrights.com/application/resources/documents/200910AccountFinalPDF.pdf Commissioners: http://www.scottishhumanrights.com/about/team

Northern Ireland Human Rights Commission	Northern Ireland	22 staff members (NIHRC website accessed on 29/9/2011) and 8 Commissioners (NIHRC website accessed on 29/9/11), including Chief Commissioner.	NIHRC Annual Report and Accounts 2010-11 states that the total comprehensive expenditure for the year was £1,691,870 (p.39). "Following the Comprehensive Spending Review in 2010 the government announced a cut of £300,000 to the Commission's £1.7 budget." (p.4 of NI Assembly Research and Information Service Briefing Paper, June 2011).	2010-11: £0.94 per person (based on a population of 1.8 million)	2010-11	Staff: http://www.nihrc.org/index.php?option=com_content&task=view&id=7&Itemid=12 Budget: http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/30/annual-report-accounts-2010-2011-final.pdf . NI Assembly Briefing: http://www.niassembly.gov.uk/researchandlibrary/2011/7611.pdf
Equality Commission Northern Ireland	Northern Ireland	In 2009-10 ECNI employed 149 staff according to NI Assembly Briefing 2011 (p.3) and 16 Commissioners (ECNI website accessed 29/9/11), including one Chief and one Deputy Chief Commissioner.	2009-10: £7.3m according to NI Assembly Research and Information Service Briefing Paper (p.3).	2009-10: £4.06 per person (based on a population of 1.8 million).	2009/10	All: http://www.niassembly.gov.uk/researchandlibrary/2011/7611.pdf Commissioners: http://www.equalityni.org/sections/default.asp?cms=AboutUs_Commissioners&cmsid=1_437&id=437&secid=0

Irish Human Rights Commission	Ireland	17 staff but 7 posts are currently frozen due to cuts, plus 3 posts funded by a philanthropic organisation, and 15 members of the Commission (including one president). (IHRC website accessed on 29/9/11).	Jan - Dec 2010: €1,523,000 for 2010 (Annual Report 2010, p.7).	2010: €0.34 (£0.30) per person (based on a population of 4.5 million)	Jan to Dec 2010	Staff: http://www.ihrc.ie/about/whoware.html Budget: Annual Report http://www.ihrc.ie/download/pdf/ihrc_annual_report_2010.pdf
Equality Authority Ireland	Ireland	Annual report 2010 (p.8): "staffing levels at year end stood at 35 overall"; 11 Commissioners/Board members, including one chairperson and one vice chair (EAI website accessed on 29/9/11).	2009 Annual budget €3,333,000 on Equinet website.	2009: €0.75 (£0.65) per person (based on a population of 4.5 million).	Jan to Dec 2010 and Jan to Dec 2009	Budget link to Equinet: http://www.equineteurope.org/350_2.html Staff: Annual Report http://www.equality.ie/index.asp?locID=136&docID=980