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Advancing Human Rights and Equality- Assessing the Role of Commissions in the UK and Ireland

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ADVANCING HUMAN RIGHTS AND EQUALITY: ASSESSING THE ROLE OF COMMISSIONS IN THE UNITED KINGDOM AND IRELAND

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INTRODUCTION

This article explores the work of statutory human rights and equality bodies in Britain, Ireland, Northern Ireland, and Scotland, and offers an analysis of the factors that have an impact on their operation. There are currently six statutory bodies established in Ireland and the United Kingdom to promote and enforce human rights or a key dimension of human rights, equality: the Irish Human Rights Commission (“IHRC”) and the Equality Authority of Ireland (“EA”); the Northern Ireland Human Rights Commission (“NIHRC”) and the Equality Commission for Northern Ireland (“ECNI”); the Scottish Human Rights Commission (“SHRC”) and the Equality and Human Rights Commission (“EHRC”, covering England, Scotland and Wales). While the timing of the establishment of these bodies reflected developments within these islands, there is an international context to 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 United Kingdom for the idea of these “commissions,” albeit some differences of view reflecting political contexts: not least the background to the Belfast (Good Friday) Agreement 1998 which preceded the establishment of the Northern Ireland Commissions, and fallout from the closure of precursor bodies. In each case the organizations have undertaken activities and secured outcomes that have been welcomed, but there have also been concerns about their operation and the limits of what they have been able to achieve. While the most recent Commission, the

SHRC, was established only in 2008, each has sufficient experience to begin an assessment of the factors that have had an impact 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 in a global and regional context 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 is now in progress.¹ In Britain, the government proposes to amend the EHRC's statute to adjust its roles and accountability arrangements.² Its remit would be narrowed, some functions removed, and it would be subject to tighter reporting requirements in relation to its business plan and financial affairs.³ The Commission has, like its Irish counterparts, recently been subject to a substantial cut in its resources. Meanwhile in Northern Ireland, the Equality

1. Analysis in this article of the two institutions in Ireland must be viewed in the context of imminent merger, and thus the lessons that can be learned from the experiences of both organizations. In order to advance this reform, a Working Group on the establishment of a new, enhanced Irish Human Rights and Equality Commission was appointed on October 6, 2011, with the aim of having the new Commission in place by the end of February 2012. The Group comprised of a Chair, four outgoing members each of the IHRC and EAL, a representative of the Department of Justice and Equality and the Special Advisor to the Minister. The terms of reference noted the need for a "new, integrated and independent Human Rights and Equality Commission." A consultation was launched in November 2011 to encourage public input into the process. The Merger Working Group reported in April 2012: Working Group on the Irish Human Rights and Equality Commission, *Report to the Minister for Justice, Equality and Defence* (Apr. 19, 2012), and see: Heads of the Irish Human Rights and Equality Commission Bill 2012 (29th May 2012). See also Angela Kerins, *Equality Strategy Needs to Address Fragmentation and Duplication*, IR. TIMES, Aug. 12, 2011; see also Carol Coulter, *Merger of Rights Authorities Urged*, IR. TIMES, Apr. 23, 2011, http://www.irishtimes.com/newspaper/ireland/2011/0423/1224295311869_pf.html; Carol Coulter, *Coalition to Merge Human Rights Commission and Equality Authority*, IR. TIMES, Sept. 9, 2011, <http://www.irishtimes.com/newspaper/ireland/2011/0909/1224303758897.html>. At the time of writing (March 2012) the Working Group has yet to report.

2. See *HM Government, 'Building a fairer Britain: Reform of the Equality and Human Rights Commission: Response to the Consultation'* (HM Government, 15 May, 2012); GOV'T EQUALS. OFF., PUB. NO. JN 404645, BUILDING A FAIRER BRITAIN: REFORM OF THE EQUALITY AND HUMAN RIGHTS COMMISSION 8 (2011).

3. See *Major Reforms to Equality and Human Rights Commission*, HOME OFF., (Mar. 21, 2011), <http://www.homeoffice.gov.uk/centre//reform>.

Commission is now co-located and shares some office services with the new Northern Ireland Commissioner for Older People,⁴ the Commission for Children and Young People,⁵ and the Commission for Victims and Survivors,⁶ heralded as a cost-saving measure while retaining separate statutory remits.⁷ Like the Northern Ireland Human Rights Commission, the ECNI entered a new phase with the appointment of a new Chief Commissioner in 2012.⁸ A process for the appointment of a new Chair for the Equality and Human Rights Commission should also be completed in the autumn of 2012. It is well recognized that globally National Human Rights Institutions (NHRIs) have faced globally significant challenges.⁹ A survey of sixty-one 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.¹⁰ A recent report from the EU Fundamental Rights Agency expressed concern that European NHRI's lacked sufficient political support, were insufficiently independent and often

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

5. See generally N. IR. COMM'R FOR CHILD. & YOUNG PEOPLE, <http://www.niccy.org/> (last visited Apr. 14, 2012).

6. See generally COMM'N FOR VICTIMS & SURVIVORS, <http://www.cvsni.org/> (last visited Apr. 14, 2012).

7. Announced by Minister Jonathan Bell in June 2011: *Junior Ministers Announce Cost Savings for Commissioners*, EQUAL. COMM'N FOR N. IR. (June 24, 2011), http://www.equalityni.org/.asp?cms=News_News&cmsid=1_2&id=285&secid=1_1.

8. The new Chief Commissioner is Michael Wardlow and his appointment was announced on February 22, 2012, (starting March first for a three-year period) by the Secretary of State for Northern Ireland, Owen Paterson: *Paterson Announces Appointment to the Equality Commission for Northern Ireland*, N. IR. OFF. (Feb. 22, 2012), <http://www.nio.gov.uk/paterson-announces-appointment-to-the-equality-commission-for-northern-ireland/media-detail.htm?newsID=18252>.

9. See generally INT'L COUNCIL ON HUM. RTS. POLICY, PERFORMANCE AND LEGITIMACY: NATIONAL HUMAN RIGHTS INSTITUTIONS (2004); AMNESTY INT'L, PUB. NO. 40/007/2001, AMNESTY INTERNATIONAL'S RECOMMENDATIONS ON NATIONAL HUMAN RIGHTS INSTITUTIONS (2001).

10. See generally OFF. OF THE HIGH COMM'R FOR HUM. RTS., UNITED NATIONS, SURVEY ON NATIONAL HUMAN RIGHTS INSTITUTIONS: REPORT ON THE FINDINGS AND RECOMMENDATIONS OF A QUESTIONNAIRE ADDRESSED TO NHRIS WORLDWIDE (2009), available at <http://www.nhri.net/2009/Questionnaire%20-%20Complete%20Report%20FINAL-edited.pdf>.

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.¹¹ An analysis of the factors that have shaped 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 Article 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.¹² The authors then outline—in broad terms—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 the authors have consulted during this research, and on our own experience working within and alongside some of the commissions and their precursor bodies.¹³ The authors do not attempt to evaluate the performance of the commissions, only to tease out the factors that appear to have an impact on it, in the context of an evolving global debate about the role of NHRIs.

11. See EUR. UNION AGENCY FOR FUNDAMENTAL RTS., NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE EU MEMBER STATES: STRENGTHENING THE FUNDAMENTAL RIGHTS ARCHITECTURE IN THE EU I 13, 18 (2010), available at http://fra.europa.eu/sites/default/files/fra_uploads/816-NHRI_en.pdf.

12. For an examination of the spread of NHRIs see generally Thomas Pegram, *Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions*, 32 HUM. RTS Q. 729 (2010); Anne Smith, *The Unique Position of National Human Rights Institutions: A Mixed Blessing?*, 28 HUM. RTS. Q. 904 (2006).

13. Both authors have extensive practical experience of working in and with commissions in the United Kingdom and Ireland. All interviews were conducted by the authors of this piece. Interviewees were informed of the interview's purpose, its voluntary nature, and the ways the information provided would be used. All consented verbally to be interviewed and were told they could decline to answer any question and end the interview at any time. The names of those consulted are listed on page 1. Due to the sensitive nature of the issues examined, however, those direct quotes from them that are used are referenced only by the date of interview, correspondence with the authors, or seminar participation.

I. THE RISE OF NATIONAL MECHANISMS FOR RIGHTS AND EQUALITY

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. The additional support for the NHRIs in the last twenty years reflected recognition 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 1993.¹⁴ 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 "[f]reely 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."¹⁵ 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.¹⁶

The Paris Principles state that national human rights institutions may also be authorized to hear and resolve complaints

14. Paris Principles, G.A. Res. 48/134, U.N. Doc. A/RES/48/134 (Dec. 20, 1993).

15. *Id.*

16. *Id.*

and should be able to carry out research and contribute to teaching and to promoting awareness of human rights, including discrimination.¹⁷ 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.¹⁸ Nor should they be subject to financial controls that might affect that independence.¹⁹ 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 for discussions relating to the formation of NHRIs, but it is not in the human rights movement's best interest to give them more importance than they deserve in light of their weaknesses and limited nature.²⁰

The UN Human Rights Centre published guidance giving some flesh to the Principles²¹ 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

17. *Id.*

18. *Id.*

19. *Id.*

20. C. Raj Kumar, *National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights*, 19 AM. U. INT'L L. REV. 259, 274-75 (2003).

21. *See generally*, U.N. CTR. FOR HUM. RTS., NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK ON THE ESTABLISHMENT AND STRENGTHENING OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS, U.N. Doc. HR/P/PT/4, U.N. Sales No. E.95.XIV.2 (1995), *available at* http://www.asiapacificforum.net//standards//practice-for-nhris/_a_handbook.pdf.

status.²² As of December 2011 there were sixty-nine fully accredited NHRIs, a further twenty deemed to comply in part with the Paris Principles, and ten institutions defined as not in compliance.²³ All four relevant institutions in the UK and Ireland (EHRC, NIHRC, SHRC, and IHRC) currently enjoy 'A' status (a formal position that has been contrasted with a substantive reading of the Principles).²⁴ The status of the EHRC was subject to a special review in 2010 and the NIHRC subject to its periodic review in May 2011, and in both instances the institutions were re-accredited with 'A' status.²⁵ 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 sixty 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.²⁶

The Council of Europe has similarly encouraged member states to establish NHRIs since the mid-1990s and has helped to coordinate their activities,²⁷ as has the Commonwealth

22. A Brief History of the ICC, Int'l Coordinating Comm. Of Nat'l Inst. for the Promotion and Prot. of Human Rights, <http://nhri.ohchr.org/EN/AboutUs/Pages/History.aspx> (last visited Sept. 24, 2012).

23. 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. See *Chart of the Status of National Institutions*, INT'L COORDINATING COMM. OF NAT'L INSTS. FOR THE PROMOTION & PROT. OF HUM. RTS. (Dec. 2011), available at http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf.

24. See, e.g., IR. COUNCIL FOR CIVIL LIBERTIES, SUBMISSION BY THE IRISH COUNCIL FOR CIVIL LIBERTIES (ICCL) TO THE WORKING GROUP ON THE ESTABLISHMENT OF THE HUMAN RIGHTS AND EQUALITY COMMISSION 2 (2011).

25. *Chart of the Status of National Institutions*, *supra* note 23 at 5.

26. See generally U.N. DEV. PROGRAMME & OFF. OF THE HIGH COMM'R FOR HUM. RTS., UNDP-OHCHR TOOLKIT FOR COLLABORATION WITH NATIONAL HUMAN RIGHTS INSTITUTIONS (2010), <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>.

27. See Council of Europe, Comm. of Ministers, Recommendation No. R (97) 14 of the Comm. of Ministers to Member States on the Establishment of Independent National Institutions for the Promotion and Protection of Human Rights, (Sep. 30, 1997); Council of Europe, Comm. of Ministers, Resolution (97) 11 of the Comm. of Ministers to Member States on the Co-Operation Between Member States' National Institutions for the Protection of Human Rights, and Between Them and the Council of Europe, (Sep. 30, 1997). During the UK Chair of the Council of Europe this was raised expressly in the context of addressing the backlog of the European Court of Human Rights. See Council of Europe Comm. of Ministers, Brighton Declaration, High

Secretariat. There is recent guidance from the Council of Europe's Commissioner for Human Rights on national structures for promoting equality,²⁸ and from its Commission against Racism and Intolerance on the establishment of bodies addressing racism, xenophobia, and anti-Semitism.²⁹ There are requirements in European Union anti-discrimination law in relation to statutory equality bodies.³⁰ Equinet, the network of European equality bodies established in 2007 develops cooperation and facilitates information exchange among its thirty-seven member organizations from thirty countries, including those that also have a human rights remit.³¹ There are now, therefore, institutions and networks in many parts of the world, taking varying forms from Commissions with a broad mandate to "Ombuds" that have a focus on fairness and legality in public service and specialized bodies focusing on the rights of a particular vulnerable group, including those established on race as a result of the EU Race Directive in 2000.³²

Level Conference on the Future of the European Court of Human Rights,, (19-20 April, 2012), available at <http://hub.coc.int/20120419-brighton-declaration>; Richard Carver, *One NHRI or Many? How many Institutions Does It Take to Protect Human Rights—Lessons from the European Experience*, 3 J. HUM. RTS. PRAC. 1, 5 (2011). For the interaction between international law and NHRIs, see Richard Carver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, 10 HUM. RTS. L. REV. 1, 4 (2010).

28. See Comm'r for Human Rights, Council of Eur., *Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality*, Doc. No. CommDH(2011)2 (2011).

29. See Eur. Comm'n Against Racism & Intolerance, ECRI General Policy Recommendation No. 2 on Specialised Bodies to Combat Racism, Xenophobia, Antisemitism and Intolerance at National Level, Doc. No. CRI(97)36 (1997); see also Eur. Comm'n Against Racism & Intolerance, ECRI General Policy Recommendation No.7 on National Legislation to Combat Racism and Racial Discrimination ¶ 24, Doc. No. CRI(2003)8 (2002).

30. The framework of law and guidance on equality bodies in Europe is set out in Gay Moon, *Enforcement Bodies, in CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW* (Dagmar Scheik et al. eds., 2007).

31. See generally EQUINET EUROPEAN NETWORK OF EQUALITY BODIES, <http://www.equineteurope.org/> (last visited Apr. 15, 202).

32. See U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., *Fact Sheet No. 19, National Institutions for the Promotion and Protection of Human Rights* (1993), available at <http://www.ohchr.org/Documents/Publications/FactSheet19en.pdf>. The notable exception is the United States. See CATHERINE POWELL, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, *HUMAN RIGHTS AT HOME: A DOMESTIC POLICY BLUEPRINT FOR THE NEW ADMINISTRATION 19-23* (2009).

II. ANALYZING INSTITUTIONS

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, mechanisms that nevertheless do not interfere with their operational independence. Likewise, the credibility of the institution depends on its responsiveness to civil society and on its 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 one can understand the difficulties that many NHRIs experience and can hope to resolve them.³³

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.³⁴ While arguing that it is not possible to separate completely NHRIs from the Executive, strong procedural safeguards were deemed critical: "A perceived or actual lack of independence will undermine the work, authority and

33. See Smith, *supra* note 12, at 908, 937-44.

34. CATHERINE MEREDITH, COMMONWEALTH SECRETARIAT, COMPARATIVE STUDY ON MANDATES OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE COMMONWEALTH 35 (2007).

legitimacy of these organizations.”³⁵ Where precisely the line between independence and appropriate accountability should fall, however, and how to assess its operation in practice, is not straightforward: “Independence itself is a relative matter.”³⁶

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 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.³⁷ 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.

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.³⁸ The limits on the mandates of NHRIs are one focus of analysis, including the regular omission of economic, social, and cultural rights;³⁹ 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

35. *Id.* at 35, 84.

36. Moon, *supra* note 30

37. For Denmark see DANISH INST. FOR HUM. RTS., www.humanrights.dk (last visited Apr. 15, 2012).

38. Sonia Cardenas, *Adaptive States: The Proliferation of National Human Rights Institutions* 55 (Carr Ctr. for Human Rights, Working Paper T-01-04, 2004).

39. See C. Raj Kumar, *National Human Rights Institutions and Economic, Social, and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights*, 28 *HUM. RTS. Q.* 755, 757 (2006).

roles and may legitimately differ in their perspectives on the course of action to take.⁴⁰

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”⁴¹ 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 organizations contribute to the institution’s capacity to deliver or create a roadblock in its path.⁴²

Recent analysis of equality commissions in Europe provides useful insight.⁴³ There is clearly significant diversity but several themes surface in the literature. Almost all bodies 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.⁴⁴ 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 an Equinet study on precisely this issue is of particular value.⁴⁵ Authors Kutsal Yesilkagit and Berend Snijders list managerial independence, policy independence, structural independence, and legal independence as the central elements and use these to frame

40. See Kumar, *supra* note 20 at 296-298.

41. Julie A. Mertus, *Human Rights Matters: Local politics and National Human Rights Institutions 2* (2009).

42. *Id.* at 138-39.

43. See generally MARGIT AMMER ET AL., HUMAN EUR. CONSULTANCY & LUDWIG BOLTZMANN INSTITUT FÜR MENSCHENRECHTE, *STUDY ON EQUALITY BODIES SET UP UNDER DIRECTIVES 2000/43/EC, 2004/113/EC AND 2006/54/EC* (2010).

44. *Id.* at ¶¶ 20, 170.

45. See generally Kutsal Yesilkagit & Berend Snijders, *Equinet, Between Impartiality and Responsiveness: Equality Bodies and Practices of Independence* (2008).

their assessment.⁴⁶ 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.⁴⁷ Their focus on leadership in counter-framing NGO perceptions of their role is instructive⁴⁸ and links to the suggestion that *de facto* independence will often depend on strong leadership and good internal management.⁴⁹ The work emerging on equality bodies is providing genuine evidence-based insight into comparative experience and examples of good practice on which to base future work. This also now includes work on the linkages between equality bodies and NHRIs, the principles that should guide the approach, the types of interaction, as well as factors for success and areas for further action.⁵⁰

III. *HUMAN RIGHTS AND EQUALITY COMMISSIONS IN THE UNITED KINGDOM AND IRELAND*

The aim in this section is to take each institution and outline in broad terms its position in relation to five areas: the establishment of the body; role and remit; duties and powers; arrangements for independence and accountability; and finally its internal governance, structure, budget and staffing. This is provided as background to the more significant discussion on the respective relevance (if any) of these factors on performance.

A. Northern Ireland Human Rights Commission

The NIHRC was established by the Northern Ireland Act of 1998 (an Act of the UK Westminster Parliament), and launched on March 1, 1999.⁵¹ It replaced the Standing Advisory

46. *Id.* at 5-6.

47. *Id.* at 7.

48. *Id.* at 8-9.

49. See AMMER ET AL., *supra* note 43 at ¶ 16.

50. See EQUINET, *EQUALITY BODIES AND NATIONAL HUMAN RIGHTS INSTITUTIONS: MAKING THE LINK TO MAXIMISE IMPACT* 5-7 (2011). This work was underpinned by a survey of members in June 2011, to which twenty-five responded. See *id.* at 9.

51. Northern Ireland Act, 1998, c. 47, § 68 (Eng.); see JANE CAMPBELL & MICHAEL POTTER, *RESEARCH & INFO. SERV., N. IR. ASSEMBLY, PAPER 76/11, NIAR 325-11, EQUALITY AND HUMAN RIGHTS INSTITUTIONS 3*, (2011).

Commission on Human Rights (“SACHR”), and the reform was firmly linked to the Belfast (Good Friday) Agreement of 1998 and the developing peace process (and the resulting need for strengthened institutional human rights protection). The Agreement makes clear that the NIHRC is intended to have enhanced powers in comparison with SACHR, and NIHRC was created to be a more effective, independent and representative institution designed to advance human rights in the post-conflict context.⁵² Its mission is to:

[W]ork 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 measures 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.⁵³

“Human rights” are not confined to European Convention on Human Rights “Convention rights,” and the NIHRC grounds its work within international human rights standards and has been active with international bodies like the UN and Council of Europe.⁵⁴

The Commission’s current strategic plan lists three aims: building and embedding a human rights culture, challenging and seeking to prevent human rights abuses, and ensuring organizational effectiveness and efficiency.⁵⁵

The NIHRC must keep the adequacy and effectiveness of law and practice in Northern Ireland under review,⁵⁶ and under the 1998 Act had to make recommendations for improvement in terms of its own functions and powers within two years of

52. See Agreement Reached in the Multi-Party Negotiations, Ir.-U.K., Apr. 10, 1998, 37 I.L.M. 751 (1998).

53. *Mission Statement*, N. IR. HUM. RTS. COMM’N, <http://www.nihrc.org/index.php/who-we-arc/vision-mission-and-values> (last visited Apr. 10, 2012).

54. See *What We Do*, N. IR. HUM. RTS. COMM’N, <http://www.nihrc.org/index.php/what-we-do> (last visited Apr. 10, 2012).

55. N. IR. HUM. RTS. COMM’N, STRATEGIC PLAN 2011-13, at 9-11 (2011).

56. Northern Ireland Act, 1998, c. 47, § 69(1) (U.K.).

establishment.⁵⁷ The Commission has the power to advise the Secretary of State and the Executive Committee of the Assembly on human rights matters of its own initiative or in response to a request.⁵⁸ The NIHRC can provide assistance to individuals and bring legal proceedings.⁵⁹ It is required to promote understanding and awareness of human rights and, to that end, can develop research and educational activities.⁶⁰ The Secretary of State was also placed under an obligation to request “Bill of Rights” advice from the Commission.⁶¹ The Commission’s powers of investigation were subject to considerable discussion and were amended.⁶² The NIHRC has the power to investigate places of detention, and many (predictable and problematic) restrictions are placed around this ability to investigate.⁶³

Commissioners, including the Chief Commissioner, are appointed by the Secretary of State for Northern Ireland (a Minister of the UK Government) who must “[i]n making appointments under this section . . . as far as practicable secure that the Commissioners, as a group, are representative of the community in Northern Ireland.”⁶⁴ The number of Commissioners is not prescribed.⁶⁵ The Commission is permitted to employ its own staff, subject to the approval of the Secretary of State.⁶⁶ The Commission’s Annual Report is delivered to the Secretary of State, who is required to lay a copy before Parliament.⁶⁷ The Chief Commissioner will not be

57. Northern Ireland Act, 1998, c. 47, § 69(2) (U.K.); see N. Ir. Hum. Rts. Comm’n, Report to the Secretary of State Required by Section 69(2) of the Northern Ireland Act 1998, at 4 (2001). For the government response see N. Ir. Office, The Government’s Response to the Northern Ireland Human Rights Commission’s Review of Powers Recommendations 2 (2002).

58. Northern Ireland Act, 1998, c. 47, § 69(3)-(4) (U.K.).

59. Northern Ireland Act, 1998, c. 47, § 69(5) (U.K.).

60. Northern Ireland Act, 1998, c. 47, § 69(6) (U.K.).

61. Northern Ireland Act, 1998, c. 47, § 69(7) (U.K.). For analysis of the Bill of Rights process that followed, see generally Colin Harvey & Alex Schwartz, *Designing a Bill of Rights for Northern Ireland*, 60 N. IR. LEGAL Q. 181 (2010).

62. Justice and Security (Northern Ireland) Act, 2007, c. 6, § 15.

63. Northern Ireland Act, 1998, c. 47, § 69C (U.K.).

64. Northern Ireland Act, 1998, c. 47, § 68(3) (U.K.).

65. There are currently fourteen commissioners (in addition to the Chief Commissioner and Deputy Chief Commissioner).

66. See Northern Ireland Act, 1998, c. 47, sch. 7, ¶ 4(1) (U.K.).

67. See Northern Ireland Act, 1998, c. 47, sch. 7, ¶ 5 (U.K.).

appointed for more than five years at a time, and Commissioners for three years.⁶⁸

Budget allocation and accountability flows through the Secretary of State and to the Comptroller and Auditor General.⁶⁹ A statement of accounts and report are laid before Parliament.⁷⁰ The staff is divided into three teams: Education and Information; Legal, Policy, and Research; and Corporate Services. The budget (UK£1 million of the UK£1.69 million is spent on staffing and Commissioners) of the Commission has recently been subjected to a reduction of twenty-five percent over a four-year period.⁷¹

B. *Equality Commission for Northern Ireland*

The ECNI was established by the Northern Ireland Act of 1998 (an Act of the UK Westminster Parliament), and launched on October 1, 1999.⁷² 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 new Commission.⁷³ The ECNI was thus established as a merger of existing equality bodies, with a view to ensuring a more coherent, integrated, efficient, and effective 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).⁷⁴

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

68. See Northern Ireland Act, 1998, c. 47, sch. 7, ¶ 2(2) (U.K.).

69. Northern Ireland Act, 1998, c. 47, sch. 7, ¶ 7(2) (U.K.).

70. Northern Ireland Act, 1998, c. 47, sch. 7, ¶ 7(3) (U.K.).

71. See N. IR. HUM. RTS. COMM'N, *supra* note 55, at p. 6 (U.K.).

72. Northern Ireland Act, 1998, c. 47, § 73 (U.K.); see EQUAL. COMM'N FOR N. IR., ANNUAL REPORT AND ACCOUNTS 2009-2010, at 13 (2010).

73. See *id.*

74. See Christopher McCrudden, *Mainstreaming Equality in the Governance of Northern Ireland*, 22 FORDHAM INT'L L.J. 1696, 1765 (1998).

fairness for the entire community.”⁷⁵ Its mission is stated to be “[t]o advance equality, promote equality of opportunity, encourage good relations and challenge discrimination through promotion, advice and enforcement.”⁷⁶ The work of the Commission includes promoting affirmative or positive action, overseeing relevant statutory duties, as well as keeping legislation under review. It produces a corporate plan every three years.⁷⁷

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 continuing absence of a Single Equality Act in Northern Ireland makes for a complex legal and policy picture (and, having once been in advance of Britain, Northern Ireland, has now fallen behind on legislative progress).⁷⁸ 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 (§ 75), and reviewing equality legislation.⁷⁹ 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 harmonization has taken place, powers differ depending on the equality ground, for example, areas where a formal investigation may be undertaken. An understanding of the precise 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

75. *About Us*, EQUAL. COMM’N FOR N. IR., <http://www.equalityni.org/sections/default.asp?secid=0> (last visited Apr. 10, 2012).

76. *See id.*

77. *See generally* EQUAL. COMM’N FOR N. IR., CORPORATE PLAN 2009-2012 (2009).

78. The extensive legislative framework can be found at *The Legislation*, EQUAL. COMM’N FOR N. IR., http://www.equalityni.org/sections/default.asp?cms=The%20Law_The%20legislation&cmsid=4_278&id=278&secid=5 (last visited Apr. 16, 2012). For discussion of a Single Equality Act for Northern Ireland see OFF. OF THE FIRST & DEPUTY FIRST MINISTER, A SINGLE EQUALITY BILL FOR NORTHERN IRELAND 9 (2004); EQUAL. COMM’N FOR N. IR., RESPONSE TO OFMDFM CONSULTATION PAPER, ‘A SINGLE EQUALITY BILL FOR NORTHERN IRELAND’ 6 (2004).

79. *See Commission Powers*, EQUAL. COMM’N FOR N. IR., http://www.equalityni.org/.asp?cms=TheLaw_Commissionpowers&cmsid=4_279&id=279&secid=5 (last visited Apr. 10, 2012).

of workforces and the requirements on employers. Third, the positive duties placed on public authorities by § 75 are overseen by the Commission (including the option of investigation), and while the general public law remedy of judicial review cannot be ruled out (and has been used), the regime appears to envisage ultimate enforcement resting with the Secretary of State for Northern Ireland.⁸⁰

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.”⁸¹ There is a 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”⁸²

The ECNI must have between fourteen and twenty Commissioners.⁸³ The Chief Commissioner cannot be appointed for more than five years at a time, and Commissioners three years.⁸⁴ The Commissioners are appointed by the Secretary of State for Northern Ireland.⁸⁵ 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 and deputy First Minister (“OFMdfM”).⁸⁶ Its Annual Report is provided to the OFMdfM, laid before the Northern Ireland Assembly, and a copy sent to the Secretary of State.⁸⁷ The annual budget from government was UK£7.3 million in 2009-10

80. Northern Ireland Act, 1998, c. 47, § 75, sch. 9 (U.K.); see *In the Matter of an Application by JRI for Judicial Review*, [2011] NIQB 5, ¶¶ 27-28 (N. Ir.); *In the Matter of an Application by Peter Neill for Judicial Review* [2006] NICA 5, ¶¶ 27-28 (N. Ir.); *In the Matter of an Application by Peter Neill for Judicial Review* [2005] NIQB 66, ¶ 48 (N. Ir.).

81. Northern Ireland Act, 1998, c. 47, § 73(4) (U.K.).

82. Northern Ireland Act, 1998, c. 47, sch. 8, ¶ 2(4)(a) (U.K.).

83. Northern Ireland Act, 1998, c. 47, § 73(2) (U.K.).

84. Northern Ireland Act, 1998, c. 47, sch. 8, ¶ 2(2) (U.K.).

85. Northern Ireland Act, 1998, c. 47 § 73(2) (U.K.).

86. See EQUAL. COMM’N FOR N. IR., *supra* note 72.

87. Northern Ireland Act, 1998, c. 47, sch. 8, ¶ 5 (U.K.).

and £6.9million in 2010-11.⁸⁸ 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.⁸⁹ The Commission employs over 140 staff.⁹⁰ Financial accountability is through OFMdfM and the Comptroller and Auditor General, and reports must be laid before the Assembly.⁹¹

C. Equality and Human Rights Commission (Great Britain)

The EHRC was established by the Equality Act of 2006 (an Act of the UK Westminster Parliament), and launched on October 1, 2007.⁹² 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.⁹³ Like all 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 competence.⁹⁴

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 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,

88. See CAMPBELL & POTTER, *supra* note 51, at 3; see also EQUAL. COMM'N FOR N. IR., *supra* note 75, at 87; see also Reaching Out to the Whole Community, Equality Comm'n for Northern Ireland

89. Northern Ireland Act, 1998, c. 47, sch. 8, ¶ 4 (U.K.).

90. See CAMPBELL & POTTER, *supra* note 51, at 3.

91. See Northern Ireland Act, 1998, c. 47, sch. 8, ¶ 7 (Eng.).

92. Equality Act, 2006, c. 3, § 1 (U.K.); see Colm O'Cinnicde, *The Commission for Equality and Human Rights: A New Institution for New and Uncertain Times*, 36 *INDUS. L.J.* 141, 141 (2007).

93. See O'Cinnicde, *supra* note 92, at 142.

94. Equality Act, 2006, c. 3, § 7(1) (U.K.).

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 of 2010.

The Equality Act of 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.⁹⁵ The Commission must consult and prepare a strategic plan, and review it at least every three years.⁹⁶ The plan is submitted to the Minister, who then must lay a copy before Parliament.⁹⁷ The Commission is clearly directed to focus on a timetable and the priorities attached to it, as well as the principles to be used in agreeing these priorities.⁹⁸ The first Strategic Plan was published in 2009 and set out the organization's principles and priorities, including how it would work with other organizations and what it would deliver.⁹⁹ The EHRC's Strategic Plan for 2012-15 is, at time of writing, being concluded following a consultation exercise.

The EHRC's role and remit initially included seeking a new Equality Act, which was achieved in 2010.¹⁰⁰ It also works to support individuals through specific interventions and cases, runs a grant program, offers advice and guidance, promotes best practice approaches, and is required to produce a triennial review of the state of human rights and equality.¹⁰¹ The first such report, entitled *How Fair is Britain?*, was published in October 2010,¹⁰² and the second, *Human Rights Review 2012: How Fair is*

95. Equality Act, 2006, c. 3, § 3 (U.K.).

96. Equality Act, 2006, c. 3, § 4 (U.K.).

97. Equality Act, 2006, c. 3, § 4(4) (U.K.).

98. See Equality Act, 2006, c. 3, § 4(1) (U.K.).

99. See generally EQUAL. & HUM. RTS. COMM'N, OUR STRATEGIC PLAN 2009-2012 (2009), available at http://www.equalityhumanrights.com/uploaded_files/strategicplan2009-2012.pdf.

100. See *id.* at 52; see also Equality Act, 2010, c. 15 (U.K.).

101. See EQUAL. & HUM. RTS. COMM'N, *supra* note 99, at 52-53.

102. See generally EQUAL. & HUM. RTS. COMM'N, HOW FAIR IS BRITAIN? EQUALITY, HUMAN RIGHTS AND GOOD RELATIONS IN 2010: THE FIRST TRIENNIAL REVIEW (2011), available at <http://www.official-documents.gov.uk/document/other/9781842063132/9781842063132.asp>.

Britain? An Assessment of How Well Public Authorities Protect Human Rights, was published in March 2012.¹⁰³

There are express equality and diversity duties placed on the EHRC, in addition to the general duty directed towards the creation of a particular form of society.¹⁰⁴ These are duties of promotion, encouragement, enforcement and “work[ing] towards.”¹⁰⁵ They include: enforcing the equality enactments, promoting equality of opportunity, understanding and encouraging good practice on equality and diversity, and promoting awareness and understanding of rights under the equality enactments.¹⁰⁶

In relation to equality of opportunity between disabled persons and others, the Commission is given the power to promote favorable treatment.¹⁰⁷ The legislation lists obligations that rest on the Commission with respect to members of groups (“group” is defined in the legislation).¹⁰⁸ These include the importance of good relations, as well as encouraging good practice.¹⁰⁹

The Commission has responsibilities pertaining to the promotion and encouragement of human rights, including raising awareness of human rights and supporting good practice.¹¹⁰ In undertaking its equality and diversity duties, the Commission is required to take account of relevant human rights.¹¹¹ It is tasked with monitoring the “effectiveness of the equality and human rights enactments,”¹¹² and has the power to advise government and to make recommendations on law and policy reform.¹¹³ The legislation is explicit in requiring that outcomes be measured against indicators.¹¹⁴ The Commission

103. See EQUAL. & HUM. RTS. COMM’N, *HUMAN RIGHTS REVIEW 2012: HOW FAIR IS BRITAIN? AN ASSESSMENT OF HOW WELL PUBLIC AUTHORITIES PROTECT HUMAN RIGHTS* (2012).

104. Equality Act, 2006, c.3, §§ 3, 8 (U.K.).

105. *Id.* § 8.

106. *Id.*

107. *Id.* § 8(3).

108. *Id.* §§ 10(1)-(2).

109. *Id.* § 10(1).

110. *Id.* § 9(1).

111. *Id.* § 9(4).

112. *Id.* § 11(1).

113. *Id.* § 11(2).

114. *Id.* §§ 12(1)(c), (3), (4).

has information and advice giving powers,¹¹⁵ and may issue codes of practice.¹¹⁶ It is empowered to conduct inquiries and investigations that relate to any of its duties.¹¹⁷ An investigation can only be triggered under the Equality Act of 2010 if the Commission suspects (for example, as the result of an inquiry) that a person has committed an unlawful act.¹¹⁸ In addition to the potential involvement of courts and tribunals, the Commission has the power to conclude action plans and agreements to ensure any unlawful action does not continue.¹¹⁹ It may provide legal assistance to individuals¹²⁰ 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 services¹²¹ and has a grant awarding role.¹²² 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.¹²³

The EHRC is a non-departmental public body (“NDPB”). The sponsoring department is the Government Equalities Office, now situated within the Home Office.¹²⁴ The Commission consists of not less than ten and not more than fifteen Commissioners.¹²⁵ The Chief Executive is an *ex officio* Commissioner.¹²⁶ The Secretary of State appoints one person as Chair and one or more persons as Deputy Chair.¹²⁷ A Commissioner is appointed for not less than two and not more than five years, with the possibility of re-appointment.¹²⁸ The Secretary of State must think that the appointee has experience

115. *Id.* §§ 13(1)(a), (d).

116. *Id.* § 14 (not relating to human rights).

117. *Id.* § 20(1) (in relation to its inquiry powers).

118. *Id.* § 20(2).

119. *Id.* §§ 22-23 (in relation to the Equality Act).

120. *Id.* §§ 28-29 (in relation to the Equality Act).

121. *Id.* §§ 27, 46 (in relation to equality—goods and services/airline accessibility).

122. *Id.* § 17.

123. *Id.* §§ 31-32.

124. *Vision and Mission, EQUAL. & HUM. RTS. COMM'N*, <http://www.equalityhumanrights.com/about-us/vision-and-mission> (last visited Apr. 9, 2012).

125. Equality Act, 2006, c.3, sch. 1, ¶ 1 (U.K.).

126. *Id.* sch. 1, ¶ 1(2).

127. *Id.* sch. 1, ¶ 4.

128. *Id.* sch. 1, ¶ 3(2)-(3).

or knowledge of human rights and non-discrimination, and have regard for the desirability of the Commissioners together having this expertise.¹²⁹ The law provides plenty of scope for the appointment of “non-expert” Commissioners.¹³⁰ The terms of appointment are specified by the Secretary of State, the Chair having the role of presiding over meetings of the Commission.¹³¹ The Secretary of State has the power to dismiss a Commissioner “who is, in the opinion of the Secretary of State, unable, unfit or unwilling to perform his functions.”¹³²

The Commission operates in Britain, but not in Northern Ireland. The Commission’s strategic plan, as well as its Annual Report, must be sent to the Secretary of State, who will lay them before Parliament.¹³³ The following provision regarding the Commission’s statutory independence from government merits full citation: “The Secretary of State shall have regard to the desirability of ensuring that the Commission is under as few constraints as reasonably possible in determining its activities, its timetables, and its priorities”¹³⁴

The Commission can establish Committees, but must ensure that the Chair of each Committee is a Commissioner.¹³⁵ It must create a Scotland Committee¹³⁶ and a Wales Committee, with a Commissioner Chair for each.¹³⁷ These have defined functions in relation to the Commission’s work in Scotland and Wales. The Commission is also required to create a Disability Committee with an extensive range of delegated powers and a provision for formal review after five years.¹³⁸ The Commission is required to ensure that these Committees have sufficient resources to exercise their functions.

129. *Id.* sch. 1, ¶ 2.

130. *Id.* sch. 1, ¶ 2.

131. *Id.* sch. 1, ¶ 4.

132. *Id.* sch. 1, ¶ 3.

133. *Id.* § 4.

134. *Id.* sch. 1, ¶ 42(3).

135. *Id.* sch. 1, ¶ 12.

136. *Id.* sch. 1, ¶ 16. See generally EQUAL. & HUM. RTS. COMM’N, *Scotland Business Plan 2011/12* (2011).

137. Equality Act, 2006, c. 3, sch.1, ¶¶ 17, 24-25 (U.K.).

138. *Id.* sch. 1, ¶¶ 49, 52, 57. See EQUAL. & HUM. RTS. COMM’N, *PRIORITIES AND WORK PROGRAMME 2011/12: PLAN OF THE EQUALITY AND HUMAN RIGHTS COMMISSION DISABILITY COMMITTEE* 4, 17 (2012).

The Commission is empowered to regulate its own proceedings¹³⁹ and to appoint its own staff, with conditions attached.¹⁴⁰ The Secretary of State's consent is required for the appointment of the Chief Executive, and the Secretary of State has ultimate authority regarding the number of staff and their terms and conditions.¹⁴¹ The Commission has employed over 400 staff, but as a result of extensive budget cuts this has been subject to significant reduction.¹⁴² The Commission's Annual Budget is set by government (approved by Parliament) and in 2009 to 2010 was UK£70 million¹⁴³ but it has since been reduced significantly. The Secretary of State is responsible for determining the remuneration of the Chair, Deputy Chair, and Commissioners including travel, pension, allowances, or gratuities.¹⁴⁴

The Commission is required to keep proper accounting records and must prepare a statement of accounts for each financial year and send it to the Secretary of State and the Comptroller and Auditor General.¹⁴⁵ The latter must examine and certify the accounts, laying the statement and report before Parliament.¹⁴⁶

D. *Scottish Human Rights Commission*

The SHRC was established by the Scottish Commission for Human Rights Act 2006 (an Act of the devolved Scottish Parliament), and launched on UN Human Rights Day, December 10, 2008.¹⁴⁷ Its strategic plan for 2008 to 2012 lists four goals: “[t]o build upon an inherent sense of fairness that already exists in Scotland and develop a sustainable

139. Equality Act, 2006, c.3, sch. 1, ¶ 5, (U.K.).

140. *Id.* sch. 1, ¶ 7.

141. *Id.*

142. See *Commission Outlines Plans for Future and Launches Staff Consultation*, EQUAL. & HUM. RTS. COMM'N (June 21, 2012), <http://www.equalityhumanrights.com/news/2012/junc/commission-outlines-plans-for-future-and-launches-staff-consultation>.

143. See *Annual Reports*, EQUAL. & HUM. RTS. COMM'N (July 26, 2012), <http://www.equalityhumanrights.com/about-us/corporate-reporting/annual-reports>.

144. Equality Act, 2006, c.3, sch. 1, ¶ 35 (U.K.).

145. *Id.* sch. 1, ¶ 40.

146. *Id.* sch. 1, ¶ 40(4).

147. See *Scottish Commission for Human Rights Act, 2006*, (A.S.P. 16) (Scot.); see also SCOT. HUM. RTS. COMM'N, STRATEGIC PLAN 2008-2012 6, 9 (2009).

human rights culture; . . . [T]o ensure human rights is at the heart of law, policy and practice in Scotland; . . . [T]o implement effective governance within SHRC; . . . [And] [t]o meet our international responsibilities”¹⁴⁸ The SHRC is, at time of writing, consulting on its Strategic Plan for 2012 to 2016, and, following an extensive research project, working on the development of a National Action Plan for Human Rights in Scotland.

The SHRC is under a general duty to promote human rights and “in particular, to encourage best practice in relation to human rights.”¹⁴⁹ “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.¹⁵⁰ In deciding upon what action to take, the Commission must have regard for the “rights of those groups in society whose human rights are not, in the Commission’s opinion, otherwise being sufficiently promoted.”¹⁵¹ The Commission is empowered to undertake information, guidance, research, education, and training roles in relation to its general duty.¹⁵² It can review law and practice with a view to recommendations for change,¹⁵³ but it has no power to assist with claims or with legal proceedings.¹⁵⁴ It can intervene in civil proceedings and make submissions¹⁵⁵ and has the power to conduct an inquiry into Scottish public authorities—although not to UK authorities in Scotland (such as an immigration detention centre).¹⁵⁶ The SHRC may enter and inspect those detentions centers that are within its power to investigate.¹⁵⁷

The Chair of the Commission is appointed by Her Majesty on the nomination of the Scottish Parliament,¹⁵⁸ with other members appointed by the Parliament.¹⁵⁹ The Commission

148. See SCOT. HUM. RTS. COMM’N, *supra* note 147, at 7.

149. Scottish Commission for Human Rights Act, 2006, (A.S.P. 16), § 2(1) (Scot.).

150. *Id.* § 2(2).

151. *Id.* § 2(4).

152. *Id.* § 3(1).

153. *Id.* § 4(1).

154. *Id.* § 6(1).

155. *Id.* § 14(2).

156. *Id.* § 8(1). For the relevant restrictions see § 9.

157. *Id.* § 11(1).

158. *Id.* sch. 1, ¶ 1(2).

159. *Id.* sch. 1, ¶ 1(3).

presents its Strategic Plan to the Scottish Parliament.¹⁶⁰ The following section merits citation: “The Commission, in the exercise of its functions, is not to be subject to the direction or control of—any member of the Parliament, any member of the Scottish Executive, or the Parliamentary corporation.”¹⁶¹

However, it is possible for a member to be removed from office by the Scottish Parliament for listed reasons, including that the Parliament has lost confidence in the member (a special voting procedure applies).¹⁶² The legislation explicitly states that the Commission can do anything connected to the purpose of the exercise of its functions.¹⁶³ The Commission may appoint its own staff, with numbers and terms and conditions approved by the Parliament.¹⁶⁴

The SHRC consists of a Chair and up to four other members (there are currently four members of the Commission, inclusive of the Chair).¹⁶⁵ Each member is appointed for a single term of eight years and may not be re-appointed.¹⁶⁶ The Commission met nine times in 2010 and on ten occasions in 2011. 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.¹⁶⁷ Financial accountability is through the Parliament and the Auditor General for Scotland.¹⁶⁸ 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.¹⁶⁹ The Commission has an annual budget of UK£960,000, a reduction from previous years.¹⁷⁰

160. *Id.* § 7(1).

161. *Id.* sch. 1 ¶ 3(1).

162. *Id.* sch. 1, ¶ 5(3)-(6).

163. *Id.* sch. 1, ¶ 8(1).

164. *Id.* sch. 1, ¶ 11(1)-(2).

165. *Id.* sch. 1, ¶ 1(1).

166. *Id.* sch. 1, ¶ 5(1), *amended by* Scottish Parliamentary Commissions and Commissioners etc. Act, 2010, (A.S.P. 11), sch. 6, ¶ 5.

167. Scottish Commission for Human Rights Act, 2006, (A.S.P. 16) , sch. 1, ¶ 14(1) (Scot.).

168. *Id.* sch. 1, ¶¶ 13-15.

169. *Id.* sch. 1, ¶¶ 13(1), 14(2).

170. *See generally*, Scottish Hum. Rts. Comm’n, *Strategic Plan 2012-2016*, http://www.scottishhumanrights.com/application/resources/documents/FinalSHRC_StrategicPlan_2012-16.pdf (last visited Nov. 1, 2012).

In addition to the Chair and the Commissioners, the Commission has ten staff members divided into three teams: Legal and Strategy, Communication and Outreach, and Business Management.¹⁷¹

E. Irish Human Rights Commission

The IHRC was established by the Human Rights Commission Act of 2000 (an Act of the Irish Parliament, the Oireachtas), as amended by the Human Rights Commission Act 2001.¹⁷² It is now subject to the merger process of the human rights and equality bodies ongoing in Ireland.¹⁷³ There had been discussion regarding the establishment of the organization for some considerable time in Ireland (including a Constitution Review Group recommendation in 1996 that such an institution be established¹⁷⁴), but as with the NIHRC and ECNI the political dynamic for its creation can be directly traced to the Belfast (Good Friday) Agreement of 1998, and the commitments undertaken there by the Irish Government.¹⁷⁵ 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

171. *Id.*

172. Human Rights Commission Act 2000 (Act No. 9/2000) (Ir.), available at <http://www.irishstatutebook.ie/2000/en/act/pub/0009/index.html>; Human Rights Commission (Amendment) Act 2001 (Act No. 35/2001) (Ir.), available at <http://www.irishstatutebook.ie/2001/en/act/pub/0035/index.html>.

173. See *Government to Establish a New Enhanced Human Rights and Equality Commission—Shatter*, GOV'T OF IR., DEP'T OF JUST. & EQUAL. (Sept. 9, 2011), <http://www.inis.gov.ie>.

174. See CONSTITUTION REVIEW GRP., REPORT OF THE CONSTITUTION REVIEW GROUP 408 (1996). Following this report an All-Party Oireachtas Committee on the Constitution was established and published a number of progress reports. The Oireachtas has also established a Committee on the Implementation of the Good Friday Agreement which has, for example, considered the work of the Northern Ireland Human Rights Commission on the Bill of Rights process, see *Bill of Rights for Northern Ireland: Discussion with the NIHRC*, HOUSES OF THE OIREACHTAS, JOINT COMM. ON THE IMPLEMENTATION OF THE GOOD FRIDAY AGREEMENT DEBATE, (Apr. 30, 2009), <http://debates.oireachtas.ie/GFJ/2009/04/30/00003.asp>.

175. See Agreement Reached in the Multi-Party Negotiations, Ir.-U.K., Apr. 10, 1998, 37 I.L.M. 751 (1998), § 9, where the Irish Government committed to the establishment of a body with an equivalent mandate and remit to the NIHRC.

Human Rights Act of 2003, which gave further effect to Convention rights in Irish law at the sub-constitutional level. The Commission was formally launched in July 2001, following extended discussion of its composition and disagreement over the initial appointments.¹⁷⁶

The role of the IHRC is to promote and protect the human rights of everyone in Ireland. The Commission is given a remit that includes the rights, liberties, and freedoms in the Irish Constitution as well as international human rights instruments.¹⁷⁷ The priorities of the Commission are reflected in its current strategic plan.¹⁷⁸ The plan states: “The mission of the IHRC is to promote and sustain the realization, protection and awareness of human rights, equally, for all, in law, in policy, and practice.”¹⁷⁹

The IHRC is required to keep the adequacy and effectiveness of law under review and, if requested, to provide its views on legislative proposals.¹⁸⁰ It may make recommendations to government on improving human rights protection in Ireland.¹⁸¹ It has the power to conduct inquiries¹⁸² and to provide legal assistance to individuals, including legal advice and representation.¹⁸³ 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.¹⁸⁴

The Human Rights Commission Act of 2000 provides: “The Commission shall, subject to the provisions of this Act, be

176. For an emphasis on the importance of appointments in this context see IR. COUNCIL FOR CIVIL LIBERTIES, SUBMISSION BY THE IRISH COUNCIL OF CIVIL LIBERTIES TO THE WORKING GROUP ON THE ESTABLISHMENT OF THE HUMAN RIGHTS AND EQUALITY COMMISSION 5 (2011). See Carol Coulter, *Rights Body Head to Quit for Reasons of Health*, Irish Times, Apr. 4, 2002, available at <http://www.irishtimes.com/newspaper/ireland/2002/0430/1017357779374.html>

177. Human Rights Commission Act 2000 (Act No. 9/2000) § 2 (Ir.), available at <http://www.irishstatutebook.ie/2000/en/act/pub/0009/index.html>.

178. See IR. HUM. RTS. COMM’N, PROMOTING & PROTECTING HUMAN RIGHTS IN IRELAND 17 (2007). The first strategic plan was published in November 2003.

179. See *id.* at 5.

180. Human Rights Commission Act 2000 (Act No. 9/2000) § 8 (Ir.), available at <http://www.irishstatutebook.ie/2000/en/act/pub/0009/index.html>.

181. *Id.* § 8(d).

182. *Id.* §§ 8(f), 9.

183. *Id.* § 10.

184. *Id.* § 11(1).

independent in the performance of its functions.”¹⁸⁵ The legislation also makes explicit that it shall have all such powers that are necessary or incidental to the performance of its functions.¹⁸⁶ The Commission is appointed by the Government, with the legislation stating that a person shall not be appointed unless “suitably qualified for such appointment.”¹⁸⁷ Special provision is made in relation to judicial appointments to the position of President of the Commission.¹⁸⁸ The terms and conditions of appointment are provided by the Government¹⁸⁹ 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.”¹⁹⁰

The Commission must consist of a President and not more than fourteen members, with gender balance.¹⁹¹ The term of office of a Commission member may not exceed five years, with eligibility for re-appointment.¹⁹² The Commission meets once a month, and meets with the NIHRC on the all-Ireland Joint Committee for Human Rights.¹⁹³

The Commission shall 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.¹⁹⁴ The responsibilities of the Chief Executive are to manage the staff, administration, and business of the Commission,¹⁹⁵ with

185. *Id.* § 4(2).

186. *Id.* § 4(4).

187. *Id.* § 5(4).

188. *Id.* §§ 5(5), (6). The first President of the Commission was Mr. Justice Donal Barrington, a retired Supreme Court judge.

189. *Id.* § 5(8).

190. *Id.* § 5(12).

191. *Id.* § 5(1)-(2) amended by Human Rights Commission (Amendment) Act 2001 (Act No. 35/2001) § 1 (Ir.), available at <http://www.irishstatutebook.ie/2001/en/act/pub/0035/index.html>.

192. Human Rights Commission Act 2000 (Act No. 9/2000) § 5(7)-(8) (Ir.), available at <http://www.irishstatutebook.ie/2000/en/act/pub/0009/index.html>.

193. *Joint Committee NIHRC & IHRC*, N. IR. HUM. RTS. COMM’N, <http://www.nihrc.org/index.php/working-with-others/joint-committee-nihrc-and-ihrc> (last visited Apr. 10, 2012).

194. Human Rights Commission Act 2000 (Act No. 9/2000) § 12(1)-(2) (Ir.), available at <http://www.irishstatutebook.ie/2000/act/pub/0009/index.html>.

195. *Id.* § 13(1).

responsibility to the Commission for the performance of these functions.¹⁹⁶ The Chief Executive 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.¹⁹⁷

The Minister, with the consent of the Minister for Finance, funds the Commission from the departmental budget¹⁹⁸ and, with the consent of the Minister for Finance, is responsible for approving the accounts of the Commission.¹⁹⁹ Accounts must be submitted to the Comptroller and Auditor General, with this report provided to the Minister before being shown to the Oireachtas.²⁰⁰

The Commission currently has provision for seventeen staff members (seven posts are frozen, due to cuts, and three 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 thirty-two percent. In 2009, the Commission had an annual budget of approximately EU€1.5 million (compared with EU€2.3 million in 2008 and EU€1.3 million in 2002).

F. Equality Authority, Ireland

The Equality Authority (EA) was established in 1999 under the Employment Equality Act 1998 (an Act of the Oireachtas).²⁰¹ It replaced the Employment Equality Agency, established in 1977 and is now, like the IHRC, subject to the ongoing merger discussions. 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

196. *Id.* § 13(2).

197. *Id.* § 14.

198. *Id.* § 22.

199. *Id.* § 16.

200. *Id.*

201. Employment Equality Act 1998 (Act No. 21/1998) § 38 (Ir.), available at <http://www.irishstatutebook.ie/1998/cn/act/pub/0021/index.html>; see *About Us: The Role and Functions of the Equality Authority*, EQUAL. AUTH., <http://www.equality.ie/cn/About-Us/> (last visited Apr. 19, 2012).

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.²⁰² 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.²⁰³

The EA is required to submit a three-year plan for approval to the Minister, addressing objectives, outputs and strategies.²⁰⁴ The latest strategic plan was published in 2009.²⁰⁵ The document describes the authority's mission as "to promote equality of opportunity and to eliminate discrimination."²⁰⁶ 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.²⁰⁷ It must also keep the relevant legislation under review.²⁰⁸ One of its strategic goals is to achieve "[a]n effective and efficient Equality Authority."²⁰⁹

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 conduct the review itself, and it may request that an equality action plan be prepared (a programmatic indication of change).²¹⁰ There is potential judicial enforcement of these

202. See *Brief Profile*, EQUINET EUROPE (2012), http://www.equineteurope.org/IMG/pdf/PROFILE_EA_IE.pdf.

203. See generally EQUAL. TRIBUNAL, <http://www.equalitytribunal.ie> (last visited Apr. 14, 2012).

204. Employment Equality Act 1998 (Act No. 21/1998) § 40 (Ir.), available at <http://www.irishstatutebook.ie/1998/en/act/pub/0021/index.html>.

205. See generally EQUAL. AUTH., STRATEGIC PLAN 2009-2011 (2009).

206. See *id.* at 8.

207. See *id.*

208. See *id.*

209. See *id.* at 10.

210. Employment Equality Act 1998 (Act No. 21/1998) § 69 (Ir.), available at <http://www.irishstatutebook.ie/1998/en/act/pub/0021/index.html>.

provisions.²¹¹ The EA may provide draft codes of practice if requested to do so by the Minister²¹² and research related to its functions.²¹³ It may conduct an inquiry, and can be required to do so by the Minister.²¹⁴ Again, as with other bodies, these powers come with tailored procedural requirements,²¹⁵ as well as the ability to issue non-discrimination notices.²¹⁶ The legislation also includes a number of offences in relation to inquiries, for example a failure to supply information.²¹⁷

The legislation makes provision for the establishment of a Director of Equality Investigations²¹⁸ to whom complaints of discrimination can be taken. The EA is also empowered to refer matters to the Director (for example, that discrimination or victimization is being generally practiced against persons).²¹⁹ The legislation provides detailed provision for securing relevant information.²²⁰

Members of the EA are appointed by the Minister.²²¹ 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.²²² The terms and conditions of the chairperson are set by the Minister with the consent of the Minister of Finance,²²³ and the Minister may remove the chair at any time for "stated reasons,"²²⁴ conditions for which are provided.²²⁵ Other members of the EA are appointed by the Minister, with provision for sectoral nomination.²²⁶

The EA must consist of twelve members, at least five of whom should be male and five female.²²⁷ The Chair is appointed

211. *Id.* § 72.

212. *Id.* § 56.

213. *Id.* § 57.

214. *Id.* § 58.

215. *Id.* § 59.

216. *Id.* §§ 62-65.

217. *Id.* § 60.

218. *Id.* § 75.

219. *Id.* § 85.

220. *Id.* §§ 94-97.

221. *Id.* § 41.

222. *Id.* § 40.

223. *Id.* § 42.

224. *Id.* § 42(4).

225. *Id.* § 43(3), including that the chair should be ordinarily resident in the state.

226. *Id.* § 44.

227. *Id.* § 41.

for a period of not more than four years, with terms and conditions and remuneration determined by the Minister with the consent of the Minister for Finance.²²⁸ The EA is empowered to appoint Advisory Committees.²²⁹ Provision is made for the appointment of a Chief Executive, with the consent of the Minister, comparable to the Irish Human Rights Commission, with similar accountability and reporting arrangements.²³⁰ The Minister, after consultation with the EA and with the approval of the Minister for Finance, is given power of appointment over all staff (currently thirty-five staff), including grades and number of staff in each grade.²³¹ The auditing and accounting arrangements are similar to the IHRC.²³² The EA has experienced significant budget cuts in recent years, with the government budget reducing its income by 43 percent: EU€5,897,000 to EU€3,333,000.

IV. COMMONALITY AND CONTRASTS

The framing context for all these bodies is extensive and complicated in law and policy. However, it is possible to tease out broad commonalities and contrasts. Only two of the bodies could be said to be entirely “new” entities at the time of their creation: the SHRC and the IHRC. Although framed in the post-conflict context of a new beginning to human rights in Northern Ireland, NIHRC followed on from SACHR. In Ireland the EA replaced the Employment Equality Agency, and the EHRC and ECNI are primarily the results of mergers. There was much existing experience to draw on—in terms of practical lessons already available and occasionally learned. Even the “new” commissions were potentially able to benefit from the experiences of other bodies nationally and internationally. There were rich sources of insight and support available. Nevertheless, the challenges associated with merging bodies with their own pre-existing structures and cultures cannot be overstated.

228. *Id.* § 42.

229. *Id.* § 48.

230. *Id.* §§ 49-50.

231. *Id.* § 51.

232. *Id.* §§ 53-55.

Wider political context matters to this analysis. It is worth, for example, underlining that the political parties that led the legislative process resulting in these changes are 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 was replaced by the Scottish National Party; in Ireland, the Fianna Fail led government was in 2011 replaced by a Fine Gael-Labour Party Coalition. Although many of the parties in Northern Ireland contributed significantly to the peace process, the dominant partners in the power-sharing administration—the SDLP and UUP—have been steadily overtaken by Sinn Fein and the DUP. The impact of this is variable, and need not result in less of a commitment to such institutions, but it may encourage proposals and initiatives for reform as new governments seek to make a distinctive contribution to the emerging debates.

In constitutional law, the United Kingdom and Ireland are unitary states, and both are member states of the EU, as well as a large range of intergovernmental organizations. The SHRC is the only Commission not created by the “primary legislature;” it was established by the devolved Scottish Parliament. In the United Kingdom, this has legal and other constitutional implications that retain their significance. The majority of the bodies (four of six) are accountable to a Minister located again within the “dominant legislature:” Westminster Parliament or Oireachtas.²³³ The ECNI and SHRC are accountable in the devolved setting: to OFMdfM and the Scottish Parliament respectively—with the ECNI in the intriguing position that the appointment of the Chief Commissioner and Commissioners is still made by the Secretary of State for Northern Ireland, even though accountability is to OFMdfM.

All the bodies have “boards” of commissioners, rather than a single commissioner model, appointed for varying and fixed terms, with the Chair usually a full-time appointment. The legal requirements on composition include, for example, “representative of the community” (NIHRC and ECNI) and “gender balance” (IHRC and EA).

233. There is now, however, a proposal that the new merged Human Rights and Equality Commission in Ireland will be accountable to the Oireachtas see fn. 1 above, Report of the Merger Working Group.

The majority of bodies, with the exception of the SHRC, have budgets determined by the relevant Minister and sponsoring department or executive, and all six have been impacted by the current challenging budgetary context.

All six share a range of functions on promotion, advice, investigations, inquiries, legal proceedings and the provision of assistance. Additionally, all participate in international, regional, and transnational networks. The NIHRC and the IHRC are formally linked through a Joint Committee of the two Commissions and have worked on, for example, a charter of rights for the island of Ireland.²³⁴ Although details differ, 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 specific and robust enforcement mechanisms.

V. *FACTORS THAT IMPACT THE OPERATION OF THE COMMISSIONS*

A. *Establishment and Context*

The first question is whether the context in which the body was established, and has operated since, has 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 impacts on its remit, powers, accountability mechanisms, and structure. It is also the environment in which a commission 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

234. See GOV'T OF IR., JOINT COMMITTEE OF THE REPRESENTATIVES OF THE IRISH HUMAN RIGHTS COMMISSION AND THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION, PRE-CONSULTATION PAPER ON A CHARTER OF RIGHTS FOR THE ISLAND OF IRELAND (2003), *available at* http://www.ihrc.ie/download/doc/paper_charter_of_rights.doc; see also Suzanne Egan & Rachel Murray, *Casting a Cold Eye on the Origins and Development of an All-Island Charter of Rights*, 34 *FORDHAM INT'L L.J.* 78, 80 (2010).

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 that 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?

1. Domestic Context

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 central to the importance that government and stakeholders attach to the differing dimensions of a commission's mandate and the expectations to which the commission responds. The NIHRC, for instance, with its mandate in the aftermath of the Belfast (Good Friday) Agreement to advise on a Bill of Rights, was expected to focus on that potential future provision rather than exclusively on reforms that the existing (but imperfect) Human Rights Act of 1998 could deliver. The prior existence of, and political support for, separate equality bodies was a factor in the political context for merged bodies. This is especially true with 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.²³⁵

In Northern Ireland, a dominant context for the NIHRC and ECNI was the peace process, in which it had been evident that enhanced institutional and substantive commitments to rights and equality would have to form one element of any agreement. Its historical legacy, devolution arrangements, and prior institutional architecture resulted in two separate

235. See Sarah Spencer, *Equality and Human Rights Commission: A Decade in the Making*, 79 *POL. Q.* 6, 10 (2008).

commissions with a-symmetric accountability mechanisms. The NIHRC was accountable entirely to the Westminster government but for the ECNI, to Northern Ireland's own Executive; although as noted, its Commissioners, counter-intuitively, are appointed by the Westminster government's Northern Ireland Minister. The Belfast (Good Friday) Agreement generated huge expectations for the new bodies. For ECNI the pressure was 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, section 75. 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 or republican political agenda. In a cross-community, power-sharing context, this divergence of view was always going to pose a dilemma for those advocating effective implementation, although it is the case that a lack of consensus on these matters is not confined to post-conflict "divided societies."

The Belfast (Good Friday) Agreement was also pivotal in Ireland's decision to establish its Human Rights Commission, albeit that a drive towards modernization 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 particular to emphasize 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.

2. International Context

The need for governments ostensibly to respect the Paris Principles was a factor in decisions on the mandate and governance of all of the bodies that have a human rights remit,

and remains a factor, as evident in the UK Government's reference to the Principles in 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 to maneuver in determining the form that the body will take, a matter on which we found contrasting views. While some participants argued that 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 EU 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 organization considered too critical of government itself. Alternatively, as the Equality Authority in Ireland experienced, a severe budget cut could be used to the same effect.

3. Mergers

A third, dominant theme is the additional challenges which, in practice, new commissions face if established through the merger of existing bodies.²³⁶ Merger—whether characterized as dissolution and replacement or as the bringing together of

236. See EQUINET *supra* note 50 at 8-9. In the Irish context, see *Shatter Announces Working Group on the Establishment of Enhanced Human Rights and Equality Commission*, GOV'T OF IR., DEPARTMENT OF JUSTICE & EQUALITY, (October 6, 2011), <http://www.inis.gov.ie/en/JELR/Pages/PR11000188>.

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.²³⁷

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 that 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 differing institutional cultures, 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. It had a smaller number of bodies with which it had to maintain working relationships (just thirty-two local authorities, for instance), and 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.

237. Correspondence with authors (Oct. 1, 2011).

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.”²³⁸ 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.²³⁹ 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 harmonization 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 within 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 had 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-

238. Seminar participant (Mar. 10, 2011).

239. Interview (Oct. 1, 2011).

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.

4. 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 organizations on which they rely for delivery. Demographically, two factors have dominated: the aging 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 skepticism, 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 did not prove possible, for instance, for the ECNI to secure approval from its government department, OFMdfM, for its 2009 to 2012 corporate plan.²⁴⁰ 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

240. See generally Equality Commission for Northern Ireland, *Reaching out to the Whole Community: Corporate Plan 2009-12* (2009), available at <http://www.equalityni.org/archive/pdf/ECNICorporateplan0912.pdf> (introducing the corporate plan of the ECNI).

remit and powers, to avoid both political and legal challenge. This absorbs considerable staff time and can seem overly cautious to supporters who 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 occasionally 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 SHRC 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, as is 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 Belfast (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 SHRC. 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-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."²⁴¹ Devolution also creates a sense that Scotland can do things differently from the way they have been done before and can look beyond the United Kingdom 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 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 determinative. 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.

B. 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

241. Interview (July 26, 2011).

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 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, 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?

1. A Regulatory Role for the Commissions?

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.²⁴² 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

242. See UK GOV'T EQUALS. OFF., PUB. NO. JN404645, BUILDING A FAIRER BRITAIN: REFORM OF THE EQUALITY AND HUMAN RIGHTS COMMISSION 20 (2011). See also, BRITISH INST. OF HUM. RTS., BRIEFING ON "BUILDING A FAIRER BRITAIN: REFORM OF THE EQUALITY AND HUMAN RIGHTS COMMISSION;" WHAT DOES IT MEAN FOR HUMAN RIGHTS? 8 (2011). The new government also decided to cease funding the EHRC helpline and grants programme following a review—see GOV'T EQUALS. OFF., PUB. NO. JN404529, INFORMATION, ADVICE AND SUPPORT ON EQUALITY AND HUMAN RIGHTS ISSUES 75-76 (2011)—and has commissioned for a new service. The GEO and EHRC agreed a "Framework Document" in 2011 to outline the nature of their relationship.

change bodies or regulatory bodies? Managing inequality is regulatory; promoting equality is making change happen”.²⁴³ 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 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 also 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 seminar contributor suggested, for the EHRC “to be treated by Ministers as a body setting gas prices.”²⁴⁴ In Scotland, we were told, when the HRC consulted on its role:

There was incredible good will when people saw how the Human Rights 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.²⁴⁵

2. 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, devolution—creating complexity in designing institutions that take account of

243. Seminar participant (Mar. 10, 2011).

244. The regulatory functions of the EHRC are listed as subject to the relevant sections of the Legislative and Regulatory Reform Act of 2006. *See* Legislative and Regulatory Reform (Regulatory Functions) Order, 2007, S.I. 2007/3544, §2, sch. pt. 1 (U.K.). The EHRC’s 2009 enforcement and compliance policy makes express reference to the 2006 Act and to the Hampton Review and Principles 2005. The Commission makes frequent use of the language of “regulation” as a result. *See* EQUAL. & HUM. RTS. COMM’N, ENFORCEMENT AND COMPLIANCE POLICY, 3 (2009).

245. Interview (July 26, 2011).

devolved and non-devolved matters. In Scotland this resulted in an institutional arrangement in which “nobody is sure what their remit is” as every issue will have a devolved dimension.²⁴⁶ 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 United Kingdom, had until recently led to stronger a provision for equality protections in Northern Ireland, but now finds it lagging behind the provisions of the Equality Act of 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 and 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.”²⁴⁷ There are, moreover, significant synergies among 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 for instance the separation of children’s rights commissions and bodies addressing freedom of information and those dealing with poverty. As one participant described, “[T]hat fragmentation has been very damaging. If you take out one key dimension, society gets fragmented, and policy makers get fragmented.”²⁴⁸ 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

246. *Id.*

247. *Id.*

248. Seminar participant (Mar. 10, 2011).

the fragmentation?”²⁴⁹ Nevertheless, merged equality and human rights bodies experienced challenges. These 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: “[T]he 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.”²⁵⁰ 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.”²⁵¹ 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

249. *Id.*

250. Correspondence with authors (Oct. 1, 2011).

251. Seminar participant (Mar. 10, 2011).

of agendas being diverted, fear that equality might be one minor value in wider human rights.”²⁵² 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 Belfast (Good Friday) Agreement, including its intergovernmental legal and political dynamics, also raises the prospect of further provoking political tensions if merger were to be pursued. This would not prevent, however, discussions in Northern Ireland about how practical co-operation could be enhanced and unhelpful “institutional rivalry” avoided.

3. Community Relations

When 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 good relations are the context in which an equality and human rights agenda could be furthered. In the context of the current backlash against multiculturalism and against migrants, it could be counter-productive to disempower commissions 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. 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

252. *Id.*

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 having 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. For instance, is it a good use of staff time to be engaged for long periods in writing statutory codes of practice on the equality legislation, 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. For example, the Joint Committee on Human Rights ("JCHR") in the UK Parliament had been a strong advocate of a single human rights and equality commission, but had then been only intermittently engaged in receiving reports on its work.²⁵³ There was no consistent reporting or scrutiny relationship that would have facilitated that engagement.

Across the EU there is no singular pattern of remits or roles regarding the equality bodies—a minority of which, seven out of the thirty-seven members of the umbrella network Equinet, have a broader human rights remit—nor expansive debates on what those roles should be.²⁵⁴ Statutory bodies fulfill 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.

253. On the work of the JCHR see: JOINT COMM. ON HUM. RTS., EQUALITY & HUM. RTS. COMM'N, THIRTEENTH REPORT OF SESSION 2009–10, 2009-10, H.L. 72, ¶¶ 82, 84 (U.K.) (reporting that the JCHR is highly critical of the Commission, for example, on the role of the chair, its progress in advancing human rights, and how the board functioned). See generally JOINT COMM. ON HUM. RTS., HUM. RTS. IN THE UK, 2011-12, HC 1718-I, (U.K.) (presenting an oral evidence session with the chairs of the EHRC, SHRC, NIHR, and ECNI).

254. See EQUINET, *supra* note 50, at 5.

C. 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 that a commission has that in practice proved significant in enabling it to deliver? Or conversely, are there instances 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, or where partnership could have delivered broader outcomes—whether deterring the body itself or others such as business with whom it might want to work?

Four themes emerged from our research.

1. Significance of Powers

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—for instance in securing entry to a closed facility or in being able to conduct a formal investigation. A body lacking a full tool kit of powers—like the SHRC in its lack of power to take cases—is inhibited and the opportunities for profile-raising they provide are thwarted. 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. “[M]ost 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 SHRC 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.²⁵⁵ 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 recognize the need for change. It was necessary for each body to consider what could be achieved through taking cases and 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

255. See Addressing Equality and Diversity in the Crown Prosecution Service, CPS EQUALITY AND DIVERSITY UNIT (Sept. 2004), available at http://www.cps.gov.uk/publications/docs/edu_stocktake.pdf

have to be used. Commissions need to be strategic with them and manage expectations where certain powers are not being used.” Commissions require 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 IHRC for instance, had not been highly effective in securing change, despite the quality of the analysis.

2. Gap Between Responsibilities and Powers

The second theme was that the differing regulatory frameworks related to equality and to 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 example, between its distinct powers in relation to discrimination, but lack of powers on the promotion of equality. Constraints on powers in tackling discrimination could also limit effectiveness, for instance in restrictions relating to discrimination by the state in the exercise of its functions. In the United Kingdom, 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 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.

3. 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”), was given as one example. Article 33(2) of that Convention requires governments to establish a framework to “promote, protect and monitor implementation,” a responsibility variously given to some of the commissions within our consideration, requiring that they must ensure that civil society representatives—in particular people with disabilities—are able to participate fully in that process.²⁵⁶ 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 was 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 fulfill that role.

4. Transparency

Finally, the impact that a commission could have in fulfilling its responsibilities was crucially affected by the extent to which transparency was a requirement on those bodies it regulated. If organizations were not required to make public information on their employment and service provision, it was difficult for a commission to be strategic in taking action against the poorest performers, or those most failing to protect the

²⁵⁶ Convention on the Rights of Persons with Disabilities art. 33(2), Dec. 13, 2006, 2515 U.N.T.S. 3.

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.

D. 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 from civil society—and likewise "accountability to whom?" looking in particular at the potential role of parliament relative to a government department. The literature had suggested value in teasing out differing modes of accountability, for financial propriety, 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 that the Paris Principles require.

In the research project, three themes emerged.

1. Tension Between Independence and Accountability

First, there was a debate on what is meant by independence and by accountability and on what was deemed the "irreducible tension" between them.²⁵⁷ 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 existed 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. There are nevertheless nuances in such relationships for which it is difficult to make provision in legislation; a fine line, for example, between a regulatory body

257. Seminar participant (Mar. 10, 2011).

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, which legislation cannot regulate, but which independence and accountability mechanisms need to be sufficiently robust to address.

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 IHRC to make the minutes of its meetings since 2007 public was cited as one instance, and the Public Accounts Committee's need to take the EHRC to task for its failure to manage its finances appropriately was cited as another instance.²⁵⁸ Participants emphasized 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 United Kingdom:

It is fundamental that independent organizations 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 rigor—a government that wants to rein you in will first and foremost look for weaknesses in governance.²⁵⁹

A lack of consensus on appropriate boundaries lay behind some of the tensions that had arisen between commissions and governments, including proposals to change the EHRC's accountability framework. Section 3 of the 2006 Equality Act stated that the EHRC should be subject to as little interference as possible, but controversy over the handling of its finances had weakened its authority in resisting reform. The fact that the

258. The accounts of the EHRC for 2006 to 2008 were qualified by the Auditor.

259. Correspondence with the authors (Oct. 24, 2011).

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 is the case 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. When 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, with an Equinet survey in 2007 finding that some commissions see themselves as part of government and staffed by civil servants.²⁶⁰ In Ireland the chief executives of both commissions at the time of writing were former civil servants; this means that they were well placed to know how to secure changes in government policy.²⁶¹ 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 when, for example, they are on secondment from their department. There is then the connected 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 government where the body has a responsibility to challenge government decisions in court if

260. See Yesilkagit & Snijders, *supra* note 45, (reporting on the survey in a study commissioned by Equinet).

261. See IR. COUNCIL FOR CIVIL LIBERTIES, *supra* note 253, at 4 (noting that the former Chief Executive of the IHRC (Eamonn MacAodha) was “seconded from a Government Department, to which the IHRC was obliged to refund the cost of his salary”). He was, in February 2012, appointed by the Irish Government as the new ambassador to Belgium.

necessary. 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?

2. 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 SHRC 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 SHRC'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 side lines. In Britain, the lack of a regular relationship with the JCHR had perhaps contributed to the force with which it criticized the commission when it did inquire into the performance of the

EHRC on human rights in 2010, in the context of a series of resignations by commissioners.²⁶² 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* to Parliament, but that there should be different forms of accountability, not just one, and not just to the one that pays the bill. Regarding 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, marginalizing the role of the Ministry of Justice despite its responsibility for human rights, and indeed those 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 or in calling it 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 organizations was a significant factor in the balance of independence and accountability that evolved over time.

3. 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 organizations 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 organizations could be disempowered

262. See THE 2010 JCHR REPORT, <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/72/72.pdf>.

and 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 example, 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. However, there was 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 on the other; 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, mobilizing 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 not limited to those groups 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 organizations 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. 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 organizations with whom it needs effective relationships, a model not replicated in the structure of the other commissions.

E. 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 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.

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 does not determine 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 organization and empowered (or not) to make an effective contribution was a further factor. A commission had some autonomy in how it organized 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 organization was largely not set down by statute but a matter for the chair and the commissioners themselves. As one consultee put it: “[W]ith a half-decent infrastructure, the right people with vision and strategic approach, most structures can deliver.”²⁶³ 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 organization 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, with commissioners overruling work that

263. Interview (June 1, 2011).

staff had already undertaken, and the chair—as well as the CEO—involved in operational decisions. 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 or 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 Commissioners' own motivation to play that 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 and 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 for their 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.”²⁶⁴

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.”²⁶⁵ 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 had 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, and to carry authority externally and to fulfill 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.²⁶⁶

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

264. *Id.*

265. *Id.*

266. *Id.*

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 organization 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, as resources will often preclude a significant regional presence.

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 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 Section 75 responsibilities for instance, staffing (and hence budget) has to reflect those roles (see Appendix). In relation to other responsibilities, a tight budget can encourage partnership working which in some respects could bring results. There is, thus, no precise 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 (“ICCL”) had a similar budget to the IHRC, 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.”²⁶⁷

A large budget could reflect a role as a service provider, handler of complaints, or, in the case of the ECNI, a monitoring

267. Interview (July 26, 2011)

role in relation to equality schemes, rather than simply an advocacy organization. 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 organization and negatively impact the skills available to it.

Finally, the expertise of staff was cited as a crucial factor in effectiveness, and ensuring the commission was respected by those it sought to influence. Staff also needed political judgment, 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 judgment: “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.”²⁶⁸ 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.²⁶⁹

The Chief Executive’s judgment 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.

268. Interview (June 1, 2011)

269. Interview (Oct. 24, 2011)

VI. *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 of how the commissions have actually performed. Were we to do so, the question arises 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? 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 the commission's performance would be one measure, meaningful over time, but limited not least because stakeholders would themselves have only partial knowledge of 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 SHRC 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 secondary role of raising the profile of the issues concerned. Nevertheless, Commissions should avoid the danger 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 fully effective if the public does 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.

CONCLUSION

The controversy that frequently surrounds each of the six commissions within our focus—with the possible exception of the SHRC, still in its early years—raises the question that this article 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.

Our research suggests the following tentative conclusions. 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 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 in 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 skeptics, 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 United Kingdom) or separate development, created a level of complexity and confusion for individuals seeking assistance, that can be avoided within a single institution. However, that could 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 of 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 that a commission, lacking resources or facing other obstacles to use of those powers, may be unable to fulfill. 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 that 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. This has been remedied to some extent by the practical work of the ICC, and guidance that has emerged on equality bodies. Sufficient thought had nevertheless not always been 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 organization is not prescribed by statute. A lack of clarity in respective roles of commissioners and staff was one fault line identified, with 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 judgment if the commission was to use its powers and resources strategically in light of the opportunities and constraints it faced. In that judgment and in managing the staff and resources of the organization, 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 clear 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 it is 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 the commission 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 judgment, and staff expertise to make a substantive difference in the performance of the commissions so that they are a catalyst for change. The six commissions examined in the United Kingdom and Ireland in this research may take comfort from the fact that it is those factors that are within their control.

*APPENDIX**A. 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 labor intensive. Given those differences, it would be erroneous to suggest that each commission should have roughly comparable staffing and budget levels. The authors 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.

APPENDIX

| Country | Area | Number of staff and commissioners | Annual budget | Budget per capita | Financial Year | Notes |
|-------------------------------------|--------------------------------------|---|--|--|----------------|--|
| England, Wales and Northern Ireland | Equality and Human Rights Commission | EHRC Annual Report 2009/10, p. 42 states: "On 31 March 2010 452 individuals were directly employed by the Commission". 43 Commissioners, including Chief and one Deputy Chief Commissioners (EHRC website accessed on 29/9/11). | The Government Equality Office Annual Report and Accounts 2009/10 states: "560m resource and £20m 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." | 2009/10: £113 per person (based UK population of 62 million) 2009/10: £113 per person | 2009/10 | <p>Annual Budget http://www.homeoffice.gov.uk/publications/equalities/annual-report?view=binary</p> <p>Staff http://www.equalityhumanrights.com/what-we-do/our-accounts/annual-report_and_accounts_2009_10.pdf</p> <p>Commissioners http://www.equalityhumanrights.com/about-us/about-commissioners/</p> |
| Scotland | Scottish Human Rights Commission | 4.1 FTE staff and 10 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 | 2009/10: £0.18 per person (based on Scottish population of 5.2 million) | 2009/10 | <p>Annual Report 2009/10 http://www.scotshumanrights.com/application/resources/documents/200910AccountFinal</p> <p>Commissioners http://www.scotshumanrights.com/about/team</p> |
| Northern Ireland | Northern Human Rights Commission | 22 staff members (NIHRC website accessed on 29/9/2011) and 3 Commissioners (NIHRC website accessed on 29/9/11), including Chief Commissioner. | NIHRC Annual Report and Accounts 2009/10 states that the total comprehensive expenditure for the year was £1,691,870. 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 2010) | 2009/10: £0.94 per person (based on population of 1.8 million) | 2009/10 | <p>Staff http://www.nihrc.org/index.php?option=com_content&task=view&id=7&Itemid=12</p> <p>Commissioners http://www.nihrc.org/dms/lat/a/NIHRC/attachments/dd/files/30/annual-report-2009-2010.pdf</p> <p>NI Assembly Briefing: http://www.niassembly.gov.uk/researchandlibrary/2011/7011.pdf</p> |

APPENDIX

| Agency | Area | Number of staff and commissioners | Annual budget | Budget per capita | Financial Year | Source |
|--------------------------------------|------------------|---|--|--|--|--|
| Equality Commission Northern Ireland | Northern Ireland | 149 staff according to Assembly Briefing 2011 (p.3) and 16 Commissioners (ECNI website accessed 29/9/11), including one Chief and one Deputy Chief Commissioner. | €10.2m according to NI Assembly Research and Information Service Briefing Paper (p.3). | €66.67 per person (based on a population of 1.8 million). | 2010 | <p>AI: http://www.niassembly.gov.uk/researchandlibrary/2011/76</p> <p>Commissioners: http://www.equalityni.org/sections/default.asp?cms=About U.S. Commissioners&semid=1_437&id=437&scid=4</p> |
| 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). | €3,523,000 for 2010 (Annual Report 2010, p.5). | 2010: €0.34 (£0.30) per person (based on a population of 4.5 million). | 2010 Dec 2010 | <p>SAFE: http://www.ihrc.ie/about/whoweare.html</p> <p>SAFE: Annual Report http://www.ihrc.ie/download/pdf/ihrc_annual_report_2010</p> |
| Equality Authority | Ireland | Annual report 2010 (p.8): "Staffing levels at year end are 35 Commissioners/Board members, including one chairperson and one vice chair. (EA website accessed on 29/9/11). | Annual budget €3,333,000 on Equinet | 2009: €0.75 (£0.65) per person (based on a population of 4.5 million). | Jan to Dec 2009 and Jan to Dec 2009 | <p>SAFE: link to Equinet: http://www.equineteurope.org/350_2.html</p> <p>SAFE: Annual Report http://www.equality.ie/index.asp?locID=136&docID=980</p> |