

Fordham International Law Journal

Volume 22, Issue 4

1998

Article 17

The Northern Ireland Human Rights Commission

Stephen Livingstone*

*

Copyright ©1998 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

The Northern Ireland Human Rights Commission

Stephen Livingstone

Abstract

The extent of these powers [...powers to scrutinize proposed legislation before the Northern Ireland Assembly for its compliance with human rights standards, to assist litigants in bringing human rights complaints before the courts, and to conduct investigations into matters that give rise to human rights concerns...advising the Secretary of State for Northern Ireland as to whether any additional human rights, beyond those to be introduced for the whole of the United Kingdom by the Human Rights Act 1998, should be included in a Bill of Rights specific to Northern Ireland...], and their adequacy to the task that the Commission is expected to achieve, will be considered in more detail later in Parts III and IV of this Essay. Before doing so, however, it is worth examining the role of human rights commissions generally, and the particular manifestations that they have hitherto taken in Northern Ireland. Such background information is essential to understanding both what can be expected from the Commission and the type of problems that it is likely to face.

THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION

*Stephen Livingstone**

“These ‘twin’ National Institutions could, I sincerely believe, become a model for other countries which have been and are still divided by a history of conflict—emanating from religious or ethnic differences.”¹

INTRODUCTION

This observation of U.N. High Commissioner for Human Rights, Mary Robinson, indicates the weight of expectation that has been placed on the Northern Ireland Human Rights Commission (or “Commission”) (and its sister commission to be established in the Republic of Ireland). With the exception of the Policing Commission, none of the new institutions created by the Belfast Agreement is likely to have so many hopes focused upon it. Many of the human rights organizations that have evolved within the past twenty years in Northern Ireland have indicated that they see the Commission playing a major role in ensuring that government is “founded on principles of full respect for, and equality of, civil, political, social and cultural rights.”² Many of the victims of the human rights abuses that have plagued Northern Ireland over the past thirty years are likely to look to the Commission for some sort of redress and the indication that such abuses will not be repeated. As High Commissioner Robinson’s statement above indicates, interest in what the Commission does is also likely to extend beyond Northern Ireland.

The extent to which the Commission is able to fulfil these hopes may depend on the political climate in which it operates and the use that it makes of its powers. The latter were sketched out in the Belfast Agreement but have now been given legislative

* Professor of Human Rights Law, Centre for International and Comparative Human Rights Law, Queen’s University of Belfast.

1. Mary Robinson, U.N. High Commissioner for Human Rights, Speech at Queen’s University of Belfast (Dec. 2, 1998).

2. Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998, Constitutional Issues ¶ 1(v) [hereinafter Belfast Agreement].

expression in the Northern Ireland Act 1998.³ They include powers to scrutinize proposed legislation before the Northern Ireland Assembly for its compliance with human rights standards, to assist litigants in bringing human rights complaints before the courts, and to conduct investigations into matters that give rise to human rights concerns. The Commission is also charged with the task of advising the Secretary of State for Northern Ireland as to whether any additional human rights, beyond those to be introduced for the whole of the United Kingdom by the Human Rights Act 1998,⁴ should be included in a Bill of Rights specific to Northern Ireland. The Agreement also provides for the establishment of an "equivalent" Human Rights Commission in the Republic of Ireland, and the Northern Ireland commission is under an obligation to facilitate the establishment of a joint Committee of the two commissions.

The extent of these powers, and their adequacy to the task that the Commission is expected to achieve, will be considered in more detail later in Parts III and IV of this Essay. Before doing so, however, it is worth examining the role of human rights commissions generally, and the particular manifestations that they have hitherto taken in Northern Ireland. Such background information is essential to understanding both what can be expected from the Commission and the type of problems that it is likely to face.

I. *HUMAN RIGHTS COMMISSIONS IN NORTHERN IRELAND: THE BACKGROUND*

A. *International Developments*

The 1980s and 1990s have witnessed a rapid growth in what has come to be known as "National Institutions for the Protec-

3. Northern Ireland Act, 1998, ch. 47 (Eng.).

4. Human Rights Act, 1998, ch. 42 (Eng.). The Human Rights Act 1998 will incorporate the substantive rights provisions of the European Convention on Human Rights ("ECHR" or "Convention") into United Kingdom law. All public authorities will now be under an obligation to act in a manner consistent with the enshrined Convention rights. All legislation passed by the new Northern Irish and Scottish Assemblies are required (by the Northern Ireland Act 1998 and Scotland Act 1998 respectively) to comply with the Convention rights as delegated legislation enacted under the authority of the Westminster Parliament. However, courts have no power to invalidate primary legislation of the U.K. Parliament for inconsistency with Convention rights and can only make a "declaration of incompatibility" if they find such inconsistency.

tion of Human Rights," especially in Africa, Australia, and Central and Eastern Europe.⁵ Although such institutions go under a variety of names, there is a certain degree of uniformity in their structure, functions, and powers. Nearly all are established and funded by government, though composed of members of civil society rather than politicians or bureaucrats. Their functions usually include things like investigating alleged violations of human rights, assisting litigants before national courts or tribunals, promoting public knowledge of human rights, and conducting research. Many have the task of adjudicating on complaints of human rights violations submitted to them,⁶ while some are empowered to conduct visits to prisons and other places of detention.⁷

The reasons why such commissions are established are diverse. One of the first commissions, established in Tanzania in 1966, was expressly designed to function in the circumstances of a one party state and to provide a means for citizen redress in the absence of a political opposition.⁸ More recent commissions have tended to be established as part of a democratization process (especially where the judiciary are considered unable, unwilling, or too remote from most ordinary people to enforce human rights) or in response to criticism of a government's human rights record. The latter reason always raises the risk that a commission is established primarily as window dressing and that its otherwise impressive powers may be undermined by inadequate funding, the appointment of Commissioners sympathetic to the government, or specific limitations on its remit.⁹ One former member of the U.N. Human Rights Committee has observed that while the Committee generally welcomed the creation of such institutions, it regarded the government's attitude

5. See, for example, the Australian Human Rights and Equal Opportunity Commission Act of 1986; the South African Human Rights Commission Act of 1994; Article 51 of the Constitution of the Republic of Uganda (1995); Ghana's Commission on Human Rights and Administrative Justice Act of 1993; and Article 159 of the Constitution of the Republic of Slovenia (1991).

6. See, for example, the commissions in Australia, New Zealand, and South Africa.

7. See, for example, the Indian commission, which is given this power by Section 12(c) of the Protection of Human Rights Act 1993.

8. See Patrick McAuslan & Yash Ghai, *Constitutional Innovation and Political Stability in Tanzania*, 4 J. MOD. AFR. STUD. 501 (1966).

9. The Ugandan statute, for example, allows the President to intervene to prevent any investigation that might prejudice the "security, defense or international relations of Uganda."

towards them as a "kind of litmus test of the political will of the authorities to promote and protect human rights."¹⁰

No doubt mindful of these risks, the United Nations, which has been strongly supportive of the creation of such National Institutions,¹¹ sought to produce a set of guidelines on the creation and operation of such institutions. These were produced at a conference in Paris in 1991, and the "Paris Principles," subsequently adopted by the United Nations General Assembly in 1993, have now become the international standard by which all national institutions are measured.¹² They state a number of key criteria for any such national institution. The first is that any national institution must be clearly independent from government. This independence can be achieved by having a clear legal basis for the Commission, which sets out its mandate and the duration for which members of the institution are appointed. The Commission should be appointed from members of civil society with government representatives involved (if at all) only in an advisory capacity.¹³ Funding that is independent from government control and adequate to ensure that the Commission has its own premises and staff is also seen as part of this requirement. Second, the Paris Principles recommend that any institution have a broad mandate as regards to the type of human rights issues it considers, and that it engage in a range of activities, including examining proposed legislation for its conformity with human rights standards, drawing the government's attention to situations of human rights violations, of human rights education, and contributing to government reports to international bodies.¹⁴ Third, the Paris Principles set out the

10. See Rein Mullerson, *National Institutions on Human Rights: General Principles and Specific Experiences*, unpublished paper submitted to the International Conference on the Establishment of the Ethiopian Human Rights Commission and the Institution of Ombudsman, Addis Ababa (May 18-22, 1998).

11. The High Commissioner on Human Rights has appointed a special adviser on National Institutions for the Protection of Human Rights, and in 1995, it published a comprehensive handbook on the issue. The Committee of Ministers of the Council of Europe also indicated support in *R (97) 14 of the Comm. of Ministers on the Establishment of Independent National Human Rights Institutions*, 602d mtg. (1997).

12. G.A. Res. 48, U.N. GAOR, 85th mtg., U.N. Doc. A/Res/48/134 (1993).

13. The Paris Principles indicate that membership might include representatives of human rights non-governmental organizations ("NGOs"), trade unions, professional associations, universities, members of Parliament, and "Trends in Philosophical and Religious Thought."

14. In respect to the last of these, the Paris Principles indicate that the Commis-

methods of operation of such institutions. The methods provide that they should be able to freely consider any matters within their competence, to hear any persons and to obtain any documents necessary, to address the public, and to maintain good relations with NGOs and professional groups. Additional principles are set out for those institutions that have quasi-judicial competence and the power to examine complaints directly.

National institutions for the protection of human rights are not a substitute for adequate laws guaranteeing human rights, an independent judiciary and bar, a free media, a vibrant human rights NGO sector, and a government committed to the protection of human rights. Indeed, although the level of information on their effectiveness remains low, there is evidence that they will find it difficult to operate in the absence of such conditions.¹⁵ However, it is clear that they can play an important role in strengthening the protection of human rights in any society. The very existence of a commission shows some level of support for protecting human rights in a state. Where the requirements set out in the Paris Principles are fulfilled,¹⁶ a commission may also bring a degree of publicly sanctioned power to bear on a human rights issue. It may take on more effectively issues that NGOs lack the resources or authority to examine fully. It may bring a more disinterested and impartial perspective to an issue of heated public controversy where the facts or the implications are bitterly disputed. A commission is also especially well placed to develop the idea of a rights culture throughout society and to encourage all public authorities to incorporate human rights standards into their activities.

The need for such an institution has long been clear in Northern Ireland. Over the past twenty-five years, a range of different institutions have been established, which play a role in the

sion should be prepared to express an opinion on government reports "with due respect for their independence."

15. As a recent study observes, "Little has yet been written on the effectiveness of these young institutions and their own literature is generally more descriptive than evaluative." SARAH SPENCER & IAN BYNOE, *A HUMAN RIGHTS COMMISSION: THE OPTIONS FOR BRITAIN AND NORTHERN IRELAND* 68 (1998).

16. Spencer and Bynoe observe that in practice few commissions fill all of these requirements. *Id.* at 68.

protection of human rights. However, none has proved entirely adequate for this task.

B. *The Role of the Standing Advisory Commission on Human Rights*

By the early 1970s the need for constitutional change in Northern Ireland was clear. Critics argued that such human rights abuses, notably in the spheres of religious discrimination and the abuse of police powers, were at the root of the developing social unrest that gripped Northern Ireland during this period.¹⁷ Moreover, it was argued that there was a lack of sufficient legal or institutional protection for human rights in Northern Ireland, with the courts having shown themselves unwilling or unable to intervene.¹⁸ As a means of rectifying this deficit, several of Northern Ireland's political parties advocated the passing of a Bill of Rights for Northern Ireland, which would entrench certain human rights guarantees in Northern Irish law.¹⁹ However, this proved too radical for the British government for the day, which took the view that developing such a measure would raise too many problems as to what rights should be enshrined and what tribunal should be responsible for their interpretation and application.²⁰ Instead, the government put forward proposals for a commission that would be "charged with the duty of keeping in touch with the activities of all public agencies in the field of human rights and of producing an annual report, including recommendations as to any further statutory provision

17. For discussions of the role of human rights abuses in fueling political grievances and protest, see MICHAEL FARRELL, *NORTHERN IRELAND: THE ORANGE STATE* (1976), and Claire Palley, *The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution*, 1 *ANGLO-AM. L. REV.* 368 (1972). For government appointed commissions recognizing some of the problems in this area, see *REPORT OF THE COMMISSION OF INQUIRY INTO DISTURBANCES IN NORTHERN IRELAND, 1969*, Cmnd. (N. Ir.) 532, and *REPORT OF THE ADVISORY COMMITTEE ON THE POLICE IN NORTHERN IRELAND, 1969*, Cmnd. (N. Ir.) 535.

18. For the failures of the Northern Irish courts when it came to tacking discrimination in particular, see KEVIN BOYLE ET AL., *LAW AND STATE: THE CASE OF NORTHERN IRELAND* (1975), and Christopher McCrudden, *Northern Ireland and the British Constitution*, in *THE CHANGING CONSTITUTION* ch. 1, 338 (Jeffrey Jowell & Dawn Oliver eds., 3d ed. 1994).

19. For a discussion of these proposals and of the general background to the creation of Standing Advisory Commission on Human Rights ("SACHR"), see Paul Maguire, *The Standing Advisory Commission on Human Rights 1973-80*, 32 *N. IR. L.Q.* 31, 32-36 (1981).

20. *Id.* at 34.

which it considers should be made.”²¹

However, by the time the proposals made it into legislative form they were considerably narrowed and Section 20(1) of the Northern Ireland Constitution Act 1973 merely provided that the Standing Advisory Commission on Human Rights (“SACHR”) would have two purposes:

- (a) Advising the Secretary of State on the Adequacy and effectiveness of the law for the time being in force in preventing discrimination on the grounds of religious belief or political opinion and in providing redress for persons aggrieved by discrimination on either ground.
- (b) Keeping the Secretary of State informed as to the extent to which the persons, authorities and bodies mentioned in section 19(1) [i.e., public authorities] have prevented discrimination on either ground by persons or bodies not prohibited from discriminating by that law.²²

Thus, while SACHR’s name suggested it was a general human rights commission, its statutory mandate limited it to consideration of discrimination on the grounds of religion or political opinion. Although, as we shall see below, the commission was able to widen the range of matters that it considered, the narrowness of the formal mandate was a matter for constant dispute with the government²³ and was one of the ways in which the commission’s legal basis inhibited its effectiveness. Another was the lack of powers given to the commission even to achieve its task of ensuring the law was adequate to prevent discrimination on the grounds of religion or political opinion. SACHR was to be very much an advisory body to government. It had no powers to receive individual complaints, to initiate or assist litigants, to conduct investigations into alleged human rights abuses, or to examine draft legislation for compliance with human rights standards. In addition to being hindered as regards effectiveness, SACHR would always face a struggle to establish its independence from government as its (part-time) members were all appointed by the Secretary of State for Northern Ireland.²⁴ These

21. NORTHERN IRELAND CONSTITUTIONAL PROPOSALS, 1973, Cmnd. 5259.

22. Northern Ireland Act, 1973 (Eng.) (author’s addition in brackets).

23. Paul Maguire observes that the government rejected SACHR’s arguments for broadening its statutory remit but also advised it not to construe those terms of reference too narrowly. See Maguire, *supra* note 19, at 51.

24. SACHR’s membership varied between eight and 16 over its lifetime. No crite-

members were in turn heavily dependent on the commission's full time staff, most of whom were directly seconded from government departments.²⁵ In addition to problems with regard to effectiveness and independence, SACHR came to operate in a very different political context than that for which it was designed. When it was established in 1973, it was envisaged that it would operate in the context of a new Northern Irish parliament and executive as provided for in the Sunningdale Agreement. However, these institutions collapsed in early 1974 and for the remainder of its history SACHR found itself dealing only with a British government, which had assumed full executive and legislative authority over Northern Ireland. Although that British government's policy was far from consistent over the next twenty-five years, a recurrent theme was the need for strong anti-terrorist measures.²⁶ As a result, while the Secretary of State dutifully laid SACHR's annual reports before Parliament, only one of them was ever debated and many of SACHR's recommendations, especially in respect of emergency powers, fell on deaf ears.

Hampered by its limited mandate and powers, struggling to establish its independence before a skeptical public, and faced by a largely unsympathetic administration, SACHR was always likely to find its task a difficult one. It is to the credit of many of its members that it did have an impact in a number of areas. Perhaps the most significant was in the area that it was expressly required to examine, the law relating to religious discrimination.

ria for appointment were indicated in the legislation and not until the 1990s were positions on the commission publicly advertised. As a result of the Anglo-Irish Agreement 1985, the Irish government was given the right to be consulted as to the membership of SACHR, but no material on the outcome of such consultation has been made publicly available.

25. SACHR had a small full time staff, usually four to five people. The head of this staff, the commission's Secretary, was normally a civil servant on secondment from the Northern Ireland Office. This was precisely the government department with which SACHR was most often at odds. The author of one study observed that the commission's secretary "carries considerable influence in major policy decisions of the Commission." See Maureen Maguire, *Sitting Still?: A Review of the Standing Advisory Commission on Human Rights 1973-95* (1995) (unpublished LL.M. thesis, Queen's University of Belfast) (on file with author).

26. For discussions of British policy in this period, see MICHAEL CUNNINGHAM, *BRITISH GOVERNMENT POLICY IN NORTHERN IRELAND 1969-89* (1991), and Brendan O'Leary, *The Conservative Stewardship of Northern Ireland, 1979-97: Sound-bottomed Contradictions or Slow Learning?*, *XLV POL. STUD.* 663 (1997).

SACHR's 1987 report on discrimination in employment²⁷ provided the framework for reforms of employment discrimination law realized in the Fair Employment Act 1989,²⁸ even if some commentators felt the act fell short of the SACHR recommendations.²⁹ The Fair Employment Act provided for a review of the law on religious discrimination after five years and required the government look to SACHR to provide the authoritative study.³⁰ From the time of its first report, the commission also ventured beyond the scope of its statutory mandate (sometimes at the express request of government) and produced a valuable series of reports and studies on matters such as family law, gay rights, education, and abortion in Northern Ireland. Some of these resulted in the government introducing legislative changes.³¹

SACHR also sought to influence government policy in the very politically sensitive area of anti-terrorist powers. Here it met with a much lesser level of success. Recommendations for greater rights for those detained under emergency legislation, such as the video taping of interviews,³² immediate access to legal representation,³³ and the need for judicial approval of extensions of detention in police custody beyond forty-eight hours,³⁴ were all consistently rejected. Calls for the removal of exclusion orders under the Prevention of Terrorism Act³⁵ or the reform of the law relating to the use of force by the police and army³⁶ fared no better. However, some were to be implemented when political conditions changed,³⁷ and SACHR's observations

27. STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, RELIGIOUS AND POLITICAL DISCRIMINATION AND EQUALITY OF OPPORTUNITY IN NORTHERN IRELAND—REPORT ON FAIR EMPLOYMENT, 1987, Cm. 237.

28. Fair Employment (Northern Ireland) Act, 1989, ch. 32 (Eng.).

29. See, e.g., Christopher McCrudden, *The Evolution of the Fair Employment (Northern Ireland) Act 1989 in Parliament*, in DISCRIMINATION AND PUBLIC POLICY IN NORTHERN IRELAND 244 (Robert Cormack & Robert Osborne eds., 1991).

30. STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, EMPLOYMENT EQUALITY LAW: BUILDING FOR THE FUTURE, 1997, Cm. 3684.

31. For example, SACHR's recommendations for the repeal of the 1954 Flags and Emblems Act were reflected in the Public Order (Northern Ireland) Order 1987, as were its proposals to decriminalize adult male homosexuality in Northern Ireland in the Homosexual Offences (Northern Ireland) Order 1978.

32. First recommended in its tenth report.

33. First recommended in the fourteenth report.

34. First appeared in the ninth report.

35. First set out in the tenth report.

36. Appeared regularly from the tenth report onwards.

37. For example, the media ban, which SACHR criticized from its introduction,

on the compliance of emergency legislation with human rights norms were given significant weight by the European Court of Human Rights.³⁸ Perhaps the nadir of its influence was reached when the government introduced legislation curtailing the right to silence³⁹ without even consulting SACHR as to its content. Above all, SACHR's consistent recommendations for the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁴⁰ ("EHCR" or "Convention") into U.K. law, first made in 1977,⁴¹ as a means of ensuring greater protection of human rights in Northern Ireland, was consistently rejected by government. Only when incorporation became part of the British political agenda, with the victory of the Labour Party in the 1997 general elections, did the idea of Northern Irish law acquiring fundamental rights guarantees become a reality.

Overall, therefore, SACHR has had a somewhat limited influence on policymaking and implementation as regards the protection of human rights in Northern Ireland. Much of this can be traced to its limited powers (which it has continually drawn attention to in its annual reports), limited resources, and government intransigence. However, it is also fair to observe that the commission has not always made the best use of the powers and resources at its disposal. Given that the commission found its reports meeting little response at the national level, SACHR was somewhat slow to make use of international channels to highlight its cause. Several of the United Kingdom's early reports to the U.N. Human Rights Committee and U.N. Committee Against Torture went by without the U.N. bodies having the benefit of SACHR's observations.⁴² The commission did not do all that it might have done to publicize its work, even

was repealed after the first IRA cease-fire in 1994, and the government now plans to provide for audio and video recording of interviews with terrorist suspects.

38. Notably in the Court's decision in *Brogan v. United Kingdom*, 145 Eur. Ct. H.R. (ser. A) (1988), which drew heavily on an *amicus* brief submitted by SACHR.

39. The Criminal Evidence (Northern Ireland) Order, 1988 (Eng.). For a discussion, see John Jackson, *Recent Developments in Criminal Evidence*, 40 N. Ir. L.Q. 105 (1989).

40. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

41. STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, *THE PROTECTION OF HUMAN RIGHTS BY LAW IN NORTHERN IRELAND*, 1977, Cmnd. 7009.

42. SACHR first submitted comments to the Human Rights Committee when it undertook its Third Periodic Report of the United Kingdom in 1991. It only submitted

within Northern Ireland. The 1977 report on a Bill of Rights resulted from a major seminar, which, even if it did not produce legislative change, was frequently quoted in debates around the Bill of Rights issue in the United Kingdom for the next twenty years. However, SACHR never again convened such a major public event. By the early 1990s, it was issuing an average of only three press releases per year and concentrating most of its media work around the publication of its annual report.⁴³ This was an increasingly bulky document, which the media often found difficult to digest and summarize. On occasions, SACHR seemed slow to react to new causes of concern with regard to the protection of human rights (for example, with respect to intimidation of defense lawyers or racial discrimination in Northern Ireland) and entered the fray only after the issue had been raised by human rights NGOs.

Finally, although the commission extended its remit beyond its original mandate, it did not seek to extend it too far. Nothing in the Northern Ireland Constitution Act prevented SACHR from conducting investigations into issues of immediate concern (such actions could be justified on the ground that they were instrumental to offering advice to the Secretary of State), but the commission shied away from embarking on such inquiries. In the late 1980s, events such as the Stalker affair and allegations of collusion between elements of the security forces and Loyalist paramilitaries cried out for independent investigation, but the then government offered only inquiries by senior police officers.⁴⁴ Given that SACHR had no powers to compel the production of witnesses or documents, any investigation by it into such matters would likely have run into substantial obstacles. However, an effort to try to do something to get to the bottom of such matters might well have produced some response by the authorities and would at least have advanced SACHR's claims to independence.

In 1987, SACHR commissioned a report on its own powers

comments to the Committee Against Torture on the occasion of its examination of the United Kingdom's Second Periodic Report in 1995.

43. See Maguire, *supra* note 25.

44. On the Stalker affair, which concerned allegations of a cover-up of unjustified use of lethal force by the police, see JOHN STALKER, *THE STALKER AFFAIR* (1988). On collusion allegations, see AMNESTY INTERNATIONAL, *POLITICAL KILLINGS IN NORTHERN IRELAND* (1994).

and effectiveness. The authors of the report agreed that it had produced reports of high quality and maintained its impartiality.⁴⁵ However, they also felt that it was not a strong force to be reckoned with in Northern Ireland, that it had a low public profile, and that it had not adopted a campaigning attitude. The lack of power to be involved with individual complaints was seen as especially detrimental to its effectiveness.⁴⁶ Government rejected SACHR's requests for increased powers and the repetition of SACHR's calls for a revised remit in its annual reports became increasingly ritualistic.⁴⁷

The commission never systematically evaluated its own effectiveness,⁴⁸ but by the mid 1990s it was clear that whatever it had achieved, concerns as to human rights violations remained strong in Northern Ireland. Indeed, if anything, while the scale of such violations may have decreased since the early 1970s, the level of international interest had grown significantly. The European Court of Human Rights, U.N. institutions, and international human rights NGOs were all taking an increasingly engaged and critical interest in human rights in Northern Ireland.⁴⁹ Moreover, human rights NGOs within Northern Ireland

45. This was also the general view of most politicians in the debates on the new Human Rights Commission (or "Commission") in 1998. Not all shared this view, however; Ulster Unionist spokesman John Taylor MP stated that in his view SACHR lacked community balance. Many of its decisions were seen as partial and it was not respected by the "greater number of people in Northern Ireland." House of Commons, Official Report, vol. 317, July 27, 1998, col. 81.

46. See Anthony Bradley et al., *Discrimination on Religious and Political Grounds: A Report for the Standing Advisory Commission on Human Rights* (1987), summarized in *STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, RELIGIOUS AND POLITICAL DISCRIMINATION AND EQUALITY OF OPPORTUNITY IN NORTHERN IRELAND: SECOND REPORT, 1990*, Cm. 1107, ¶ 10.8.

47. In the nineteenth report, it highlighted the fact that its own remit was not consistent with the Paris Principles.

48. See Maguire, *supra* note 25. Maguire notes that SACHR was unable to respond fully to a request in 1993 from William Ross MP for a list of its recommendations to the Secretary of State and "the success or otherwise of each particular recommendation whether partial or full." Maguire also observes, "In fact the Commission could not comply with Mr. Ross's straightforward request because it has never consciously followed the fate of specific recommendations."

49. On the approach of the European Human Rights system, see Stephen Livingstone, *Reviewing Northern Ireland in Strasbourg 1969-94*, 1 *IR. H.R. Y.B.* 15 (1995). For U.N. examinations, see the Committee Against Torture reports of 1991 (CAT/C/SR.133), 1995 (A/51/44), and 1998 (CAT/C/UK); the Human Rights Committee report of 1995 (CCPR/C/79/Add.55); and the report of the Special Rapporteur on the Independence of Judges and Lawyers in 1998 (E/CN.4/1998/39/Add.4). For increasing interest of international NGOs, see AMNESTY INTERNATIONAL, *POLITICAL KILLINGS IN*

and agencies such as SACHR have made increasing reference to the importance of compliance with international standards in the design of laws and institutions affecting human rights in Northern Ireland. By these international standards, SACHR fell well short of an adequate national institution for the protection of human rights. Moreover, there were already examples within Northern Ireland of more effective bodies working in the area.

C. *Anti-Discrimination Commissions in Northern Ireland*

Although SACHR was charged with the task of advising government on the law relating to discrimination on the grounds of religion and political opinion, it was not the only or the most important body acting in this area. In 1976, the Fair Employment (Northern Ireland) Act, which was passed to prohibit discrimination on grounds of religion or political opinion in employment, created the Fair Employment Agency ("FEA"). The FEA was initially given the task of receiving and resolving complaints of discrimination in employment as well as advising employers of their obligations under the legislation and conducting investigations into alleged patterns of discrimination. However, its functions were substantially changed and the agency was renamed the Fair Employment Commission ("FEC") with the passing of the Fair Employment (Northern Ireland) Act 1989. A key feature of these changes was that the FEC lost the power to make adjudications on claims of discrimination and instead was given the role of assisting individual applicants in bringing their complaints before the newly created Fair Employment Tribunals.⁵⁰ This change was foreshadowed by a number of reports, including SACHR's review of the law on religious discrimination, which indicated that the FEA had found it difficult to combine its adjudication role with its enforcement powers, to the detriment of combating discrimination effectively.⁵¹ Too often, the

NORTHERN IRELAND (1994); HUMAN RIGHTS WATCH, HUMAN RIGHTS IN NORTHERN IRELAND (1991); HUMAN RIGHTS WATCH, TO SERVE WITHOUT FAVOUR: POLICING, HUMAN RIGHTS AND ACCOUNTABILITY IN NORTHERN IRELAND (1997); LAWYERS COMMITTEE ON HUMAN RIGHTS, HUMAN RIGHTS AND LEGAL DEFENCE IN NORTHERN IRELAND (1993); and LAWYERS COMMITTEE ON HUMAN RIGHTS, AT THE CROSSROADS: HUMAN RIGHTS AND THE NORTHERN IRELAND PEACE PROCESS (1996).

50. For a summary of the functions of the Fair Employment Commission, see Stephen Livingstone, *Religious Discrimination*, in CIVIL LIBERTIES IN NORTHERN IRELAND 209-11 (Brice Dickson ed., 3d ed. 1997).

51. See *supra* note 27; see also Christopher McCrudden, *Law Enforcement by Regulatory*

FEA appeared anxious to resolve cases through pressure on both sides to conciliate, rather than seeking to establish precedents, whose impact would reach beyond the individual case. The 1989 legislation put the emphasis more on ensuring employers' compliance with their legal obligations not to discriminate and cast the FEC much more clearly in the role of an agency charged with securing such compliance. In addition to its power to assist individual applicants, the commission was also given enhanced powers to conduct investigations into employers where a significant imbalance of representation from one community was evident.⁵² Like SACHR, the FEC is a multi-member and part-time Commission. Unlike SACHR, however, it has a full time Chief Executive and a staff recruited by the commission itself. The budget and staff of the FEC are also considerably larger than that of SACHR.

The structure of the FEC is replicated in the Equal Opportunities Commission for Northern Ireland ("EOC-NI"), which was established by the Sex Discrimination (Northern Ireland) Order 1976.⁵³ The EOC-NI also has power to assist applicants alleging sex discrimination⁵⁴ and to conduct investigations. Like the FEC, it has a number of part-time commissioners who oversee the work of a staff appointed directly by the commission.

Therefore, by the early 1990s there were clearly alternative models available within Northern Ireland as to what a human rights commission should look like.⁵⁵ The power to assist litigation, to conduct investigations, and to appoint one's own staff were central features of this alternative. It was also evident that agencies with these powers were better known than those without. In a 1989 study, conducted as part of SACHR's research

Agency: The Case of Employment Discrimination in Northern Ireland, 45 MOD. L. REV. 617 (1982).

52. Fair Employment Act, 1989, § 11 (N. Ir.).

53. Sex Discrimination (Northern Ireland) Order, 1976 (Eng.). Ironically, SACHR once again had a hand in the creation of this. In 1976, the Secretary of State for Northern Ireland had referred to it as the question of whether and how British sex discrimination legislation should be applied to Northern Ireland. See Maguire, *supra* note 19, at 48.

54. The Equal Opportunities Commission for Northern Ireland's ("EOC-NI") remit is wider than the Fair Employment Commission ("FEC") and extends to goods, facilities and services as well as employment.

55. The Commission for Racial Equality in Northern Ireland, established in 1997, was given similar powers to the EOC-NI, but the Northern Ireland Disability Council, which was set up in 1995, was given an advisory role more similar to SACHR.

into public attitudes for its discrimination law review, over eighty percent of respondents indicated awareness of the FEA and sixty-six percent of the EOC as against just fifty percent for SACHR.⁵⁶

II. TOWARDS A NEW COMMISSION: HUMAN RIGHTS IN THE BELFAST AGREEMENT

As the Northern Ireland peace process gathered pace, the need for greater protection of human rights as part of any overall settlement became increasingly prominent.⁵⁷ Whereas the Anglo-Irish Agreement of 1985⁵⁸ contained a single article (Article 5), which referred to the governments' role in promoting respect for human rights and the need to consider whether a Bill of Rights for Northern Ireland would be valuable, both the Downing Street Declaration of 1993⁵⁹ and Framework Documents of 1995⁶⁰ indicated that respect for a number of rights would have to be part of any agreement. On the political plane, mechanisms to ensure greater respect for human rights within Northern Ireland were seen as one thing that could be offered to Nationalist politicians to encourage them to accept a political settlement that allowed Northern Ireland to remain within the United Kingdom. Moreover, it was a concession that there was evidence of Unionists' willingness, for all Northern Ireland's political parties had indicated support for a Bill of Rights by the early 1990s.⁶¹

With the election of a Labour government, which pledged to incorporate the European Convention on Human Rights into British law, another obstacle was removed at the 1997 U.K. gen-

56. See DAVID SMITH, *EQUALITY AND INEQUALITY IN NORTHERN IRELAND: PART 3—PERCEPTIONS AND VIEWS* 101 (1987).

57. For detailed discussion of the development of human rights themes in documents produced by the British and Irish governments over this period, see Colin Harvey & Stephen Livingstone, *Human Rights and the Peace Process in Northern Ireland*, 3 EUR. H.R. L.R. ____ (forthcoming 1999). For a discussion of the development of the peace process, see EAMONN MALLIE & DAVID MCKITTRICK, *THE FIGHT FOR PEACE: THE SECRET STORY BEHIND THE IRISH PEACE PROCESS* (1996).

58. Anglo-Irish Agreement Between the Government of Ireland and the Government of the United Kingdom, Nov. 15, 1985, Cmnd. 9657, *reprinted in* TOM HADDEN & KEVIN BOYLE, *THE ANGLO-IRISH AGREEMENT* 15-48 (1987) [hereinafter *Anglo-Irish Agreement*].

59. Cmnd. 2442.

60. A New Framework for Agreement, Dec. 1994, 34 I.L.M. 946 (1995).

61. See COMMITTEE ON THE ADMINISTRATION OF JUSTICE, *A BILL OF RIGHTS FOR NORTHERN IRELAND* (1993).

eral election. To many observers, British reluctance to accede to widespread support for a Bill of Rights in Northern Ireland always had more to do with an antipathy to the entrenching of human rights in British law generally than with the question of whether it was desirable in Northern Ireland. However, although the Framework Documents indicated the need to entrench certain rights in any new constitutional arrangements for Northern Ireland and to strengthen measures to combat discrimination, they said little on the issue of new institutional arrangements to enforce these rights. Human rights NGOs, such as the Committee on the Administration of Justice, argued strongly that a new Human Rights Commission was needed to ensure that any rights did not remain paper rights.⁶² Yet when the new multi-party talks opened in September 1997, it was far from clear that this position was accepted by those involved in them.

This remained the position for most of those talks as it seemed that while the need for greater human rights provisions was accepted as an inevitable part of any settlement, little discussion on the details occurred until the final two weeks of negotiations. The outcome of these was a specific section of the Agreement on "Rights, Safeguards and Equality of Opportunity—Human Rights." The agreement signatories committed to the Agreement to "the mutual respect, the civil rights and the religious liberties of everyone in the community." It went on to outline eight rights, which the parties affirmed in particular. These rights included (1) the right of free political thought; (2) the right to freedom and expression of religion; (3) the right to pursue democratically national and political aspirations; (4) the right to seek constitutional change by peaceful and legitimate means; (5) the right to choose one's place of residence freely; (6) the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender, or ethnicity; (7) the right to freedom from sectarian harassment; and (8) the right of women to full and equal political participation.⁶³

No commitment is given to enshrine these rights in any

62. See COMMITTEE ON THE ADMINISTRATION OF JUSTICE, MAKING A BILL OF RIGHTS STICK: THE OPTIONS FOR NORTHERN IRELAND (1997).

63. Belfast Agreement, *supra* note 2, Rights, Safeguards and Equality of Opportunity, Human Rights ¶ 1.

legal form, but the Agreement goes on to outline commitments by the British Government to incorporate the ECHR fully into Northern Irish law (including the power for courts to overrule Assembly legislation for inconsistency with its provisions), to create a statutory obligation on public authorities in Northern Ireland to carry out their functions with due regard to promote equality of opportunity in respect of a number of criteria,⁶⁴ and to consider recommendations for what might be included in a specific Bill of Rights for Northern Ireland beyond the guarantees of the ECHR.⁶⁵ The Irish Government also committed itself to strengthening its protection of human rights and taking steps to ensure "at least an equivalent level of protection of human rights as will pertain in Northern Ireland."⁶⁶ Specifically, it agrees to take a number of measures including (1) ratifying the Council of Europe Framework Convention on National Minorities, (2) implementing enhanced employment equality legislation, and (3) introducing equal status legislation.

However, for the purposes of this Essay, perhaps the most significant aspects of this section of the Agreement was the commitment to create new institutions for the protection of human rights in Northern Ireland. One was the Equality Commission, to replace the existing commissions on fair employment, sex discrimination, race discrimination, and disability. The second was a new Northern Ireland Human Rights Commission. The Agreement indicated that this new commission would replace SACHR and that its membership would reflect "community balance." The new commission would have an "extended and enhanced" role beyond that of SACHR, which would include (1) keeping under review the adequacy and effectiveness of laws and practices; (2) making recommendations to Government as necessary; (3) providing information and promoting awareness of human rights; (4) considering draft legislation referred to them by the new Assembly; and (5) in "appropriate cases," bringing court

64. Those listed are religion, political opinion, gender, race, disability, age, marital status, dependants, and sexual orientation. This commitment has now been given legislative force in Section 75 of the Northern Ireland Act 1998.

65. Belfast Agreement, *supra* note 2, Rights, Safeguards and Equality of Opportunity, Human Rights, United Kingdom Legislation ¶¶ 2-4.

66. *Id.*, Rights, Safeguards and Equality of Opportunity, Human Rights, Comparable Steps by the Irish Government ¶ 9.

proceedings or providing assistance to individuals doing so.⁶⁷ The commission was also to be charged with the task of advising the government on any Bill of Rights for Northern Ireland. In addition to this Commission, the Irish government pledged that it would create a human rights commission "with a mandate and remit equivalent to that in Northern Ireland," and Section 10 of the Agreement envisaged a creation of a joint committee of the representatives of these two human rights commissions. The one specific task that the Agreement outlined for this joint committee was to consider "the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland."

The inclusion of specific human rights commitments in the Agreement, which has since been approved by referendums both in Northern Ireland and the Republic of Ireland, indicates that it goes beyond a set of arrangements for the institutions of government to embrace the idea of certain fundamental values lying at the heart of any future arrangements for the government of Northern Ireland.⁶⁸ This in turn, as will be discussed in more detail later, strengthens the position of the new human rights and equality commissions. They may justly claim that they are not simply further "quangos," which may be swept away when fully representative arrangements for government are restored to Northern Ireland,⁶⁹ but instead are integral parts of the new arrangements for the governance of Northern Ireland. Within

67. *Id.*, Rights, Safeguards and Equality of Opportunity, Human Rights, New Institutions in Northern Ireland ¶ 5.

68. This is reinforced by Paragraph 2 of the "Declaration of Support" at the start of the Agreement, where all parties pledge to "firmly dedicate ourselves to the achievement of reconciliation, tolerance and mutual trust and to the protection and vindication of the human rights of all." *Id.*, Declaration for Support ¶ 2. Also, Paragraph 1(v) of the "Constitutional Issues" section whereby the parties endorse the commitments of the British and Irish governments to the effect that whatever choice is freely expressed by a majority of the people of Northern Ireland, "the power of sovereign government with jurisdiction there shall be exercised with rigorous impartiality on the behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities." *Id.*, Constitutional Issues ¶ 1(v).

69. For discussion of the role of quangos in Northern Ireland, see JOHN MORISON & STEPHEN LIVINGSTONE, *RESHAPING PUBLIC POWER: NORTHERN IRELAND AND THE BRITISH CONSTITUTIONAL CRISIS* 161-68 (1995).

those arrangements they have the specific role of acting as the guardians of the human rights and equality provisions that are central to it. However, whether they are able to play this role effectively depend on whether they would be given the legal necessary authority.

III. *MAKING RIGHTS EFFECTIVE: THE HUMAN RIGHTS COMMISSION AND THE NORTHERN IRELAND ACT 1998*

A. The Legislative Process

Not all human rights campaigners were satisfied by the provisions for the Human Rights Commission set out in the Belfast Agreement.⁷⁰ Critical studies noted that the Agreement left it unclear as to how independent the new Commission would be (especially as to its funding and power to appoint its own staff) and whether it would only be able to review legislation that the Assembly chose to send it. Few were concerned with the absence of power to receive and adjudicate complaints (the problems of the Fair Employment Agency having perhaps paid to this model in Northern Ireland), but many noted the lack of any power to conduct investigations. The absence of this function was especially regrettable since, as has been noted earlier, it was precisely the absence of independent investigation into serious and disputed human rights concerns that had led to much disillusionment with the state of human rights protection in the 1980s and 1990s.

These concerns were not assuaged by either the draft legislation, which went before the U.K. Parliament in July of 1998 or the process leading up to it. While the making of the Agreement, by all accounts, was preceded by lengthy and open consultation with many parties, the draft legislation was a much more rushed affair. Many of the politicians involved in the Agreement negotiations complained that they saw drafts of the legislation only shortly before it was submitted to Parliament and had little opportunity to comment on it. With respect to the Human

70. See, e.g., BRICE DICKSON, *CREATING AN EFFECTIVE HUMAN RIGHTS COMMISSION FOR NORTHERN IRELAND: A PAPER COMMISSIONED BY THE STANDING ADVISORY COMMISSION ON HUMAN RIGHTS* (1998); Christopher McCrudden, *The Northern Ireland Human Rights Commission: Some Comments* (1998) (unpublished paper prepared for the Committee on the Administration of Justice) (on file with author).

Rights Commission, the bill not only failed to address concerns as to the lack of investigation powers, but also appeared to retreat from the commitments in the Agreement by omitting to provide for a power for the Commission to bring court proceedings of its own motion. Although this retreat from the position set out in the Agreement was not as severe as in the case of the equality provisions (where the Agreement's commitment to the provision of impact statements by public authorities disappeared in the original version of the bill),⁷¹ it was sufficient to trigger extensive lobbying efforts to amend the legislative proposals. Early in the debate on the bill, the British Government accepted the need for further consultation on its human rights provisions,⁷² and subsequently brought forward a significant number of amendments of its own. Such actions have clearly improved the provisions for the Human Rights Commission from those set out in the original bill. Whether they are enough to satisfy all the concerns of the Government's critics remains to be seen.

B. Composition, Staffing and Funding of the Commission

The new Commission is to be established under the authority of Section 68 of the Northern Ireland Act 1998.⁷³ Section 68(2) of this act indicates that the Commission is to consist of "a Chief Commissioner and other Commissioners appointed by the Secretary of State."⁷⁴ Schedule 7 of the act indicates that Chief Commissioners are appointed to five-year terms and other Commissioners for three years.⁷⁵ The British Government subsequently indicated that the Chief Commissioner would be a full-time post and that up to a further nine Commissioners would be appointed on a part-time basis.⁷⁶

In a break with the tradition that had prevailed under SACHR (whose appointments procedure always remained some-

71. For a summary of the concerns as to the Human Rights and Equality provisions of the bill, see Kevin McNamara, *Inattention to Detail on Amendments on Detail Could Be Costly*, *IRISH TIMES*, Oct. 29, 1998.

72. See House of Commons, Official Report, vol. 315, July 20, 1998, col. 879 (Mr. Murphy).

73. Northern Ireland Act, 1998, ch. 47, § 68 (Eng.).

74. *Id.* § 68(2).

75. *Id.* sched. 7(2).

76. The idea that at least some Commissioners should be full-time was advocated by Brice Dickson, *supra* note 70. Professor Dickson has since been appointed to be the first Chief Commissioner, Northern Ireland Office Press Release, Jan. 18, 1999.

thing of a mystery), but in line with current government criteria for public appointments,⁷⁷ all of these posts were advertised and applications were invited from the general public. The advertisements indicated that knowledge of human rights was a “desirable but not essential” criterion for appointment and also that applicants should have a “balanced” approach to human rights.⁷⁸ Section 68(3) of the act also indicates that in making appointments the Secretary of State “shall as far as practicable secure that the Commissioners, as a group, are representative of the community in Northern Ireland.”⁷⁹ In legislative debates, the Minister of State indicated that the Government regarded “community” here as referring essentially to Nationalists and Unionists,⁸⁰ even though a broader definition of community is utilized for the Civic Forum⁸¹ and it might be argued that ethnic minorities in Northern Ireland would have a strong interest in representation on a Human Rights Commission. Whether the selection process will be able to produce a group of Commissioners who satisfy both Nolan criteria and “community representativeness” tests remains to be seen. Certainly the recent experience of the Parades Commission suggests that basing an agency’s legitimacy largely on its claim to community balance is vulnerable to shifts in composition and community perception. The withdrawal of the main Protestant representative on this Commission was swiftly followed by Unionist politicians indicating that they no longer regarded it as an authoritative body.

Whereas the staffing arrangements for SACHR seemed to involve a clear breach of the Paris Principles, the new Commission will be empowered to appoint its own staff, “subject to the approval of the Secretary of State as to numbers and remuneration.”⁸² However, whether it will have adequate resources to appoint sufficient staff remains uncertain. The legislation provides

77. See *FIRST REPORT OF THE COMMITTEE ON STANDARDS IN PUBLIC LIFE*, 1995, Cm. 2850-I.

78. Information on the appointment criteria can be found on the Northern Ireland Office website. See <http://www.nio.gov.uk>.

79. Northern Ireland Act, 1998, ch. 47, § 68(3) (Eng.).

80. Paul Murphy MP stated: “I think that all the world knows what traditions and communities we are considering: the broad Unionist community and the broad nationalist community.” House of Commons, Official Report, vol. 317, July 27, 1998, col. 60.

81. Belfast Agreement, *supra* note 2, Strand One, Democratic Institutions in Northern Ireland, Relations with other institutions ¶ 34.

82. Northern Ireland Act, 1998, sched. 7(4)(1).

for the Commission to be funded by grants from the Secretary of State out of the money provided by Parliament. This does not seem to envisage the Commission directly seeking funds from Parliament, and it will remain dependent on the decisions of the Secretary of State as to the resources that it will receive each year. The British Government indicated in the debates on the bill that it expected the Commission's budget to be £750,00 in its first year.⁸³ This is just over £500,000 more than the budget of SACHR in its last year although the new Commission has a substantially enhanced role and over £120,000 of that increase is likely to be consumed by Commissioners' salaries. The Commission's projected budget is about half that of the current Equal Opportunities Commission for Northern Ireland and is likely to be under severe stress if it engages in much litigation or investigative activity. Any sort of adequate consultative exercise on a Bill of Rights is likely to require separate funding, and the early years of the Commission may well see it in regular dispute with government as to the adequacy of financial commitment given to it.⁸⁴

C. Functions and Powers of the Commission

Sections 69 and 70 of the Northern Ireland Act set out the Commission's functions.⁸⁵ The Commission retains the general advice function that SACHR developed over the years. This is now expressed as the duty to advise both the Secretary of State and the Executive Committee of the Assembly "of legislative and other measures which ought to be taken to protect human rights,"⁸⁶ either on request or as it thinks appropriate. In addition, the Commission gains a range of functions that were not available to SACHR. These functions are discussed below:

83. This was confirmed by the Minister of State, Paul Murphy MP on the parliamentary debates on the Act, House of Commons, Official Report, vol. 317, July 27, 1998, col. 66.

84. The South African Commission was allocated a budget of R6.8m (US\$1.5 million) in its first year. At the end of this it requested an increase to R32m (US\$7 million). See David McQuoid-Mason, *The Role of Human Rights Institutions in South Africa*, unpublished paper submitted to the International Conference on the Establishment of the Ethiopian Human Rights Commission and the Institution of the Ombudsman, Addis Ababa (May 18-22, 1998).

85. Northern Ireland Act, 1998, ch. 47, §§ 69-70 (Eng.).

86. *Id.* § 69(3).

1. Power to Advise the Assembly Whether a Bill Is Compatible with Human Rights⁸⁷

Perhaps the first thing to note in respect to this power is that the Commission is required to advise on compatibility with "human rights" and not simply the Convention rights that have now become part of U.K. law with the passing of the Human Rights Act. In parliamentary debates, the responsible minister accepted that this would allow the Commission to look at a broad range of international human rights provisions, including things like the International Covenant on Civil and Political Rights,⁸⁸ Convention on the Rights of the Child,⁸⁹ and various anti-discrimination Conventions.⁹⁰ Many of these go much further than the European Convention on Human Rights, and the Commission might even include in its definition of human rights things such as U.N. codes of conduct. Section 14 of the Northern Ireland Act provides that Standing Orders of the Assembly will make provision for the Assembly's Presiding Officer to send all bills to the Commission as soon as reasonably practicable after they have been introduced and for the Assembly to request the Commission's view on whether a bill is compatible with human rights. Only if such a request is made is the Commission under an obligation to offer such advice. However, the Commission may also tender advice even if this has not been requested, where it thinks that this is appropriate. This is a sensible provision that will give the Commission a degree of discretion as to which proposed legislative measures it wishes to comment on. It is hoped though that Ministers of the Assembly will seek the Commission's advice on draft legislation before it has been introduced in bill form, lest changes become more difficult subsequently.

The Commission, of course, only has the power to give ad-

87. *Id.* § 69(4).

88. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967).

89. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/736 (1989), *reprinted in* 28 I.L.M. 1448.

90. The legislation does not itself define human rights. Lord Williams of Mostyn indicated at committee stage in the House of Lords that it would be for the Commission itself to define this, House of Lords, Official Report, vol. 593, Oct. 21, 1998, col. 1529. Section 69(11)(b) of the Northern Ireland Act, which defines "human rights" as "including the Convention rights," would also appear to endorse giving an interpretation to the term that goes beyond the scope of the ECHR.

vice. There is no requirement on Ministers to accept it, and the Commission has no power to certify whether or not legislation may be enacted. However, there are both a range of measures that suggest that the Commission's advice should be taken seriously and a range of avenues for the Commission to pursue if it is not. To start, Section 6(2)(c) of the Northern Ireland Act provides that the Assembly does not have competence to pass legislation that is inconsistent with Convention rights. Ministers introducing legislation are required to make a statement that it is consistent with the Assembly's legislative competence.⁹¹ It would be difficult to do this in good faith where the Commission has indicated a belief to the contrary. Even if a Minister does make such a statement, the Presiding Officer of the Assembly has the power not to allow a bill to go forward where he or she believes that it is outside the legislative competence,⁹² and the Attorney General for Northern Ireland may refer to the Privy Council any bill on the same basis.⁹³ Failure of either of these things happening will put the Commission in a position to assist applicants raising the issue of compatibility with the Convention in subsequent proceedings.

In addition to ensuring that Assembly legislation is consistent with Convention rights, Section 14(5)(a) provides that the Secretary of State may refuse to submit for the Royal Assent any bill that contains a provision that is "incompatible with any international obligations."⁹⁴ This provides an opportunity for the Commission to put pressure on the Assembly to ensure that any legislation is compatible with the United Kingdom's other international human rights obligations, for example, with the International Covenant on Economic, Social and Cultural Rights⁹⁵ or the Convention on the Rights of the Child.

Therefore, there are a range of measures that should ensure that the Commission's voice will be heard when it comes to de-

91. Northern Ireland Act, 1998, § 9(1). It is worth noting that although the Human Rights Act 1998 is not scheduled to be brought into force throughout the United Kingdom until early 2000, Schedule 14 of the Northern Ireland Act 1998 provides that with respect to the legislative competence of the Assembly it will be treated as being in force.

92. *Id.* § 10(1).

93. *Id.* § 11(1).

94. *Id.* § 14(5)(a).

95. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 165, U.N. Doc. A/6316 (1966).

cluding whether the Assembly passes legislation that is consistent with human rights standards. However, it is worth remembering that these provisions only apply to legislation of the Assembly. Many of the issues on which, from a human rights perspective, controversial legislation might be passed come within the purview of reserved or excepted matters. This includes the whole of policing and criminal justice as well as immigration law and the maintenance of public order.⁹⁶ On these issues the Commission's formal position is identical to that of SACHR. It can only hope that the British government proves more willing to consult and listen to it than it did with respect to its predecessor.

2. Power to Provide Assistance to Individuals in Proceedings Raising Human Rights Issues and to Bring such Proceedings Itself

Section 69(5)(b) of the Northern Ireland Act restored the power promised in the Agreement that the Commission would have the power to initiate proceedings in its own right.⁹⁷ However, the value of this is reduced by Section 71(1), which indicates that nothing in Section 69(5)(b) will allow anyone to initiate proceedings alleging (or relying upon) a breach of Convention rights, unless they can show themselves to be a "victim" for the purposes of the ECHR.⁹⁸ Given that Convention rights will be the main source of legally enforceable human rights in Northern Irish law, it is difficult to see what this leaves the Commission to base any actions on. The anti-discrimination provisions of Northern Irish statute law might be one candidate, but the Commission may feel that such actions are best left to the Equality Commission. Others could be common law notions of "fundamental rights"⁹⁹ or making use of the United Kingdom's other international human rights obligations. However, the first are likely to be subsumed under Convention rights while it is

96. However, as reserved matters, there remains the possibility in the future that policing, criminal justice, and public order may come within the competence of the Assembly.

97. Northern Ireland Act, 1998, ch. 47, § 69(5)(b) (Eng.).

98. *Id.* § 71(1). This is also the test for standing used in the Human Rights Act 1998. The European Court of Human Rights has defined "victim" in a way that largely excludes representative actions. See DAVID HARRIS ET AL., *THE LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 630-38 (1995).

99. For a discussion of these, see John Laws, *Is the Hugh Court the Guardian of Fundamental Rights?*, 1993 PUB. L. 59.

doubtful that the second will give rise to any enforceable legal obligations.¹⁰⁰ To require the Commission to enter such actions without invoking Convention rights is to ask it to go into court with one hand tied behind its back.

The Commission's litigation activity is therefore more likely to focus on assisting individual applicants raising Convention issues.¹⁰¹ Here, its main problem is likely to be deciding on a strategy for the offering of assistance. When the Human Rights Act comes into force, it opens up a potentially vast range of legal issues to human rights concerns. Many criminal defendants, almost anyone suing the police or prison service, and not a few litigants in property-related matters might claim that their case has a human rights aspect. If the Commission extends its definition of human rights beyond the Convention rights, then even more cases may come within its purview. Taking all these cases would clearly swamp the Commission and swiftly bring on budgetary crisis. To avoid this, the Human Rights Commission would do well to follow the lead of the FEC and EOC in developing a strategy around priority areas, backed up by a willingness to refer other cases to private lawyers. To make this strategy successful, the Commission will need to be assured that legal practitioners throughout Northern Ireland are conversant with the new legal provisions of the Human Rights Act, something that comes within its education mandate.

In coming to decisions about litigation strategy, the legislation offers some assistance. Section 70(2) provides that assistance may be granted (a) where the case raises an issue of principle, (b) where it would be unreasonable to expect the person in question to deal with the matter without assistance, e.g., by reason of the complexity of the matter, or (c) where there are other special circumstances that make assistance appropriate.¹⁰² This still leaves a very broad area of discretion for the Commission to set priorities on. It may well decide as a matter of policy not to assist criminal defendants or appellants, save in exceptional

100. For a discussion of the status of human rights treaties in British law, a discussion that retains its relevance for treaties other than the ECHR, see MURRAY HUNT, *USING HUMAN RIGHTS LAW IN ENGLISH COURTS* (1997).

101. It can also seek to persuade the Attorney General for Northern Ireland, who does have standing without needing to show victim status, to initiate Convention-based actions.

102. *Id.* § 70(2).

cases (as these will normally be legally aided), and to allow the Equality Commission to deal with all those raising discrimination issues. Pending reforms to legal aid in Northern Ireland could put more pressure on the Commission to accept cases that no private lawyer is willing to take.¹⁰³

The legislation makes no reference to the Commission being able to intervene as *amicus curiae* in any proceedings before the courts. However, this is not ruled out and it would appear to be a valuable way for the Commission to play a role in cases, especially those which reach the Court of Appeal or Privy Council, without taking on the responsibility of litigating the case itself. Courts in the United Kingdom have shown themselves increasingly willing to accept *amicus* briefs at the appellate stage¹⁰⁴ and it is hoped that judicial encouragement will be shown to the Commission in this regard.

3. The Power to Conduct Investigations

In the end, Section 69(8) of the Northern Ireland Act provided that "for the purpose of exercising its functions under this section the Commission may conduct such investigations as it considers necessary or expedient."¹⁰⁵ Since Section 69(1) includes in the Commission's functions the general obligation to keep under review the adequacy of law and practice affecting human rights in Northern Ireland, it appears that the Commission has a broad remit to conduct investigations.¹⁰⁶ Although the inclusion of this power went some way to satisfying critics who noted its absence from the original bill, the Government still stopped short of giving it powers to acquire documents or interview witnesses. Government spokesmen indicated that there was insufficient consensus among the political parties for this to be included.¹⁰⁷ Although the same spokesmen pledged that the British government would cooperate fully with the Com-

103. Section 70(4) of the Northern Ireland Act allows the Commission to recover expenses "in certain circumstances." *Id.* § 70(4). This may enable it to recover costs from successful litigants.

104. See, for example, the recent Pinochet case, *R v. Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Ugarte* (Amnesty International Intervening) 4 ALL. E.R. 897 (1998).

105. Northern Ireland Act, 1998, ch. 47, § 69(8) (Eng.).

106. *Id.* § 69(1).

107. House of Lords, Official Report, vol. 593, Oct. 21, 1998, col. 1539 (Lord Moxton).

mission, they added that such cooperation would be subject to the need to protect national security, public safety, and public order.¹⁰⁸ Moreover, this pledge cannot bind agencies such as the police, who are formally independent of government direction.

The power to conduct investigations has already been highlighted as one that is especially apposite for a human rights commission in Northern Ireland. However, it is difficult to believe that investigations into issues such as Stalker, collusion, or the use of plastic bullets would have gone very far without the power to subpoena witnesses or obtain documents. In setting up the Saville Inquiry into Bloody Sunday, the Government appears to have recognized that getting to the truth of controversial and disputed matters requires the powers of a judicial inquiry.¹⁰⁹ Since the structure of the Act recognizes the Commission as an institution with the function of scrutinizing the Assembly (since its powers are an excepted matter not capable of change by the Assembly), it is arguable that the emphasis should have been more on making sure that it has effective powers than that Assembly parties support them. In their current formulation, it is not clear that the Commission's powers conform to the Paris Principles standards.¹¹⁰

As with the power to assist litigation, the Commission will need to act strategically with regard to its investigation powers. In this area, it is also likely to be faced with a myriad of claims to investigate incidents or alleged patterns of abuse. Part of that strategy may involve referring requests to other institutions, such as the Equality Commission, Police Ombudsman, or Parades Commission, provided that it feels that these institutions have the requisite authority and commitment. However, it may be wise for the Commission to test at an early stage the public commitments of cooperation that it is likely to receive initially from a range of public agencies. Undertaking a significant investigation early in its life may help the Commission identify the scope of its

108. *Id.* at 1543.

109. Both the FEC and EOC-NI also have considerably stronger powers of investigation.

110. These provide that the National Institution "shall hear any person and obtain any information and any documents necessary for assessing situations falling within its competence."

power and the actual depth of the state's commitment to its effectiveness.

4. The Power to Promote Understanding and Awareness of Human Rights in Northern Ireland

This was power that SACHR regarded itself as having but did little to act upon. Section 69(6) of the Northern Ireland Act now places the Commission under an explicit obligation to pursue this. The introduction of the Human Rights Act may provide the focus for the Commission to conduct a public education campaign at several levels. It may want to ensure that the judiciary, lawyers, public authorities, the police, and prison services all have an adequate understanding of the implications of the Human Rights Act for them either through delivering training to them itself or certifying the adequacy of their own in-house training. The Commission may also seek to take education in human rights to a much broader range of people, perhaps through developing human rights training in schools or via a media campaign.

5. The Power to Advise the Secretary of State on Additional Rights to Be Enshrined in a Northern Ireland Bill of Rights

Section 69(7) of the Northern Ireland Act places the Secretary of State under an obligation to request information from the Commission on what additional rights might be included in a Northern Ireland Bill of Rights. In paragraph 4 of the Belfast Agreement, to which the act explicitly refers, it is suggested that these additional rights should reflect "the principles of mutual respect for the identity and ethos of both communities and parity of esteem." It goes on to refer explicitly to two matters that the Commission should consider:

the formulation of a general obligation on government and public bodies to respect fully, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and

a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.

The second of these topics invites consideration of extension of Section 76 of the Northern Ireland Act, which both prohibits discrimination by public authorities on the grounds of religious belief or political opinion, including forms of "indirect" discrimination,¹¹¹ and prohibits non-employment related acts of discrimination in the private sector. This reflects the weakness of Article 14 of the European Convention on Human Rights, which is too narrow to serve as an adequate anti-discrimination provision in Northern Ireland.¹¹² It may also provide for consideration as to whether other categories such as race, disability, sex, and sexual orientation might be included in this guarantee, although the Agreement seems to direct consideration only to "two communities" issues. The first of the topics invites more detailed consideration of how to give a legal expression to "parity of esteem" questions first highlighted in SACHR's 1990 study on equality of opportunity.¹¹³ Issues relating to language, education, and expressions of cultural identity may well feature prominently in such deliberations.

Providing advice on any such additional rights poses both procedural and substantive challenges for the Commission. The procedural challenge is how to go about providing this advice. There are good arguments for engaging in the sort of large-scale consultation exercise that the South African Constitutional Convention engaged in when seeking to draft a Bill of Rights¹¹⁴ and that the Policing Commission has recently undertaken in Northern Ireland. Such an exercise would assist the Commission's public education efforts and might strengthen the legitimacy of any recommendations. The substantive challenge is what rights the Commission will ultimately recommend the Secretary of State to include. It could decide to range wider than the areas suggested by paragraph 4 of the Agreement and seek inclusion of a much broader range of international human rights obliga-

111. It was generally assumed that Section 19 of the Northern Ireland Constitution Act 1973, the predecessor of Section 76, only applied to direct or intentional discrimination. *See supra* note 46, ¶ 4.18.

112. Article 14 of the ECHR is not a general anti-discrimination provision. It only prohibits unequal treatment with respect to other rights guaranteed under the Convention. For a critique, see Stephen Livingstone, *Article 14 and the Prevention of Discrimination in the European Convention on Human Rights*, 1 *EUR. H.R. L. REV.* 25 (1997).

113. *See supra* note 46, ¶ 8.34.

114. *See* NAZREEN BAWA, *HUMAN RIGHTS AND SOUTH AFRICA: LESSONS FOR BUILDING INSTITUTIONS* 19-31 (1998).

tions (perhaps including economic, social, and cultural rights), especially if a consultation exercise reveals support for this. Even if it keeps to the areas suggested in the Agreement, it faces a difficult task in reconciling the sort of communal rights that may be required to give effect to principles of parity of esteem, with the individual rights contained in the Human Rights Act. The whole issue of contentious marches, which has given rise to especially bitter conflict in recent years, is one area where such difficulties are likely to be manifest.¹¹⁵

6. Doing All that It Can Do to Establish a Joint North-South Human Rights Committee¹¹⁶

At the time of writing, the Irish Government has yet to announce their proposals for legislation to create a Human Rights Commission, though this is expected in the near future. The Agreement suggests that this joint committee has the very general task of being "a forum for consideration of human rights issues in the island of Ireland" and the specific obligation of considering the establishment of a charter of rights to be signed by all Irish political parties. The latter may be a useful symbolic exercise, but one suspects it may be drafted at such a high level of generality that it is unlikely to be more than this.

The joint committee might take on the role of scrutinizing the extent to which decisions of the North-South ministerial bodies provided for in Strand Two of the Agreement raise human rights issues. Actions in the field of health, education, the environment, and language¹¹⁷ may all raise human rights questions. Matters relating to family law and land ownership are other areas where the joint committee may want to make proposals to harmonize human rights protections throughout the island. The committee may also want to explore the extent to which developments at a European level pose new issues for the protection of human rights on both sides of the Irish border.¹¹⁸

115. For a discussion of different ways ahead in giving effect to these principles, see KEVIN BOYLE & TOM HADDEN, *NORTHERN IRELAND: THE CHOICE* 159-207 (1994).

116. Northern Ireland Act, 1998, § 69(10).

117. All such fields have been identified in the recent agreement between the First Minister and Deputy First Minister on proposed cross-border bodies. Deaglan de Breadun, *Timetable for Setting Up North's Institutions Agreed*, *IRISH TIMES*, Jan. 16, 1999.

118. For a discussion of some of these issues, see Anthony Whelan, *Fundamental Rights, Democracy and the Rule of Law in the Third Pillar*, in *JUSTICE CO-OPERATION IN THE EUROPEAN UNION* 205 (Gavin Barrett ed., 1997).

Joint programs on human rights education and training are another matter that could emerge from this joint committee.

Overall, therefore, the Northern Ireland Act attributes a wide range of functions to the new Human Rights Commission. Although the act met many concerns of critics of the original bill, it did not go all the way. In an effort to reassure these critics, the British Government introduced Section 69(2), which provides for the Commission to review its functions, provisions, and effectiveness within two years and to make recommendations to the Secretary of State. What recommendations it makes will depend heavily on how it finds its powers working out over the next two years.

IV. *PROSPECTS FOR THE FUTURE*

The Human Rights Commission has the opportunity to make a considerable contribution to the protection of human rights in Northern Ireland, but it is wise not to overestimate its potential. It can be argued that the most significant violations of human rights in Northern Ireland over the past thirty years have stemmed from the abuse of emergency powers, misconduct by the police and army, and patterns of religious discrimination. The capacity of the Commission to effect change in each of these areas is limited. Dealing with religious discrimination is likely to remain primarily in the preserve of the Equality Commission. Policing and police powers are currently under examination by the Policing Commission and the Criminal Justice review. Emergency legislation remains within the control of the U.K. government, which has recently indicated an intention to introduce permanent anti-terrorist law throughout the United Kingdom even if it withdraws the emergency legislation that applies to Northern Ireland.¹¹⁹ The Human Rights Commission will no doubt wish to contribute to the discussions of the Policing Commission and the proposals for anti-terrorist law, but its formal position in relation to these is no stronger than that of SACHR.

What the Commission can do is to strive to ensure that the Agreement's commitments to the protection of human rights become part of the wiring of all public institutions in Northern Ireland. To achieve this, it must adopt a much higher public

119. See *Straw Launches Broader Laws Against Terrorism*, *GUARDIAN*, Dec. 18, 1998.

profile than was the case with SACHR, something its enlarged staff and full time Chief Commissioner should help it to achieve. Although the Northern Ireland Act does not confer upon it a clear power to advise other public authorities, the Commission should seek to make full use of its powers to facilitate human rights education, to advise the Secretary of State, to support litigation, and to undertake investigations with the overall objective of ensuring that bodies such as the police, prison service, and government departments fully respect human rights. It should seek to establish close relations with related bodies such as the Equality Commission, Policing Ombudsman, Parades Commission, and Commissioner for Complaints to ensure that human rights norms are fully integrated into their practices. To the extent that this is true, the Human Rights Commission may be able to reduce the amount of work that it has to do. The powers to indicate that Assembly legislation is inconsistent with human rights obligations and to support challenges to the actions of public authorities in Northern Ireland should give it considerably more leverage to achieve this objective than SACHR ever had. Even in respect of legislation passed by the Westminster government or decisions made by civil servants answerable to the Secretary of State for Northern Ireland, where the Commission's formal powers are weaker, it can still make use of its investigation and litigation powers to engineer greater compliance. Whether this will prove sufficient to produce change may depend on whether the approach that it espouses receives sufficient support from courts, which in Northern Ireland and Britain, have not always shown themselves to be sympathetic to human rights arguments.¹²⁰

SACHR constantly found its legitimacy under threat as it lacked the organizational structure to distance itself from government sufficiently or the powers to make an impact on government. A more active and effective Human Rights Commission is likely to find itself facing legitimacy problems from a different direction. Agencies that do manage to impose themselves effectively on state institutions are vulnerable to the claim that they

120. On the Northern Irish courts record, see Brice Dickson, *Northern Ireland's Troubles and the Judges*, in *NORTHERN IRELAND: POLITICS AND THE CONSTITUTION* 130 (Brigid Hadfield ed., 1992). For the approach of the House of Lords, the final domestic appeal court for Northern Ireland, see Stephen Livingstone, *The House of Lords and the Northern Ireland Conflict*, 57 *MOD. L. REV.* 333 (1994).

are unrepresentative quangos who are frustrating the will of the electorate.¹²¹ If the Commission's membership does turn out to be sufficiently "representative of the community in Northern Ireland," then some of the force of such criticisms may be deflected. However, the Commission can also argue that it is more than just another quango. Rather, along with the Equality Commission, it can be seen as having a key constitutional role in giving effect to the human rights and equality provisions that are central to the Agreement and hence to the future government of Northern Ireland. The inclusion of these provisions in the Northern Ireland Act is a clear indication that Northern Ireland has moved a long way from the traditional British constitutional themes of parliamentary sovereignty and the absence of substantive legal limits on government power.¹²² Instead, Northern Ireland's constitution now recognizes that its form of democracy includes some limits on the power of majorities. To the extent that the Human Rights Commission plays a role in making these limits effective, it is developing rather than denying democracy.

One of the Australian Human Rights Commission's most important activities to date was to hold public hearings, which exposed major problems in Australia's mental health care system. This led to significant legislative reform.¹²³ Matters such as the care of the mentally ill, unlike claims of discrimination or police malpractice, often do not enjoy a high level of political and media visibility. Arguably, it is these on which a Human Rights Commission should focus as others already have sufficient advocates. In Northern Ireland, as elsewhere in the world, there are issues such as the treatment of children and immigrants that badly require serious examination from a human rights perspective. In time the Northern Ireland Human Rights Commission may even come to do its most important work in these fields. However, if it fails to have an impact on the more politically controversial issues of human rights, which are at the heart of the Agreement, then it may never gain the authority that will enable it to do so.

121. See CAROL HARLOW & RICHARD RAWLINGS, *LAW AND ADMINISTRATION* 307-12 (2d ed. 1997).

122. For critiques of the Westminster models as applied to Northern Ireland, see MORISON & LIVINGSTONE, *supra* note 69, at 89-120, and McCrudden, *supra* note 18, at 341-44.

123. See SPENCER & BYNOE, *supra* note 15, at 59.