EVALUATING THE EFFECTIVENESS OF NATIONAL HUMAN RIGHTS INSTITUTIONS:

THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION

WITH COMPARISONS FROM SOUTH AFRICA

Professor Stephen Livingstone
Dr Rachel Murray

2005
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Professor Stephen Livingstone
Dr Rachel Murray

(with Anne Smith, research assistant)

January 2005
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FORWORD

This report is an important contribution to the small but growing collection of scholarly literature on statutory human rights institutions. While its primary focus is the Northern Ireland Human Rights Commission, established as one element of the Good Friday Agreement, its significance goes well beyond that jurisdiction.

Those of us involved in drafting the United Nations Principles Relating to the Status of National Institutions in 1991 (the Paris Principles) were concerned that certain internationally recognised minimum standards were urgently needed – if a proliferation of ineffective institutions was to be avoided. However, these principles prescribing ‘establishment criteria’ were only a first step. Effective evaluation criteria and regular monitoring are essential complements to this normative framework – and very little substantive work has been done in this area. The authors of this study have performed a valuable service in developing and applying such criteria to one institution, but doing so in a manner which is relevant to many others.

It is encouraging that the Secretary of State has already decided to act on several of the serious problems described by the authors – including the need to confer adequate powers on the Commission to compel the production of documents and the attendance of witnesses when necessary in exercising its investigative mandate. However, other major problems, including the necessity to provide the Commission with adequate resources, must also be addressed if it is to function more effectively. That it achieved what it did - notwithstanding the political complexities of its environment, the inadequacy of its resources and the deficiencies inherent in its initial legislative mandate - is a tribute to Brice Dickson and most of his colleagues.

The lessons which can be drawn from the Northern Ireland experience – both by governments establishing such institutions and by those appointed to run them – are also particularly timely and relevant across the United Kingdom. Both the governments in London and Edinburgh should find this report a valuable reference as they move to establish the Commission on Equality and Human Rights and the Scottish Human Rights Commission.

Having had the privilege of working in nearly 50 countries where national or provincial human rights institutions have been or are being established, I have no doubt that this book will assist practitioners in all countries in developing more effective criteria to evaluate and improve their performance.

This may have been Stephen Livingstone’s final publication in a career of consistent and distinguished scholarship. However, his work with Rachel Murray is a fitting testament to his commitment to applied research – scholarship with practical value in the continuing struggle to promote and protect Human Rights.

Professor Brian Burdekin AO
Raoul Wallenberg Institute, Sweden
January 2005
PREFACE

Shortly before this report was completed Stephen Livingstone disappeared in March 2004 and is now presumed dead. Writing this report in his absence has been extremely difficult. I miss his sensitivity, his sense of humour and his immense academic expertise. I cannot thank his partner, Karen McCartney, Kieran McEvoy and Maggie Beirne enough for all they have done in helping me throughout and with the final product. John Morison has also been very supportive and helpful. This research was made possible with the kind assistance of the Nuffield Foundation. I would like to thank Sharon Witherspoon in particular for her support and assistance throughout, in particular in the past few months.

There are many others whom I know Stephen would also have wanted to thank. We would like, in particular, to express our gratitude to Anne Smith, the research assistant on this project, for all her hard work and dedication. Her organisational skills in particular, with respect to the interviews and the holding of the conferences in Belfast and London in October 2003, deserve special mention.

Professor Brice Dickson at the Commission has been open, frank and his support has been invaluable in the course of the research, going beyond simply responding to queries to providing us with additional information and commentary. We would also like to thank the staff and Commissioners at the NIHRC, both present and former, who were willing to talk to us and provided us with information. In the course of this research we also interviewed around 100 individuals and organisations in Northern Ireland, Dublin, Scotland, England, Geneva and South Africa and we are indebted to them for their contributions. Thanks must also be expressed to Professor Hugh Corder at the University of Cape Town for facilitating the interviews held in South Africa.

Our initial and primary intention in carrying out this research was to analyse in depth a specific national human rights institution. From its inception the Northern Ireland Human Rights Commission was a controversial body. We were acutely aware of the difficulties of evaluating the effectiveness of an institution within a complex political environment and the impact that our research could have on this. Since we had interviewed most of those with an interest in the Commission there was an increasing interest in the outcome of our research and on more than one occasion people, from different perspectives, expressed concerns to us about what we would say. This included concern from people outside Northern Ireland on the impact of our views on the prospects for strengthening human rights commissions elsewhere. We can only say that we have had to carefully consider our role in this arena and have striven hard to ensure that, by playing close attention to the original benchmarks established, our conclusions are as independent and impartial as possible. We did not wish for our research to result in undermining the Commission’s achievements, legitimacy or credibility, but rather that it would contribute to its eventual effectiveness in promoting and protecting human rights in Northern Ireland. I hope that this report is a fitting tribute to Stephen and to that aim.

Dr Rachel Murray
January 2005
**ABBREVIATIONS**

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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>AIAC</td>
<td>Association of Independent Advice Centres</td>
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<td>BIRW</td>
<td>British Irish Rights Watch</td>
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<td>CAJ</td>
<td>Committee on the Administration of Justice</td>
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<td>CHRAJ</td>
<td>Commission on Human Rights and Administrative Justice, Ghana</td>
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<td>CoSo</td>
<td>Coalition on Sexual Orientation</td>
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<td>CRE</td>
<td>Commission for Racial Equality</td>
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<td>DRC</td>
<td>Disability Rights Commission</td>
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<tr>
<td>DUP</td>
<td>Democratic Unionist Party</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECONI</td>
<td>Evangelical Contribution on Northern Ireland</td>
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<td>ECOSOC</td>
<td>UN Economic and Social Council</td>
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<td>EHRLR</td>
<td><em>European Human Rights Law Review</em></td>
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<td>EOC</td>
<td>Equal Opportunities Commission</td>
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<td>HRA</td>
<td>Human Rights Act</td>
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<td>HRQ</td>
<td><em>Human Rights Quarterly</em></td>
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<td>ICC</td>
<td>International Coordinating Committee</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ILM</td>
<td><em>International Legal Materials</em></td>
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<td>JCHR</td>
<td>Joint Committee on Human Rights</td>
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<td>ICHRP</td>
<td>International Council on Human Rights Policy</td>
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<td>IHRC</td>
<td>Irish Human Rights Commission</td>
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<td>IPPR</td>
<td>Institute for Public Policy Research</td>
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<td>LCD</td>
<td>Lord Chancellor’s Department</td>
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<td>MLA</td>
<td>Member of the Legislative Assembly in Northern Ireland</td>
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<td>NDPB</td>
<td>Non-Departmental Public Body</td>
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<td>NGOs</td>
<td>Non-Governmental Organisations</td>
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<td>NHRI</td>
<td>National human rights institutions</td>
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<td>NIA</td>
<td>Northern Ireland Act</td>
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<td>NICEM</td>
<td>Northern Ireland Council on Ethnic Minorities</td>
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<td>NICVA</td>
<td>Northern Ireland Council for Voluntary Action</td>
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<td>NHRC</td>
<td>Northern Ireland Human Rights Commission</td>
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<td>NILQ</td>
<td><em>Northern Ireland Legal Quarterly</em></td>
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<td>NIUP</td>
<td>Northern Ireland Unionist Party</td>
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<td>NIWC</td>
<td>Northern Ireland Women’s Coalition</td>
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<td>NIO</td>
<td>Northern Ireland Office</td>
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<td>OFMDFM</td>
<td>Office of the First Minister and Deputy First Minister</td>
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<td>OSCE</td>
<td>Organization for Security and Cooperation in Europe</td>
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<tr>
<td>PFC</td>
<td>Pat Finucane Centre</td>
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<td>PSNI</td>
<td>Police Service of Northern Ireland</td>
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<td>PUP</td>
<td>Progressive Unionist Party</td>
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<td>RFJ</td>
<td>Relatives for Justice</td>
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<td>RUC</td>
<td>Royal Ulster Constabulary</td>
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<td>SACHR</td>
<td>Standing Advisory Commission on Human Rights (Northern Ireland)</td>
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<td>SAHRC</td>
<td>South African Human Rights Commission</td>
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<tr>
<td>SDLP</td>
<td>Social Democratic and Labour Party</td>
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<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
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<tr>
<td>UNHCHR</td>
<td>United Nations High Commissioner for Human Rights</td>
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<td>UUP</td>
<td>Ulster Unionist Party</td>
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EXECUTIVE SUMMARY

In this report we examine in-depth the effectiveness of the Northern Ireland Human Rights Commission.

The Northern Ireland Human Rights Commission was established as part of the Good Friday/Belfast Agreement. This study drew upon international material, in particular from South Africa, a broad array of literature, UN documentation, material from numerous national human rights institutions across the world, and over 100 interviews, to ask whether it was possible to identify benchmarks and indicators which rendered these institutions effective.

The research identified three such categories of benchmarks and indicators: Capacity, Performance and Legitimacy. In terms of the Capacity of the institution, it was clear that conditions under which a commission are created lay the foundations for its future effectiveness. Thus, institutions that had a clear defined legal status, whose independence was protected, who had political support in their creation, were part of a democracy with other independent state institutions, were given adequate powers, resources and a broad mandate and where there was a clear understanding of the respective roles of Commissioners and staff, were more likely to be effective in promoting and protecting human rights in their jurisdictions.

These factors alone were insufficient and issues relating to an institution’s Performance also need to be examined, namely, how the institution itself used the powers and resources at its disposal. Here it was clear that if the institution had a clear strategic plan and collective vision, made full use of its powers and resources, however limited; had a coherent management and operational structure and was able to deal with crises, it was more likely to be taken seriously and its recommendations and suggestions put into play. Lastly, the study identified the issue of Legitimacy, namely how the institution was perceived in the eyes of others. Here was clear that it was key how it operated with government, but also with the legislature, civil society and other key stakeholders such as the media, legal profession, other statutory bodies and public.

The research then went on to apply these criteria to the Northern Ireland Human Rights Commission. It examined not only the context in which it was established, but how it made use of its powers and resources and how it dealt with crises that had arisen in its short history. It found that while the NIHRC was reasonably well placed as regards powers compared with Commissions in many other parts of the world, there was a very significant omission as regards its investigation powers and while the appointments process did contain more transparency than has been evident in many NHRIs it was not sufficiently transparent to counter criticisms that its composition was not fully representative of the community. Most seriously the government failed to provide the NIHRC with sufficient resources to execute the very broad mandate it had been given. The NIHRC faced a very difficult context with the issue of human rights having become quite a politicised one in a divided society.

With respect to its Performance – The NIHRC clearly has achieved a number of significant things in a very short time. It is seen as accessible at a local level but also enjoys a high reputation at the international level. It has displayed significant industry in responding to official reports and legislative proposals. Aspects of its litigation and investigation work have produced change that advances the protection of human rights. However there have also been significant failings. The Commission was slow to put in place adequate organisational structures and is still in the process of developing these. It has struggled to develop a clear strategy and vision that, in particular, works out the relationship between promotion and protection activities. Internal divisions have grown worse rather than diminishing. The impact
of its work, especially as regards producing change through litigation or advice has been limited, and it has yet to achieve its major task of providing final advice on a Bill of Rights for Northern Ireland.

Lastly, with regard to its Legitimacy – It is a matter of particular concern for the NIHRC that its legitimacy does not appear to have grown in the eyes of some while it has clearly diminished in the eyes of others. Legitimacy as regards government institutions is always a difficult issue for any NHRI. Although government has frequently professed its support for the NIHRC its actions did not always live up to these commitments. While the primary responsibility for this must lie with government itself it has been suggested to us by a number of people that the NIHRC has not always helped itself to earn this respect. With other stakeholders in society, while the Commission enjoyed respect from some, it failed to gain support from many who had been hostile to its work from the start, in particular those from the unionist community. In recent months, in addition, there has been an increased sense of disillusionment among those who would have traditionally supported its work, namely civil society and nationalist politicians.

In conclusion the research directed recommendations firstly to government, including that it should ensure adequate funding, ensure a transparent appointments process, provide the Commission with adequate powers; and ensure effective engagement with it. One of the clearest ways in which it can do this is to respond positively to its review of powers. The recent statement of the government that it intends to enhance its investigative powers, is therefore to be welcomed. In addition the study suggests that there are a number of things Commissioners can do to strengthen the effectiveness of their institution. These include: developing a clear vision and purpose for the Commission; fully understanding the idea of independence in this area and distinguishing it from isolation. Thirdly, the Commission could build on what exists in the human rights field. The research stressed this particularly with respect to the Human Rights Act. Lastly the research recommended paying sufficient attention to organisational issues, especially where one is building a new institution.

In conclusion the research finds that although the new appointment of new members does not create a new Commission as such, ‘new blood’ is an opportunity for the Commission to take stock, learn from the past and look to the future. Taken together such actions by both the NIHRC and government might rekindle the hopes of many who were so encouraged by the creation of the Commission in 1999 and still hope to see it play a major role in the promotion and protection of human rights.
CHAPTER 1

WHAT ARE NATIONAL HUMAN RIGHTS COMMISSIONS? BENCHMARKS AND INDICATORS FOR THEIR EFFECTIVENESS

The establishment by governments of institutions, through legislation, decree or constitution, at the national level with a remit over human rights has increased dramatically in recent years. The reasons for their establishment have been explained as falling into three categories: as part of a number of institutions established during a transition from a conflict to a more democratic regime;1 to attempt to deflect criticism about a state’s human rights record;2 and as part of a stable democracy.3

The attention given to such bodies through the UN and at the regional level has helped to develop certain standards and criteria against which these institutions should be measured. The recognition of the role that national human rights bodies could play has a long history, being first raised in the UN in 1946,4 and again in 1960.5 Further developments took place in the 1970s and 1980s6 but it wasn’t until the early 1990s that the UN and its then Centre for Human Rights took detailed interest in the issue, prompted by a Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris from 7-9 October 1991. This meeting proposed the guidelines that are now seen as central to measuring the effectiveness of national human rights institutions, the Paris Principles.7 Since then the UN, through its High Commissioner for Human Rights and, in collaboration with other agencies such as the UNDP, has paid considerable attention to these bodies8 and the Paris Principles

1 For example, the South African Human Rights Commission was created in the 1994 Interim Constitution and consolidated in the Final Constitution of 1996. The Commission Béninois des Droits de l’Homme (Benin) was created during transition to democratic rule in 1989; and the Commission on Human Rights and Administrative Justice in Ghana, during the transition to constitutional democracy in the early 1990s.
4 In an ECOSOC discussion when it asked states to consider setting up information groups or local human rights committees in their states to further the work of the UN Human Rights Commission, Resolution 2/9, 21 June 1946.
5 ECOSOC Resolution 772B (XXX), 25 July 1960.
6 In 1978 in Geneva the UN Commission on Human Rights organised a seminar drafting guidelines for such bodies, ST/HR/SER.A/2 and Add.1. These guidelines were endorsed by the Commission and the General Assembly which invited states to take steps to establish such institutions or strengthen those that already existed; see also Resolutions A/36/440 (1981); A/38/416 (1983); E/CN.4/1987/37 (1987); E/CN.4/1989/47 and Add.1 (1989); E/CN.4/1991/23 and Add.1 (1991).
7 Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights. The Secretary General then put these forward to the UN for adoption in 1993, Report E/CN.4/1992/43.
8 Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, including the Question of the Programme and Methods of Work of the Commission, National Institutions for the Protection and Promotion of Human Rights, E/CN.4/1993/33, 5 January 1993. See, for example, the Vienna Declaration and Programme of Action which ‘reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights’, further, it ‘encourages the establishment and strengthening of national institutions having regard to the “Principles relating to the
have been applied in their dealings with states and institutions and upheld by other organisations and individuals as the benchmarks against which NHRI should be measured.

In recent years there has been increased coordination among these institutions at the international and regional levels. In 1993 the UN Commission on Human Rights approved through resolution 1993/55 the setting up of a Coordinating Committee for NHRI composed of representatives of NHRIs, tasked to ‘create and strengthen National Institutions and to ensure that they conform to the Paris Principles’ and restricting membership to only those institutions that comply with them. Although the focus of the ICC initially may have been on getting such institutions established, some attention has been paid at the international level to compliance with standards for an effective and independent institution.

National institutions themselves now meet regularly at the international and regional levels, adopting declarations and developing further standards on human rights. Institutions across Europe, Latin America, Asia Pacific, the Mediterranean and Africa, often have their own coordinating machinery and secretariats and have held regional seminars with resulting declarations. There are also developments at the level of the Commonwealth. These have helped to develop examples of best practice among these institutions.

status of national institutions” and recognising that it is the ‘right of each state to choose the framework which is best suited to its particular needs at the national level’, 32 ILM (1993) 1661, at 1672 para 36.


12 Ibid, Article 3. However, often well established institutions that are deemed to be highly regarded will be accredited even if they do not technically comply with the Paris Principles.

13 Noting at its first meeting that it ‘should be flexible and simply take note of the existence of national institutions, irrespective of the political or ideological regime under which they had been established, bearing in mind that they could be improved and that technical assistance could be provided to that end’, Human Rights Questions. Report of the Secretary General, September 1995, para 18.

14 The first international conference was held in Paris in 1991, from which the Paris Principles evolved; Second International Workshop on National Institutions for the Promotion and Protection of Human Rights, Tunis, 13-17 December 1993; Third International Workshop on National Institutions for the Promotion and Protection of Human Rights, Manila, 18-21 April 1995. The Fourth International Workshop on National Institutions for the Promotion and Protection of Human Rights, held in Merida, Mexico, 17-29 November 1997 looked not only at cooperation between NHRI but also at particular themes of racism, economic, social and cultural rights and the right to development. Fifth International Workshop on National Institutions for the Promotion and Protection of Human Rights, Copenhagen and Lund, 10-13 April 2002; and Seventh International Conference National Institutions for the Promotion and Protection of Human Rights, Seoul, September 2004.


16 The first European Workshop on National Institutions was held from 7-9 November 1994 in Strasbourg, and discussed racism and xenophobia; Second European meeting, Copenhagen, 22 January 1997; Third European Meeting, Strasbourg, 16-17 March 2000; Fourth European meeting, Belfast and Dublin, November 2002; Fifth European meeting, Berlin, November 2004. For the Mediterranean, the first meeting of Mediterranean NHRI was held in Marrakech, Morocco, 27-29 April 1998; Second
Many of the international and regional human rights treaty bodies have developed mechanisms by which NHRI can participate at their meetings, often with the right to speak and to receive documentation. The 1993 World Conference on Human Rights, for example, invited NHRI to participate as observers: ‘to sustain the momentum in the establishment of national institutions and to consolidate their position as leading agents in the promotion and protection of human rights’.

The role of the UN with respect to these institutions over recent years has focused, initially through its Special Advisor and now through the National Institutions Unit, on providing encouragement for their establishment through technical and advisory services, in conjunction with UNDP and in giving support to those already established. Many such institutions worldwide receive funding and other support from a variety of international agencies. Yet attention has moved from the principles for establishing such bodies, namely the Paris Principles, to how these bodies can contribute to the development of thematic issues of substantive rights. But something has been omitted in between. It would appear that while

Conference of Mediterranean Human Rights Commissions, Athens, 1-3 November 2001. For the Americas: Second regional meeting, Mexico City, 19-21 November 2000; Second Conference of National Institutions of the Americas, Mexico, 21-24 November 2001; First regional conference for African institutions was held in Yaoundé Cameroon, 5-7 February 1996; Second conference of African NHRI, Durban, South Africa, 30 June –3 July 1998; Third regional conference on NHRI in Africa, Lomé, Togo, 14-16 March 2001. For the Asia-Pacific, the first regional workshop was held in Darwin, Australia from 8-10 July 1996; Second Asia Pacific Regional Workshop, New Delhi, India, 10-12 September 1997; Third Annual Meeting, Jakarta, Indonesia, 7-9 September 1998; Fourth Annual Meeting, Manila, Philippines, 6-8 September 1999; Fifth Annual Meeting, Rotorua, New Zealand, 7-9 August 2000; Sixth Annual Meeting, Colombo, Sri Lanka, 24-27 September 2001; Seventh Annual Meeting, New Delhi, India, 11-13 November 2002; Eighth Annual Meeting, Kathmandu, Nepal, 16-18 February 2004; Ninth Annual Meeting, Seoul, South Korea, 13 September 2004.


20 See, for example, ibid, at para 15.

21 Ibid, at para 11.
attention has been placed on the need to establish such bodies, the same degree of thought has not been paid to factors that render them effective and the need to ensure that those are established or in existence satisfy such criteria: 22 ‘Most research has focused on the elaboration of normative standards rather than on how human rights institutions have evolved in practice’. 23 It is this gap that this study seeks to make a contribution to filling.

Methodology

Our methodology in producing this report is to set out a number of benchmarks for evaluating what is required to ensure an effective National Human Rights Institution and then to consider the operation to date of the Northern Ireland Human Rights Commission with respect to them. We also look at comparisons with other NHRIs, notably with the South African Human Rights Commission, to enable us better to understand whether the NIHRC is placed in a unique situation or has acted in a unique way. However this study should not be read as a full length comparison between the NIHRC and any other NHRI.

This study is not a formal evaluation, in that it has not been commissioned by anyone with a direct interest in the funding or management of the NIHRC to whom we report. It is an independent academic study that we designed and then sought funding from the Nuffield Foundation to conduct. Its aim is to contribute to public understanding about the operation and effectiveness of NHRIs in general and the NIHRC in particular. We write from the perspective of scholars who recognise the role that such institutions can play in the promotion and protection of human rights and the need for research to assess how this might best be achieved. We have used a variety of techniques to achieve triangulation, 24 including drawing upon a wide range of documentary material such as international organisations’ resolutions and papers, documents from national human rights institutions across the world, academic and review reports and studies on these institutions, NGO critique and commentary, media reports, debates in parliaments and court cases, as well as the use of semi-structured interviews.

The study also draws upon the methodology used in evaluation studies. As Newburn has observed this has developed recently away from an exclusive focus on ‘experimental’ approaches characterised by controlled trials to a much broader range of methods that involve the observation of institutions in practice. There is no ‘right way’ to conduct evaluation. 25 The approach we have adopted includes elements of both Accountability Evaluation – which is primarily concerned with outcomes and Development Evaluation – which looks more to providing ideas on how an institution might be developed and improved. 26 Assistance in developing guidance for measuring the effectiveness of institutions can be found in a variety of sources such as those in respect of private sector bodies, as well as government standards applying in respect of public sector organisations. With regard to the latter, for example, the British government has developed a number of guidelines and benchmarks for evaluating its Non-Departmental Public Bodies (NDPBs), of which the NIHRC is one, including assessing their relationship with other statutory bodies and whether their functions need a separate institution or can be carried out by the voluntary or private

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22 Human Rights Watch, Protectors or Pretenders?
sector. In addition, in other fields, there has been considerable attention to evaluating the effectiveness of NGOs, and a recognition, perhaps equally applicable to national human rights commissions, of difficulties assessing such organisations where ‘there is no clear bottom line and the various stakeholders have a wide range of vastly different expectations. Sustainable development and poverty alleviation...are complex and long-term issues that are hard to assess in the limited time frame of [NGO] projects. Added to these problems, the available instruments for monitoring, evaluation and reviewing are weak, and the culture of [NGOs], favouring action over reflection and seeking to minimise overheads which could pay for assessments of effectiveness – discourages efforts to develop more useful analytical approaches’.

Literature and evaluations of organisational effectiveness also served some use in attempting to identify benchmarks for a national human rights commission, although this is obviously an extensive range of material which must also be examined in the context of its application to public sector bodies. This was particularly useful in examining the internal functioning of the commission as an organisation and the importance of leadership.

In the human rights field, the use of indicators and benchmarks to measure the implementation of human rights is relatively new. However, they have tended to focus on the substantive rights themselves, particularly economic, social and cultural rights. There has been very little attempt to develop criteria for an evaluation of the institutions set up to promote and protect those rights, whether at the national or international level.

The aim of this study was to consider in detail the performance of one particular institution and its operation in practice. This study thus focuses on the Northern Ireland Human Rights Commission with comparisons from South Africa in particular, but also elsewhere. In this course of this research, given the constitutional setting, it was necessary for us to consider the place of the Northern Ireland Commission in the wider UK context, even more so given the parallel discussions at the time this research was being undertaken, of the remit and functions of the soon to be established Scottish Human Rights Commission, and the debate surrounding whether there should be a UK-wide or indeed England/Wales Human Rights Commission. Further discussion is provided on these issues below.

We would like at this point to acknowledge the co-operation of the NIHRC, especially the Chief Commissioner Professor Brice Dickson, in conducting this study. Professor Dickson was not only willing to be interviewed for the research, but has gone beyond what one might have expected in providing additional information and documentation and detailed commentary on the drafts of the report. He was always accessible by phone and email and took the platform at both the conferences we held. It cannot have been an easy task to

27 Cabinet Office, Guidance for Reviewing NDPBs, April 2003, Factsheet 1. See also with regard to UK government guidance to NDPBs, Comptroller and Auditor General, Report on Good Practice Performance in Reporting on Executive Agencies and Non-Departmental Public Bodies, HC 272 Session 1999-2000, 9 March 2000.
comment on a report evaluating the institution for whom you work, yet Professor Dickson was willing to respect differences of opinion in the conclusions which we had reached, yet at the same time being prepared to read the drafts in detail and highlight substantive as well factual and grammatical errors. The research would not have been possible without his assistance, support and openness.

This research has been conducted with the kind assistance of the Nuffield Foundation. This enabled us to appoint a researcher for eighteen months, to visit South Africa, Geneva and Scotland and to hold two conferences, one in Belfast and one in London. We undertook an initial literature survey of national and international work on national human rights commissions. The documents of national human rights institutions in South Africa in particular, but also elsewhere were examined in detail. The Northern Ireland Human Rights Commission was then examined in detail, the documentation it produced, as well as reports that had been written on it by others, and literature from a wide variety of sources including media, civil society, parliament and government.

We spent some time in South Africa interviewing individuals and organisations from Parliament, the government, NGOs and the Commission itself, with the kind assistance of Professor Hugh Corder at the University of Cape Town, as a precursor to the Northern Ireland focus. As with all comparative work, there are benefits of being able to examine similar problems in different legal contexts and through this, enabling us to better comprehend our own systems. The study of the South African Human Rights Commission provided a detailed look at an institution which had been in existence for a longer time than its Northern Ireland counterpart, but which had been established in a post-conflict society.

We then held many interviews with individuals and organisations involved in not only the NIHRC but also the developments in the UK and Scotland. Thus interviews were held in London, Dublin, Geneva and in Northern Ireland, where we spoke with government, parliamentarians, NGOs, civil society, religious organisations, trade unions, the legal profession, academics and those who had used the Commission’s services. Finally we concluded with interviews of the staff and all those who have served on the Commission. All of these were semi-structured interviews exploring a number of themes including the role of a human rights commission, the perception of its performance to date, its relationship with other stakeholders in society, its composition, mandate and its independence. Request for permission to tape record the interview was made and in most cases permitted. The interviews were then transcribed. Where there was a direct quotation referred to in the text of the report, the individual in question was asked whether they were happy for this to be attributed to them. Some individuals were only willing to speak to us or for their comments to be used on the basis that they were not named in the report. Thus, throughout the report, whereas some interviewees have been identified, others have wished to remain anonymous, in which case we have referred simply to the date of the interview.

We were acutely aware of the difficulties of evaluating the effectiveness of an institution within a complex political environment and the impact that our research could have on

31 We are indebted to Anne Smith for her invaluable work on this project.
33 The report on the South African Human Rights Commission was written up separately, on file with author.
34 A list of the individuals and organisations interviewed is attached in Appendix I.
However, these issues became even more complex as divisions within the Commission widened, leading to a number of resignations. By the time we were nearing completion of the research almost as many people had resigned from the Commission as remained on it. Views about the performance of the Commission had become increasingly hardened and personalised. Since we had interviewed most of those with an interest in the Commission there was an increasing interest in the outcome of our research and on more than one occasion people, from different perspectives, expressed concerns to us about what we would say. This included concern from people outside Northern Ireland on the impact of our views on the prospects for strengthening human rights commissions elsewhere. We can only say that we have had to consider carefully our role in this arena, and have striven hard to ensure that, by playing close attention to the original benchmarks we established, our conclusions are as independent and impartial as possible.

What is a NHRI?

It is recognised that there is no one single model or definition of a national human rights commission, although the UN has attempted to provide one: “the term “national institution” is taken to refer to a body which is established by a government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights”. In fact, some countries have bodies that encompass a variety of functions; others are ‘hybrid human rights ombudsmen’. Further, it has been in fact recognised by the UN and other bodies that there should be some degree of discretion to states to decide which model is best suited to its own circumstances.

Evaluating the effectiveness of a Human Rights Commission

The initial consideration is what would one expect and hope a national human rights commission to achieve? It is clear that a NHRI cannot be the panacea for all society’s ills. There must be realistic expectations placed on what such a body can achieve and it must be seen in the context of the political, economic and social situation in which it is created. It will depend very much on the other mechanisms and structures in place in the jurisdiction and the extent to which there is a human rights protection and promotion system in place. Beyond

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40 For example, it has been suggested by the Commonwealth that ‘in small and developing states or states within very limited resources, it may be more practicable to confer the mandates of both an NHRI and an Ombudsman upon a single institution’, Commonwealth Secretariat, *National Human Rights Institutions*, at 4.
this, however, it is possible to identify a number of roles that a human rights commission can achieve. Firstly, it would be hoped that it would occupy a semi-official role and operate on a more inside track with government. This requires not only that a commission maintain its independence and not be subject to government pressure, but, conversely, work closely enough with government that it is able to influence it and be taken seriously by it.

Secondly, a commission should have some educational role in terms of promoting human rights in the jurisdiction and in this sense should act as the 'standard bearer' for rights. A NHRI should act as the primary focal point for human rights within a jurisdiction and set and apply the necessary international and domestic standard.

Thirdly, a NHRI should have more political clout than NGOs and yet should be able to act as a bridge between NGOs and government. Again, whilst maintaining its independence, a NHRI should exploit any relationships it may have with civil society and human rights organisations to work closely with them and encourage them to develop further. As a semi-official body, a NHRI can provide a useful link between what are sometimes seen as opposing forces, offering a forum or medium through which NGOs and government can interact.

Lastly, a particularly important role of a national human rights commission must also be to facilitate the implementation of international standards at the domestic level. This is an issue of increasing concern to many international bodies and a formal role for national human rights institutions has been suggested.41

Although UN documentation seems to have consistently stressed the need for states to establish human rights commissions, there was little attention to the criteria by which they should be judged once set up and the standards that should be applied to ensure that they did the job for which they were intended. Even among those organisations that fund the establishment of national institutions, there does not appear to have been clear guidelines or benchmarks against which the funding is assessed. Indeed, it has been noted that the UNDP and the UNHCHR have been too quick to provide funding without evaluating the extent to which it is used effectively or evaluating the effectiveness of the organisation to which it is being given.42 As Human Rights Watch note with respect to African governments, support and advice ‘has concentrated on encouraging states that are thinking of setting up a commission and providing advice to them in the early stages’.43 As a result of giving the Special Advisor the task of being the main person to advise, it is possible that ‘the advice given may be generic and tied to the Paris Principles, rather than based on an in-depth understanding of what might work best in the political and cultural context of the country’.44 Where there has been evaluation of what makes an effective body, it often goes no further than a restatement of the Paris Principles. As Human Rights Watch again noted in their report on human rights commissions in African states,

‘the Office of the High Commissioner for Human Rights appears to have fully embraced the premise that the effective enjoyment of human rights calls for the establishment of a national human rights institution and is actively marketing human rights commissions. This presumes that the creation of a human rights commission will, in itself, contribute to the

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41 For example, the UN Committee Against Torture has recently confirmed that the UK government should designate the NIHRC as one of the monitoring bodies under the Optional Protocol to the Convention Against Torture, Committee Against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention. Conclusions and Recommendations of the Committee Against Torture. United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, 25 November 2004, CAT/C/CR/33/3, at para 5(m).
42 Human Rights Watch, Protectors or Pretenders?, at 77.
43 Ibid, at 74. They recommend greater coordination among country desk officers of the UN High Commissioner for Human Rights and the technical assistance programme.
44 Ibid.
promotion and protection of human rights, an unfounded premise as this report shows. There has been no serious effort to question this premise in internal evaluations nor does there appear to have been any serious policy discussions, based on the record of existing national human rights institutions, to take stock and question whether this policy direction should expand, or even continue’.45

There are examples of NHRI that have been set up in ideal situations, with the requisite degree of independence, but yet that have failed to make a mark. Thus, the Commission in Benin ‘given its genuine autonomy from the government, stable leadership and broad mandate, it might be expected that the CBDH would have been one of the most active and effective national human rights commissions over the ten years of its existence. But the facts are otherwise. …The Benin example serves to pose the question whether the existence of a human rights commission necessarily helps to bring improved human rights protection in a country’ 46. One of the aims of this research was therefore to consolidate and develop further standards by which such bodies should be judged and evaluated in order to see whether they are fulfilling the roles for which they were intended.

Although there is a recognition there is no one model of a NHRI and that their structure, mandate and powers will reflect the domestic situation, this research has aimed to consider the commissions in South Africa and Northern Ireland in particular as well as elsewhere, to identify some benchmarks and indicators that can be applied to NHRI to evaluate their effectiveness.

Indicators and Benchmarks for an effective national human rights commission

It was therefore crucial to our research to develop a clear set of benchmarks and indicators against which to assess the Commission and which could be of use beyond their applicability to the institution in Northern Ireland.

What are benchmarks and indicators?
The first difficulty is clarifying what we mean by ‘benchmarks’ and ‘indicators’. There has been considerable debate on this issue in the literature, both in the human rights field, and elsewhere.47 Benchmarks are different from indicators:

‘benchmarks can be defined as goals or targets that are specific to the individual circumstances of each country. As opposed to human rights indicators which measure human rights observation or enjoyment in absolute terms, human rights benchmarks measure performance relative to individually defined standards. Benchmarks, in this sense, are also sometimes referred to in the context of economic, social and cultural rights as “minimum thresholds”’.48

With regard to indicators, for our purposes, we will adopt the definition that includes something beyond simply statistics49 and, as suggested by Green, that a human rights indicator as ‘a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation’.50 In this regard, we would suggest that an

46 Ibid, at 101-104.
47 Green, ‘What we talk about when we talk about Indicators’, at 1064.
48 Ibid, at 1080.
50 Green, ‘What we talk about when we talk about Indicators’, at 1065. See also CW Cobb and C Rixford, Lessons Learned from the History of Social Indicators, Redefining Progress, San Fransisco. 1998, http://www.redefiningprogress.org/newpubs/1998/SocIndHist.pdf. The UN Population Fund says that an indicator ‘is a variable, or measurement, which may convey both a direct and indirect message.
indicator for a human rights commission is: ‘a piece of information used in measuring the extent to which a particular goal of a commission is being carried out’.

There is considerable assistance with developing good benchmarks and indicators from a variety of fields.\textsuperscript{51} They include suggestions that numerical indicators may not always give you the information you want; ‘effective indicators require a clear conceptual basis. …you need to spend time clarifying exactly what you are trying to measure’;\textsuperscript{52} attention should be paid to the potential values and bias inherent in indicators that you may select;\textsuperscript{53} and it might be more useful to select ‘a narrow range of indicators is more powerful than a laundry list. Historically, the most powerful indicators work has focused on a single issue’.\textsuperscript{54}

Further, one can also identify indicators from the perspective of the various stakeholders and what their needs are.\textsuperscript{55} In this respect, it has been argued that this approach has tended to focus on some stakeholders rather than others, often neglecting the clients, the public and ‘the members of the community served’.\textsuperscript{56} What is needed, therefore, is ‘a multiplicity of internal and external criteria are needed for a more comprehensive evaluation of organisations’.\textsuperscript{57}

The aim of the research was to measure the effectiveness of a NHRI, specifically the NIHRC. In order to identify indicators and benchmarks for effectiveness of a NHRI, we need first to identify what factors amount to an effective institution. It may be more difficult to evaluate the effectiveness of such an institution within a short period of time.\textsuperscript{58}

**Benchmarks of NHRI**

The Paris Principles themselves suggest a number of criteria which it is presumed lead to an effective human rights commission, including independence, plurality of membership and extensive powers. That these are the guiding principles on national institutions has been consolidated by numerous writings and reference to these standards by other organisations both within and outside the UN and writers on the area. Thus membership of coordinating bodies of institutions is limited to ‘only national institutions which comply with the Paris Principles will be eligible to be members of the group of national institutions’.\textsuperscript{59} The Paris Principles are seen as the target applicable to all such institutions and the ‘dominant’ model for national commissions wherever they are in the world,\textsuperscript{60} indeed, literature on human rights

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\textsuperscript{51} Cobb and Rixford, *Lessons Learned*, at p.16.

\textsuperscript{52} Ibid, at p.17.

\textsuperscript{53} Ibid, at p.18.

\textsuperscript{54} Ibid, at 18.


\textsuperscript{56} Ibid, at 27.

\textsuperscript{57} Ibid, at 26.

\textsuperscript{58} Reif, ‘Building Democratic Institutions’, at 23.


commissions ‘has been almost completely marked…by a fundamental fidelity to the United Nations conception of the ideal or optimal NHS’. The UN Handbook also lists a number of ‘effectiveness factors’ for NHRI, detailing further on the list of the Paris Principles, noting the need, for example, for a defined jurisdiction and adequate powers, accessibility, cooperation, operational efficiency and accountability.

But it has been argued that the Paris Principles, and those writings that rely on them, have at present several flaws and need to be supported by other issues that impact on the effectiveness of a NHRI. Thus, the Paris Principles are said to rely too much on legalism, they are not often judged on how they can be used as a resource by others and on how much attention they pay to the most vulnerable in society. Others have also suggested that an effective national commission is one that should be, in addition, ‘qualified and diverse in their membership’; ‘adequately staffed and resourced’, and ‘accessible to the public’. Further, research elsewhere has indicated that the effectiveness of an institution may depend on the extent of its powers and jurisdiction, the level of cooperation with other bodies, the character of those chosen to head and work in the institution, the behaviour of the government towards it and the credibility of the institution in the eyes of the public. Clearly, an effective institution is one that has a positive impact on the human rights situation in the jurisdiction and can establish itself as a focal point for human rights, and a body can also be evaluated on the extent to which it complies with standards that it may have set for itself, for example, on transparency, openness and fairness. Being able to ‘build bridges between government and civil society and between groups within civil society’ is also shown as a feature of an effective body.

From the above and other writings and research on NHRI it would appear that the following benchmarks should be used to evaluate a commission’s effectiveness. We have divided these into three categories. These will be examined in turn and benchmarks and indicators identified in respect of each.

### A. Capacity

There are a number of factors that are key for a commission’s effectiveness which are determined at its creation. The conditions under which a commission is created lay the foundations for its future effectiveness. Although there are examples of national human rights institutions being established in ideal situations, limitations in this regard have an impact on the extent to which they can be effective. The Paris Principles, in particular, focus on many of these issues.

#### 1. Legal status

In order to provide the institution with the necessary security and protection from change, there should also be a clear legal foundation for the establishment of such a body. This, it is said, includes that the provisions ‘be entrenched in the constitution or clearly stipulated in the enabling legislation’, preferably they should be set up ‘through incorporation in the constitution of a state’, but less preferably through an Act of parliament (with fixed provisions

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61 Ibid, at 677.
65 Ibid.
66 Ibid.
amendable only by a special majority vote of the parliament’\(^71\) and anything set up by presidential decree is not ideal.\(^72\)

By way of example, the South African Human Rights Commission was created in the Interim Constitution under which Commissioners were appointed, and its existence affirmed in the Final Constitution\(^73\) and clarified further in the Human Rights Commission Act of 1994. Although since its establishment it has not been free from controversy and criticism, the manner in which it was created, as central to the constitutional process, set it on a firm initial basis.

2. Protecting its independence

There are various aspects of independence with respect to the relationship of the Commission with a range of actors including government, NGOs, political parties and others. Firstly, considering the members of the Commission and their perceived relationship with government, in this regard the manner in which commissioners are appointed is central, namely that it ‘gives them independence from influence or control of government the office is designed to investigate – the executive/administrative branch – and other government and nongovernmental bodies that could influence its activities’.\(^74\) The process should also be ‘transparent process that also involves both the legislature and civil society’ and this requires ‘wide consultation and include a process for public nomination of candidates’.\(^75\) The Paris Principles do not require them to be elected, but that the procedure of appointment ‘affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of: nongovernmental organisations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organisations, for example, associations of lawyers, doctors, journalists and eminent scientists; trends in philosophical or religious thought; universities and qualified experts; parliament; government departments (if they are included, these representatives should participate in the deliberations only in an advisory capacity)’.\(^76\)

Other suggested criteria for an effective appointment procedure include that there is wide advertisement of the posts, the criteria on which staff and commissioners are appointed is made public, equal opportunities provisions apply, that those who may be reticent or suspicious of such a body are encouraged to apply, that there is a public nomination process, that interviews are held in public, that positions that become free should be filled quickly, and that commissioners are appointed for a sufficient length of time.\(^77\)

Whilst there are examples of members of national institutions who have been appointed by the executive and have been criticised for the too close relationship with it, there are also examples of national institutions whose members have been appointed by the executive yet which have still managed to maintain a degree of independence,\(^78\) and conversely, where

71 Ibid, at 11.
72 Ibid, at 10.
73 s.184.
74 Reif, ‘Building Democratic Institutions’, at 25. For further detailed discussion on the appointments process, see below.
75 Commonwealth Secretariat, National Human Rights Institutions, at 15.
76 Paris Principles, B.1.
78 For example the commissioner and two deputy commissioners of Ghana’s Commission on Human Rights and Administrative Justice are appointed by the President on the advice of the non-party Council of State, yet the previous Commissioner, Emile Short, was praised for his outspoken stance on violations and tackling difficult and sensitive issues, see Human Rights Watch, Protectors or Pretenders?, at 157-158. In addition, although members of the Ugandan Human Rights Commission
members are appointed by legislature yet have been perceived as bowing to government pressure or have been inadequate in other ways. For example, there have been allegations directed at the South African Human Rights Commission, while appointed with a degree of independence from the executive, for responding to government pressure to withdraw from certain court cases. Clearly, therefore, other factors must play a part in this independence as well. While appointment by the legislature has the advantage of at least giving the appearance of a more independent process, the South African experience in particular suggests it is not that straightforward. Thus, in order to instil confidence in the independence of those who are selected the process should be transparent, involve civil society and media, the interviews held in public and that members of the legislature use information available to them to question potential candidates in-depth, particularly on their human rights credentials. It is also naïve to assume that appointment by legislature will necessarily entail a more objective process free from political manipulation: ‘a major difficulty is that making a Parliamentary committee responsible for nominations inevitably means that the nominations will reflect the party political make-up of the committee. The danger is that party political considerations consequently overshadow criteria more germane to the nature of the body for which nominations are being considered’.

The Paris Principles also require that ‘in order to ensure a stable mandate for the members of the institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of their mandate. This mandate may be renewable, provided that the pluralism of the institution’s membership is ensured’. The Commonwealth handbook also mentions best practice in terms of appointment including what criteria should be included, how commissioners should be removed, that members be appointed for fixed terms of five years with the possibility of reappointment, and that vacant positions should be filled quickly. A secure tenure would seem important as it would appear that the less likely governments are able to remove members, the more likely they are to be perceived as independent and to feel comfortable to operate independently.

There is also great store set by the fact that in this regard, the institution should have the power to investigate, report, manage its own budget and appoint its own staff. Funding is clearly an issue that affects the perceived independence of the commissions. This includes not only the need for sufficient resources to enable it to carry out its mandate, but also that it should be free to make decisions on how best to allocate funding for specific aspects of its work.

are appointed by the President on approval of Parliament, without consultation of NGOs, their members have been praised for their strong leadership and competency, Human Rights Watch, Protectors or Pretenders?, at 358-359.

79 This was the well-known Treatment Action Campaign Case, Minister of Health and Others v. Treatment Action Campaign and Others, Constitutional Court, CCT 8/02, 5 July 2002. Further, the individuals appointed to be Procurador para al Defesa de los Derechos Humanos of El Salvador, despite being appointed by the legislative Assembly, have been criticised for being ineffective, lacking qualifications in human rights and in their ineffective administration of the office, see Reif, ‘Building Democratic Institutions’, at 57.


81 Paris Principles, B.3.

82 Commonwealth Secretariat, National Human Rights Institutions, at 16.


84 Paris Principles, paras A.3 and B.2; Reif, ‘Building Democratic Institutions’, at 25.

85 As the UK Parliamentary Joint Committee on Human Rights noted in its report on the NIHRC, ‘A system which requires the NIHRC to present detailed proposals for a particular project for which it seeks additional funding allows for at least the potential for the Northern Ireland Office to withhold funding from projects on the basis of policy disagreements, or to influence the character of the project
All of these factors play a key role in the perceived independence of the Commission, yet they are issues over which those appointed have little control themselves. In this regard, it must be the responsibility of the government or appointing body to uphold the independence of the individual members of the subsequent commission, particularly when, post appointments, the criticism may be more likely to be directed at the members themselves for their individual attributes, rather than the government or body for the way in which they were appointed. Governments, or whoever does the appointing, must take responsibility for their decisions.

3. Political support in their creation

As has been apparent from the research that one factor that is essential in whether the Commission will be effective depends on the manner in which it is established and the background to its creation: ‘institutions can only be properly understood in light of the circumstances leading to their creation, i.e. Why were they created and how are they legitimated?’

In this sense, ‘the process of establishing an NHRI should be seen, in itself, as critical to the success of the project’. Where the process towards its establishment is ‘consultative, inclusive and transparent; …led and supported at the highest level of government; and involve and mobilise all relevant elements of the state and civil society’, despite making the process longer, it seems to create a sense of ownership and legitimacy of the final institution. An institution created in secrecy will make this more difficult.

‘it is essential that all stakeholders “buy-in” to the establishment process if the NHRI is to have the trust and confidence of both government and people’.

Where national institutions are established, however, as part of a peace agreement in the transition from conflict, it may be particularly difficult to achieve this sense of ownership, ‘since it is either the product of negotiations between the warring parties or, possibly worse, a solution formulated by the international community’. Thus, the Commission in South Africa was established as part of the democratic process and after wide consultations the idea of having a commission received the support of many of the political parties involved in the negotiations for a new constitution. The desire to create a national human rights commission emerged, therefore, from a supportive political environment and a vibrant human rights community:

‘public acceptance for national human rights institutions is greatest within the transitional context, as the institutions are perceived as part of a new constitutional order’.


Commonwealth Secretariat, National Human Rights Institutions, at 9.

Ibid, at 10.


A Nordmann, The South African Human Rights Commission and the Realisation of Socio-Economic Rights, Dissertation for LLM at Cape Town University, 2001, at p.5. See R Spitz and M Chaskalson,
There also needs to be a balance, if the institution is created because it was largely prompted by NGOs, for example, rather than political parties, it may lack some of the sense of ownership by the political forces that are so necessary to its success.

4. The political context in which they are established and the need for independent and democratic state institutions

While it has been recognised that national human rights commissions could play a key role in the promotion and protection of human rights, it is also clear that even an effective national human rights institution cannot achieve full human rights protection alone. It must be ‘an integral part of a democratic society’, where there are other ‘basic institutions of democracy’ such as an effective and accessible judicial system, education and training, and a free press, among other things, which can support it and to which it can also contribute and strengthen. ‘There is little question that national human rights institutions work most effectively when they are part of a functioning democratic framework rather than a voice in the wilderness’. As Reif notes: ‘as an accountability mechanism a national human rights commission will find it extremely difficult to function in a state without a democratic system of checks on the exercise of power, where real independence from the ruling power is not possible and where human rights are not respected in law and/or practice’. In this respect the circumstances in which an institution is established are key to its success.

The role of NHRI established during times of transition from conflict to peace perhaps play a more central role in creating and consolidating the democratic state, than those which have been set up by already stable democracies. Thus, it has been noted with respect to the Polish Commissioner for Civil Rights Protection, ‘the problems encountered in the judicial system result in the Commissioner playing an even more important role in human rights protection than would be the case in an established democracy’. In this regard, those established as part of a peace process have to fit between both the past abuses that occurred and the need for a change in the future. As Bell notes, ‘human rights institutions are shaped not only by the context of the “deal”, but also by the particular context of past abuses. …The particular human rights addressed, and the institutions established to address them, are shaped by notions of past injustice. The role of such institutions can therefore be understood as inherently transitional – mediating between past and future’. Where national institutions are created, as was the NIHRC, as part of the peace agreement, ‘the human rights institutions must continue to construct the shape of the new order’, without

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100 Ibid, at 2. ‘In a new democracy, a history of human rights violations and the lack of effective institutions to protect rights will likely mean that an ombudsman office established in that country must take on a significant amount of responsibility for protecting fundamental rights. In other countries where the human rights record is much more favourable, an ombudsman who has built up sufficient expertise may be able to expand her view to systemic problems that still afflict some sectors of the population’, B von Tigerstrom, ‘The Role of the Ombudsman in Protecting Economic, Social and Cultural Rights’, 2 *International Ombudsman Yearbook* (1998) 3-56, at 3.
101 Reif, ‘Building Democratic Institutions’, at 42.
of course becoming embroiled in the politics of the peace process. However, where there is still debate over the need for transition, the role of NHRI and importance of human rights in this transition is essential. Yet, ‘what is clear is that the ability or not of the deal to deliver on human rights commitments will significantly affect, and even determine, the nature of the transition. Without effective human rights institutions, the transitions in each of these three situations will at best be from more violent to less violent conflict’. 103

In this regard it may be more important for such national institutions created as part of peace agreements to have strong protection powers. As Reif notes: ‘Given the severe human rights problems in most war-torn societies, national institutions with a strong human rights protection role will probably continue to be most relevant for potential inclusion in future peace agreements or as elements of civil reconstruction’. 104 The role of a human rights commission in a state faced by conflict can, however, cause it serious problems. For example, although ‘there is probably no country with as dire a need for a strong human rights commission than war-torn Sierra Leone’, 105 because of the dangerous situation in the country, some of its members and staff have been killed during the conflict. 106 Further, if other democratic institutions do not support the NHRI then this may also result in huge expectations being imposed on it, as a single body, and tasks that it alone simply cannot fulfil. 107

On the other hand, in some cases it has been shown that a national commission’s effectiveness may diminish when the other institutions in the state are functioning effectively. For example, it has been noted that the ‘relative inactivity’ of the Commission Béninoise des Droits de l’Homme may be because the ‘more forceful role of the constitutional court has taken in regard to the protection of rights. …One might ask if the availability of independent and effective judicial redress through the courts diminishes, in the eyes of victims, the need to recourse to another mechanism such as the national human rights commission?’ 108

Clearly there has to be a balance and the situation in the country must be weighed up against what is already in place and what gaps, if any, need to be filled that cannot be done by other institutions.

The extent to which a commission establishes itself as the authoritative voice on human rights for that jurisdiction is also important. 109

5. Adequate powers and resources to fulfil its mandate; broad mandate and defined jurisdiction

National commissions should have adequate powers and resources to fulfil their mandate. The Paris Principles list a number of responsibilities that a national institution ‘shall’ possess, including advice to the government, parliament ‘or other competent body’ on legislative or administrative provisions, including the power to ‘examine legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights’; on ‘any situation of violation of human rights which it decides to take up’; preparing reports on issues and the national situation; informing the government of violations and making proposals to end such. 110 It should also ‘promote and ensure the

103 Ibid, at 311-312.
104 Reif, ‘Building Democratic Institutions’, at 16.
105 Human Rights Watch, Protectors or Pretenders, at 275.
108 Human Rights Watch, Protectors or Pretenders, at 104-105
109 See debate below on this point.
110 Paris Principles, para A.3(a).
harmonisation of national legislation, regulations and practices with international human rights instruments to which the state is a party and their effective implementation; “encourage ratification” of such instruments “and to ensure their implementation”; “contribute to the reports which states are required to submit to United Nations bodies and committees and to regional institutions...and where necessary, to express an opinion on the subject, with due respect for their independence”; “cooperate with the United Nations and any other agency in the United Nations system, the regional institutions and the national institutions of other countries which are competent in the areas of the protection and promotion of human rights”; “assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles”; “publicise human rights and efforts to combat all forms of discrimination...by increasing public awareness, especially through information and education and by making use of all press organs.”

The Paris Principles do not make it obligatory that national institutions possess the power to hear and consider complaints, but set out suggestions for how it should deal with them if so. The Principles also require that the national commissions be given “as broad a mandate as possible”. Clearly it includes the requirement that they have both promotional and protective powers.

Criticism and assessment of NHRI often centres around the extent to which they have this list of powers and it has been argued that the focus is often on the legalistic powers of the Commission, to the expense of their promotional powers. Thus, debate often focuses on whether they have the power to litigate and on coercive powers such as the ability to investigate and accompanying powers to compel evidence and documentation and witnesses, with it being argued that such powers should be “as strong as possible”. This is not to say that such powers are not important, but, as Okafor and Agbakwa have stated, “Our contention is that being too extensive, that role is too excessive as well. Concomitantly, we are of the view that the role that is normally assigned to non-court-like features of NHCs is all too often too limited; and that this role ought to be more central, and much more extensive. Accordingly, the dominant conception of the ideal NHC ought to regard such promotional, educational and advisory roles as more central and important.”

Yet, also what is apparent is that few institutions have all powers that seem to be preferable by the Paris Principles. Further, even of those that do, such as the South African Human Rights Commission, it also has been criticised for the manner in which it has used, or failed to use the mechanisms available to it. It would seem perhaps to be important that NHRI should have the correct balance of protective and promotional activities. This can be ensured, for

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111 Paris Principles, paras A.3(b)-(g).
112 Paris Principles, para D.
117 See for example, Professor Brice Dickson, Chair of the Northern Ireland Human Rights Commission, who argues that the power to litigate “is most critical to the special part they play” and that “litigation is by far the best way to achieve change on the human rights front”, although he does argue of the need to consider situations in which litigation may not be as effective as other methods, B Dickson, ‘Human Rights Commissions: A Unique Role to Play, Now and in the Future’, 27 Human Rights, Summer 2000, 19-20, at 20.
example, by making sure members of the institution are not just lawyers and the court-like
functions are ‘not overemphasised...at the expense of the non-court like functions’ in the
legislation.\textsuperscript{120} The Cameroonian National Commission on Human Rights and Freedoms
appears to have undertaken limited protective functions, but extensive promotional and
educational work, and yet ‘after nearly ten years in existence, the NCHRF is still largely
unknown in Cameroon.’\textsuperscript{121} What seems to be important, therefore, is the extent to which a
NHRI uses the powers that it has in a dynamic way.

It would appear that effective institutions will have a jurisdiction which is ‘as wide as
possible’, including police, prisons, etc. in its remit,\textsuperscript{122} as well as the power to deal with all
human rights as recognised by international law,\textsuperscript{123} including economic, social and cultural
rights,\textsuperscript{124} to which NHRI may be particularly well suited.\textsuperscript{125}

These powers should be ‘defined precisely’\textsuperscript{126} and ‘shall be clearly set forth in a constitutional or
legislative text, specifying its composition and its sphere of competence’.\textsuperscript{127} As has been
seen with regard to the Northern Ireland Human Rights Commission, it spent considerable
time and expense\textsuperscript{128} pursuing a case through the courts to clarify a power to intervene as a
third party, because this was not expressly stated in its defining legislation.

Many NHRI operate on the international plane, through UN bodies and as part of
coordinating meetings at the international and regional levels, and there is often a perceived
value in this work. Yet it is clear that this activity must feed into the commission’s overall
strategy and that these potentially powerful fora be used to advance the promotion and
protection of rights in its own jurisdiction.

Having a broad mandate, however, may bring difficulties to a commission in deciding how to
prioritise. Handled appropriately, however, it can be to the commission’s advantage as the
experience of Ghana’s Commission on Human Rights and Administrative Justice (CHRAJ)
has shown, ‘staff attempt to help people, particularly in the rural areas where the CHRAJ is

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{120} Ibid, at 712.
\item\textsuperscript{121} Human Rights Watch, Protectors or Pretenders, at 124.
\item\textsuperscript{122} Reif, ‘Building Democratic Institutions’, at 25.
\item\textsuperscript{123} Commonwealth Secretariat, National Human Rights Institutions, at 4.
\item\textsuperscript{124} P Earle, National Human Rights Institutions and the Human Rights Approach to Development,
Background Paper for the Regional Workshop on the Role of National Human Rights Institutions and
Other Mechanisms in Promoting and Protecting Economic, Social and Cultural Rights, Human Rights
Council of Australia. See the General Comment No.10, The Role of National Human Rights Institutions
on the Protection of Economic, Social and Cultural Rights, adopted by the Committee on Economic,
\item\textsuperscript{125} It has been suggested by others that NHRI and ombudsman are in a particularly useful position in
this regard as: their jurisdictions may cover many government agencies; they respond to individual
complaints; they are accessible, so are potentially open to more low income groups; they are more
flexible than other procedures; they may often look at the international obligations not just national
laws; and they may have some remit (particularly with regard to ombudsman) over corruption which is
closely linked to economic, social and cultural rights violations, von Tigerstrom, ‘The Role of the
Ombudsman’, at 15-16. As Gomez states, a NHRI is a body which can have other powers beyond
litigation which may offer some better ways of dealing with such rights and its role in this regard could
be to define the content of such rights, identify indicators, define core obligations, submit national
reports to the Committee on Economic, Social and Cultural Rights, scrutinise public policy, compile
human rights impact statements, and work with NGOs and other groups, M Gomez, ‘Social Economic
\item\textsuperscript{126} Reif, ‘Building Democratic Institutions’, at 25.
\item\textsuperscript{127} Paris Principles, A.3.
\item\textsuperscript{128} Although most of its costs were later reimbursed.
\end{enumerate}
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often the only place people can obtain advice. This accommodating approach has contributed to building public confidence in the CHRAJ as a responsive institution’.129

6. Financial resources
A further aspect of this is that a commission must be endowed with the necessary financial resources to enable it to fulfil its mandate effectively. Not only must the resources be adequate, but they must ensure the commission’s independence. As Hugh Corder has noted in relation to South African constitutional institutions, ‘Financial independence implies the ability to have access to funds reasonably required to perform constitutional obligations’.130 In this respect, it is often recommended that funds be provided by Parliament, not the executive, and that the commission report to Parliament to vouch for the funding it has used and request additional funding from it.131 There should be a system in place for requesting additional funding, such as a trust fund,132 or the ability to apply to external sources, although the core funding should come from the state.

7. Personnel issues
The Paris Principles and practice adopted in many countries presume the model of a commission composed of several members and staff, although they do not clarify the relationship between them or the tasks that should be assigned to each.

It is useful in this regard to consider separately the criteria required for commissioners as individuals, and the criteria for the commissioners as a group. It would appear that these issues are confused. The first question is, then, what are the qualities that render an individual effective within a commission? It has been suggested that they should have qualifications ‘necessary to undertake the role and should meet the advertised selection criteria’.133 Where the commission has many roles, it would make sense to appoint individuals who reflect these different skills. The Commonwealth recommends that the appointment process ‘be designed to secure the best possible members’.134 What these qualities are, however, is more problematic. It is clear that the qualities of the members and staff need to be related to the functions of the body. So if the body is to be primarily legalistic, then staff and members need to have legal qualifications. Similarly, given that national commissions are likely to be need to use the media and communications in order to be effective, having someone with some PR experience may be useful. It is usually presumed that the commissioners are the named individuals, the face of the commission, giving advice and guidance and setting policy, with the staff being those who implement it and run the commission on a daily basis. In this regard one would expect them to have therefore some public role perhaps and an expertise in the human rights field to be able to apply to the situation. The requirements of membership vary from institution to institution, and include such things as prohibition on sitting as members of the legislature or political office,135 and that they are ‘morally or professionally sound’,136 that

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129 Human Rights Watch, Protectors or Pretenders, at 159.
132 The South African Human Rights Commission has such a fund.
133 Commonwealth Secretariat, National Human Rights Institutions, at 15.
134 Ibid.
135 See for example, the Ombudsman of Belize, Ombudsman Act, Article 5. The UK Directory of Civil Service Guidance notes that for board members of NDPBs the independent Commissioner for Public Appointments ‘makes clear that political activity is not generally a bar for appointment to bodies within her remit, although she requires the collection of monitoring information on such activity…However, board members of public bodies…should not generally occupy paid party political posts or hold particularly sensitive or high-profile offices in a political party’, Directory of Civil Service Guidance 2000, Civil Service Guidance I: Political Activities: Members of Public Bodies, www.cabinet-office.gov.uk/guidance/one/directory.asp?intID=95.
they be appointed on ‘merit’ and with equal opportunities in mind, some require legal qualifications. Whether members in particular should have human rights knowledge has, however, not always been considered to be important, an omission that has been criticised by many. Further, even if the qualities required are clearly defined, it would appear that the job description for various human rights commissions do not always apply the criteria, some of them requiring management experience, suggesting more of a managerial role of staff, rather than policy direction.

It is also important that regard is had to the background of the individual members, and there are attempts in many countries to limit the political connections individuals have once appointed to the institution. For example, with respect to the UK, the Cabinet Office guidelines for NDPBs state that ‘in most circumstances board members, whether full-time or part-time, are expected not to occupy paid party political posts or to hold particularly sensitive or high-profile unpaid roles in a political party. Subject to that, part-time members should be free to engage in political activities, provided that they are conscious of their general public responsibilities and exercise a proper discretion’.

Further, the personal character of those appointed to head and sit on the body is also key. Leadership skills are an essential requirement and those who head the institution should have ‘expertise, integrity and credibility in the eyes of both the government and the populace’, and ‘an established history of independence from government’. It is also said that they should be ‘sensitive to issues relating to gender, ethnicity and the rights of indigenous peoples, people with disabilities and other vulnerable groups’. This is important as, as noted above, despite the limited powers that a body may have and the political circumstances in which it has been established, the character of the individuals appointed to the NHRI can determine its effectiveness to a large extent. For example, with regard to the Sri Lankan Human Rights Commission it was noted that although ‘its legal framework was weak, but it had an impact because of the dynamism of its chairperson, his stature as a former judge of the Supreme Court, and his ability to function almost full time’.

As a group, however, there are other factors that need to be considered. The Paris Principles and others suggest that ‘collectively the members should reflect gender balance, the ethnic diversity of society and the range of vulnerable groups in their respective society’. The Paris Principles tend to focus on the characteristics of the commissioners as a group, rather

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136 For example, Costa Rica, People Defender’s Law, 11 May 1992, Article 4; People’s Defender of Dominican Republic, Law No.19-01, Article 5.
138 For example, that they have a doctorate in law, Defensor del Pueblo of Ecuador, Peoples’ Defender Bylaw, Articles 4 and 6.
139 La Procuradura para la Defensa de los Derechos Humanos of El Salvador is required to have a background in human rights, Decree No.163, Article 5. Also the Venezuelan Defensor del Pueblo is required to have competency in human rights issues, Article 280 of the Constitution of Venezuela.
140 For example, the UK Parliamentary Joint Committee on Human Rights in respect of Northern Ireland stated that ‘In appointing a Commission whose membership from Northern Ireland reflects the composition of the community as a whole, the principal criterion should be that of experience, knowledge and expertise in the field of human rights’, Joint Committee on Human Rights, Fourteenth Report. Work of the Northern Ireland Human Rights Commission, at para 24.
142 In this regard, it is noted with respect to the Spanish Defensor del Pueblo that it ‘has benefited from the appointment of generally strong individuals to head the institution’, Reif, ‘Building Democratic Institutions’, at 37-38.
143 Ibid, at 27.
144 Commonwealth Secretariat, National Human Rights, at 13.
146 Commonwealth Secretariat, National Human Rights Institutions, at 15.
than the individuals themselves.\textsuperscript{147} It is submitted that both need to be considered. The focus of the Paris Principles is clearly on the members being ‘representatives’ of various sectors of civil society, rather than on the individual qualities of the persons appointed and their capacity to do the job. Experience from various institutions shows that if attention is focused primarily on ensuring this representivity, over and above other qualities, there is a risk of being tokenistic and appointing individuals who are not necessarily suited for the post.

The Paris Principles also do not consider the characteristics of the membership of the commission as a whole, including its staff as well as its members. In this sense it exacerbates this unhelpful hierarchy between the two.

Most NHRI take the model that there should be staff of the Commission, and then a number (perhaps at times only one or two), of Commissioners. However, in practice there is often no clear division of responsibility between these personnel beyond a simple agreement that Commissioners make policy and staff implement it.

Thus, there have been numerous examples of problems in NHRI where staff are unable to be involved in decision-making but have to work on a daily basis with the results of those decisions, and Commissioners are too involved in the day to day running of the organisation. For example, staff at the South African Human Rights Commission in the provincial offices stated that:

‘Because when it comes down to it, the provinces then have to implement. Specially in the way we run inquiries is that there is supposed to be information gathering and various research and that inevitably happens in your provincial offices. Not having been consulted in the process you find that you have yourself and try to solve and do it in the way the Commission has envisaged it but then the decision has already been taken and that creates problems for us’.\textsuperscript{148}

Thus, the Commonwealth have argued that it is the commissioners who should decide how to allocate resources, select staff and appoint them and be accountable for budgetary decisions.\textsuperscript{149} Further, staff should be suitably qualified and the level of staff ‘sufficient to adequately support the group of members in discharging the full mandate of the NHRI’.\textsuperscript{150}

Internally, employment processes should ‘promote professionalism and equal employment opportunities’ and there should be a separate legal unit to address individual complaints’.\textsuperscript{151}

These divisions of responsibility are blurred further when Commissioners are full and part time. Although the Paris Principles do not require expressly that commissioners are either full or part time, preference has been expressed for one or the other. For example, the Commonwealth recommend that there should be at least three full time members of a commission who could be the ‘leading members’, and members should be given salary and rank equivalent to senior judicial officers.\textsuperscript{152} Indeed, in many parts of the world commissioners are appointed on a full time basis. Brian Burdekin, former Federal Human Rights Commissioner of Australia and former UN High Commissioner on Human Rights Special Adviser on National Human Rights Institutions is of the opinion that only

\textsuperscript{147} With regard to the pluralism among Commissioners, the Commonwealth Secretariat publication states that ‘the interests of representation and plurality are best promoted by multi-member NHRI. In those micro states for which multi-member bodies may not be sustainable, a balance may be achieved by ensuring that the senior staff of the NHRI are appropriately representative of the society’, ibid, at 14.

\textsuperscript{148} Interview with staff member of the South African Human Rights Commission, May 2002.


\textsuperscript{150} Ibid.

\textsuperscript{151} Ibid, at 14.

\textsuperscript{152} Ibid, at 13.
commissions with full time commissioners are really likely to be effective. Few we spoke to in the United Kingdom and Ireland seemed to have thought much about this alternative.

There are clear difficulties with requiring commissioners to be full time. It may reduce the pool of people available to take commission appointments, as qualified people may be unwilling or unable to make the career break necessary to take up such a post. A full time commission would also almost certainly be a smaller commission and hence less able to ensure broad representation of the community as a whole. The different roles of commissioners and staff may become more blurred. What seems more important, however, is that the role and functions of the commission is matched to its members and staff and secondly, that there is detailed consideration at the outset at the respective mandates and tasks of commissioners and staff.

There needs to be fair remuneration for both commissioners and staff in terms of the work that they do. In this regard, to whom they should compare themselves is difficult. Many commissioners and staff have compared their salaries and conditions of employment to the civil service, as often this is the scale on which they are placed and assessed.

B. Performance

Although the manner in which a commission is established can impact on its effectiveness, it is also clear that even those established in the ideal conditions can fail to deliver. There are numerous factors that are within the Commission’s control that can determine its effectiveness.

1. Must have a clear strategic plan and vision

No commission is likely to have all the powers, resources and funding that it would ideally wish. However, what is clear in this regard is that the Commission has a clear strategy for the most effective use of its resources, budget and powers. This may be difficult to decide in its early years, yet when the spotlight will be on the commission to produce tangible results and to carve a niche for itself. In some respects, the broader the mandate of the body the more difficult its task becomes in defining a role and clear strategic direction for its work. As a staff member of the South African Human Rights Commission noted to us: ‘Now everything is a

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153 ‘I have always and consistently and in every country advised that there should be full-time commissioners. Why? It is my own experience in nearly sixty countries. In my own country we had a part-time commission; it didn’t work; we had to get rid of it. I agreed to be the Federal Human Rights Commissioner on the basis that we scrap the old model and start again. I think we had eleven part-time commissioners and there were many problems with that. First of all you end up in a situation where the staff know more than the commissioners know about what is going on because the commissioners are busy people, they’re QCs or they’re doctors or specialists, they may be working 60 or 70 hours a week anyway. I don’t know a country in the world where you can be an informed Human Rights Commission on five or six hours a week and if you’ve got a family and a profession you are going to be flat out finding twenty hours a week? Running a Human Rights Commission in any jurisdiction is a full-time job. There are enough issues to keep people very busy’, Interview with Brian Burdekin, then Special Advisor to the UN High Commissioner for Human Rights, 27 November 2002.

154 While those in academia, public service, trade unions or the church may be able to secure secondment arrangements from employers this may be less open to the self employed, such as many of those in business or the legal profession.

155 As the International Council for Human Rights Policy observes ‘multiple membership gives the opportunity for a variety of different sections of society to be represented in the composition of the institution’, International Council on Human Rights Policy, Performance and, at 77.

156 This has been the case in Ghana.
human rights problem if you phrase it correctly...But even then you must find out what your core business is, there is no real definition of it’.157

In this regard a human rights commission should ensure that it develops a clear overall strategy and that this is informed by, and feeds into, all aspects of its work and mandate:

‘Performance assessment rests upon the assumption that an organisation has a vision and clearly developed strategic plan for achieving that vision. Sectional plans need to be clearly related to that detailed organisational plan’.

The strategy must be focused and specific, identify specific human rights goals, and ensure a ‘joined-up’ approach.159 This will require focused and regular discussion among all those working at the commission on what they are trying to achieve in a broader sense and the direction for the next few years.

Any human rights commission should be leading the way in defining the human rights standards applicable to the particular jurisdiction in which they operate. In this regard, it is essential that while it is inevitable that commissioners and staff will have differences of opinion on various matters, that they should portray a united front in their policies to those outside. The importance of developing a common vision among commissioners, especially in a society where human rights are a contentious issue, is crucial. It is necessary for a commission to consider, therefore, how best to address any contradictions between individual commissioners’ views and the commission’s public stance. Consensus in decision making, or where this is impossible, a vote with the chair having the deciding vote,160 may assist in some instances. But developing a corporate approach will require going beyond mere voting procedures and entails a responsibility on all members of the commission to ensure that a collective vision is maintained.

2. Make full use of its powers and resources

Despite the above requirements, few institutions match the Paris Principles’ ideal. Yet, there are numerous examples of NHRI being dynamic and using what would be perceived to be limited powers under the Paris Principles guidelines, to have an impact. Thus, despite the fact that the Norwegian Ombudsman does not have any express powers to consider human rights she has interpreted her mandate to do so, as Reif notes, this seems to ‘depend on the approach of the ombudsman in office at any particular time, and her interpretation of the mandate of the office’.161 Further there is also an argument for this approach, one which has been directed at the Northern Ireland Human Rights Commission when it called in its review of powers for increased powers of investigation among others,162 that unless the commission uses what it has to its full potential, it will be unable and it will be difficult for it to argue for any extension to its powers at a later date.

The Paris Principles suggest various ways in which a national commission should operate including, ‘freely consider any questions falling within its competence’;163 ‘hear any person and obtain any information and any documents necessary for assessing situations falling within its competence’,164 ‘address public opinion directly or through any press organ,

157 Interview with a staff member of the South African Human Rights Commission, May 2002.
159 Bell and McCormack, The Northern Ireland Human Rights Commission.
161 Reif, ‘Building Democratic Institutions’, at 15.
162 See below.
particularly in order to publicise its opinions and recommendations; meet on a regular basis and whenever necessary in the presence of all its members after they have been duly consulted, establish working groups from among its members as necessary, and set up local or regional sections to assist in discharging its functions; maintain contact with the other bodies, whether jurisdictional or otherwise, responsible for the protection and promotion of human rights (in particular, ombudsmen, mediators and similar institutions); develop relations with the non-governmental organisations devoted to protecting and promoting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialised areas. Yet the Paris Principles should clearly be seen as the minimum standard for NHRI. With regard to the different types of powers available, there have been suggestions made as to the best way of carrying out those functions that will achieve the best results.

With regard to cases, it has been suggested that commissions should adopt clear guidelines on which cases they will deal with. It is possible that it may not be feasible or desirable for a commission to deal with every case that comes to it, it must therefore have some consistent and clear guidelines for how to select cases. These guidelines should reflect the strategic plan of the Commission and also be well publicised so that those approaching the commission are aware of the criteria on which the institution will base its decision. In the handling of cases, the institution should ensure that parties are kept informed regularly of the progress of their case, that time limits are set and kept to in terms of responding to letters and progress, and that if the commission rejects cases, it should make sure that reasons are given for doing so. It is important that the institution maintain some degree of control over which cases are selected and how they processed, rather, than for example, handing them over to outside agencies or lawyers. Where outside legal advice is provided, however, those lawyers have a responsibility to keep the institution informed of the progress of the case. The institution should also ensure that it monitors which cases it receives, and from whom and whether there are particular groups or areas that are not approaching it and the reasons why this may be the case.

It is likely and desirable that institutions will want to refer cases to other statutory or constitutional bodies, in which case, the process and guidelines for doing so should be clear. There should be a system by which such cases are monitored to ensure that they do not fall between the two.

The commission should also monitor the impact of the cases procedure on the rest of its mandate, its litigation, etc., and try to link these into its overall approach in its other functions. This can be done through identifying patterns of violations that may come to it through the cases, or lobbying for a change in legislation that seems to be required as a result.

With regard to an investigation function, the Paris Principles state that institutions should ‘hear any person and obtain any information and any documents necessary for assessing situations falling within its competence’. In this regard, because some commissions have few strong enforcement powers, there can be a blurring between this function and that of research. In this respect, the commission needs to clarify the role and goals of each. Each should ensure there are clear criteria on which they are being carried out, and the different types of investigations that could be undertaken. This power should be related and linked with
the other resources and powers of the commission. Investigations and their findings should be followed up, there should be a plan for their follow up and consideration of avenues such as judicial review if necessary.

With regard to a commission’s power to monitor law and policy, in this regard it is important that it has early sight of all relevant draft legislation. There should be a clear process by which its recommendations are considered, even if they do not have to be adopted. The Commission itself should have a clear strategy as to which pieces of legislation it will consider and how this ties with its overall strategy. There should also be a system of follow up, whether the recommendations were taken on board or not. The Commission should monitor the extent to which its recommendations are considered and used in the final legislation. Having regular meetings with parliamentarians and committees, as well as government departments can facilitate this process.

With regard to an educational and awareness raising function, it has been suggested that institutions can maximise their potential in this regard by ensuring that they coordinate their work, with other aspects of their mandate, by working on putting human rights into educational curriculum, providing training on human rights for various sectors, holding conferences on human rights and engaging with the media. The Commission should ensure that it reaches it to those most hostile to its work and there should be a strategy of engaging with these communities.

### 3. Must have coherent management and internal structure and operational efficiency

Related to this, and something which may hinder or assist the development and functioning of a clear strategy is the internal management and operation of the institution itself. The Paris Principles state that the NHRI ‘shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding’. There are a number of issues that seem to be important in this regard. The first relates to the role of commissioners, as discussed above. Given this is often not clear, this impacts on the relationship with and the role of the staff. Thus, it is essential that the relationship between the commissioners and staff of the commission is clarified at the outset and regularly reviewed. The job descriptions of staff and commissioners should also be clarified more precisely. One issue that can be problematic in this regard is the division of responsibility between the president of a commission and its Chief Executive where while it is presumed that staffing issues would fall to the latter, this may not always be the case.

In addition, in order to function effectively as an organisation, it is clear that the institution needs ‘adequate financial and human resources’, and ‘the freedom to select and employ its own personnel (i.e. is not forced to hire from the existing civil service complement)’. It is also important that ‘the institution has appropriate internal working and evaluation procedures’. In this regard, an institution should have a clear space for staff and commissioners to meet. There should be joint planning between commissioners and staff and it should be ensured that each meeting has clear outcomes and goals. There should also be meetings for development of wider strategy and policies. Having a competent chair can greatly facilitate the process of meetings.

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174 Hudson, *Organising NGOs International Advocacy.*
175 Ibid.
176 Ibid.
177 Ibid.
4. Should be influential, be the ‘catalyst for influential change’ at national and international level

There is clearly little point establishing a commission unless it can effect some positive change. In this regard, one task of a national human rights institution should be to assist in ensuring that human rights are mainstreamed in public bodies and that a culture of human rights is developed. In this regard it needs to maintain close relationships with public bodies, and to ensure that it has a high public profile. Planning and following up on its reports and recommendations to government, and using the media may assist in this regard. The other factors listed above will also impact on its ability to influence.

Further, experience shows that the institution could use the international level to add pressure to the government. In this sense, a national human rights commission should not attend international meetings for the sake of it, but use them strategically. Often national institutions use methods such as treaty monitoring and attendance at conferences, but they need to ensure that these are balanced against its other procedures and fit into its wider strategy and used to more effective means.

5. Dealing with crises and reflecting on problems

Finally, it is important that the commission itself not only has a strategy for how to deal with events that it cannot predict, but also that it regularly monitor its own effectiveness, in order to make the necessary changes and to evaluate the extent to which any proposals or changes have worked or how it has responded to matters that have arisen. Some institutions are required to do this as part of their founding legislation. This may encompass or may require a separate review of its powers and funding, and if this is provided in legislation then the government has an obligation to consider it. These findings should be made public.

C. Issues of Legitimacy

These matters again fall partly beyond the Commission’s control but are central in determining the extent to which it can be effective. A NHRI that is performing well would enjoy widespread legitimacy, but this cannot be taken for granted. Legitimacy requires consideration of its standing in the eyes of others and the nature of the relationship it has with others.

I. Relationship with government

One of the key tenets of the Paris Principles and all UN documentation and other standards applied to human rights commissions is that they are independent. This has various facets, as discussed above. A human rights commission is in a difficult position. Its legitimacy and credibility and therefore effectiveness, depend on its ability to be perceived as independent of the government, yet the manner of its creation and its special status derives from its closer

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180 The Northern Ireland Human Rights Commission was required under s.69(2) of the Northern Ireland Act ‘before the end of the period of two years beginning with the commencement of this section, make to the Secretary of State such recommendations as it thinks fit for improving (a) its effectiveness; (b) the adequacy and effectiveness of the functions conferred on it by this Part; and (c) the adequacy and effectiveness of the provisions of this Part relating to it’.
relationship with government. As Brice Dickson has articulated, ‘There is, I think, only one feature of a human rights commission which meaningfully differentiates it from other organisations. Simply put, it is that a human rights commission is in some sense an official body working on the protection of human rights’. Thus, commissions are, therefore, in a unique position to influence politicians and civil servants, as they may be able to build personal relationships with relevant personnel and ‘are more likely to be able to guarantee a certain expertise which is free from any politically partisan approach’.

‘What distinguishes a national human rights institutions from a nongovernmental human rights organisation is its very establishment as a quasi-governmental agency, occupying a unique role between an independent judiciary, the elected representatives of the people, and the executive branch of government. This position entitles the agency to have access to governmental files, to conduct investigations, and to make recommendations that have the force of law, or that can help create law and institutions safeguards for the protection of human rights. The agency’s core purpose is to be an ombudsman, a “peoples’ person” to hold public officials accountable for their conduct of governance in accordance with the law and to set minimum human rights standards and protections. These purposes are of course at the heart of the democratic ideal’.

In turn, however, this places an onus on the NHRI to work with others. The commission, therefore, has to establish itself in the difficult and vaguely defined space between government and civil society, working closely with, but independent of, both.

It is an inherent contradiction, but it is essential for the commission to have any influence, that it has some degree of support from the government. Beyond providing it with the required powers and resources to fulfil its task, the government then should not politicise it and should have a receptive attitude towards it: ‘political and government support must be given to the institution, its work and its recommendations’, and work and recommendations should not be ‘ignored or unreasonably criticised by government’. Having a Memorandum of Understanding with the government can assist in this respect. In addition, identifying key personnel in the various government departments, and ensuring that these of a rank that is sufficiently senior may also be useful.

2. Relationship with the legislature
A key requirement of effective NHRI often cited is that they should be accountable. The problem is that it is may not be clear to whom. It would appear that at the very least NHRI should be accountable to Parliament, and not government, and also accountable to the public. There is also the issue of managerial accountability. As Boyne et al have argued,
One of the complicating factors in the public sector is that these models may operate at the same time and be in conflict with each other. For example, teachers may feel accountable to their peers (professional accountability) and to their governing body (internal accountability). An additional difficulty is that the nature of performance in the public sector is contestable. Different stakeholders may disagree, for example, over the objectives of services such as education and over what counts as “good” performance. … Even if there is agreement over the objectives of services it is often difficult to define and measure performance. Although it is comparatively easy to measure the inputs to a service it is much more difficult to provide indicators of output and outcome. … This means that accountability must involve debate over purposes, practice and performance’. 191

Thus accountability can be ensured through, as is usually the case, reporting to the legislature. 192 Many institutions are required to submit annual reports to the legislature. This should be an opportunity to engage in depth with parliament. In addition, the institution should be submitting its other publications, where relevant, to parliamentary committees and engaging with them and others. There is a responsibility on the institution, as well as on parliamentarians to engage. The South African Human Rights Commission has had a difficult relationship with Parliament, despite the requirement that it is accountable to Parliament, must report to it, and its members are appointed through the legislature. It has been argued that many members of Parliament were not aware, interested or understood what it does. The Commission’s constant calls for additional funding did not receive a sympathetic response from the Portfolio Committee on Justice, 193 and it was not clear that the Commission’s reports were debated at any length. 194 While some responsibility must fall on parliamentarians themselves, the Commission must also, it is argued, ‘drive the process’, in terms of making its reports more accessible and easier to read, and by engaging proactively with parliamentary committees.

3. Relationship with NGOs and civil society

The other aspect of independence relates to the commission’s relationship with other bodies and agencies, in particular the NGO community. It is clear that one of the difficulties facing NHRI is their position between government and civil society. Yet it is also apparent that NHRI have often not come to terms with this position and can find it difficult fitting between the two. This is often especially the case when many of their members and staff may well have had close relationships in particular with the NGO community, in particular, prior to, and even during, their role on the Commission. Indeed membership of human rights NGOs may be seen as a criterion for appointment, and commissioners may wish to retain those links whilst sitting on the commission.

In this sense there is an interesting debate to be had about the role of NGOs in society, as acting in opposition to government, and in this regard, the space which NHRI should then occupy. 195 Yet clearly, Commissions play an important role in mediating this space between

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191 Ibid, at 693.
194 In their submissions to us, many constitutional institutions have pointed out that due to their workloads of these Committees there is not tangible or visible follow up of the matters raised or the recommendations which are made to them in reports. In addition, it has been pointed out that uniform rules and practices need to be set in place for the submission of reports including length, frequency and content’, Corder et al, Report on Parliamentary Oversight and Accountability, at 56-59.
NGOs and the government, particularly where the relationship between them may be difficult. For example, the national commission in Nigeria enabled the deadlock to be broken and provided a space for human rights NGOs to interact with the government. National institutions that set up meetings and training in which government and NGOs interact may facilitate this process.

What powers a commission has may impact on its relationship with the NGO community. Thus, while the educational and promotional role of commissions perhaps causes less controversy, ‘For NGOs focused on human rights education, governments are not potential opponents, but necessary partners’, the protective mandate of the commission is likely to be more problematic.

Okafor and Agbakwa also note that as well as concentrating on what a human rights commission can do, they should also be evaluated on the basis of how much they are used as a resource by others, citing examples of what NGOs in Nigeria were able to do using the national commission as a tool and resource. They thus argue that ‘in most cases, the NGO is viewed as the asset that the [NHRI] deploys or utilizes. In such a conceptual model, the [national human rights commission] is the agent while the NGO is the resource. Rarely, if ever, is this relationship imagined in the reverse. Rarely is the NGO the agent and the [human rights commission] the resource’, an approach they criticise as not necessarily wrong, but ‘significantly limited’.

This can be measured in various ways. Firstly, it can be examined whether the commission has ‘sought the advice, cooperation and assistance’ of NGOs and whether it has ‘assisted them in a variety of significant ways’, including organising workshops with them, publishing reports with them. Further, it should be considered whether the commission itself has recognised, in its documents, speeches, that it is a resource for such organisations that can be used. Thirdly, there should also be an evaluation of how many complaints have come from NGOs and an examination of if this is small, why. For example, it was noted that the Nigerian Human Rights Commission received only 5% of its complaints from NGOs, with most preferring to use courts given that the commission could not enforce its own decisions: ‘it is indicative of the fact that unless [a NHRI] is designed as a virtual human rights court (as is the case with the Canadian Human Rights Commission) it is unlikely to have much appeal vis-à-vis the regular courts, as a venue for the adjudication of human rights disputes, at least in Nigeria. This begs the question whether the [NHRI] should not concentrate on or emphasise those functions that the regular courts either do not perform, or do not usually perform well (such as suo motu investigations and human rights education)’.

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196 Okafor and Agbakwa, ‘On Legalism’, at 691-693.
198 Okafor and Agbakwa, ‘On Legalism’, at 689-693.
199 Ibid, at 713.
200 Ibid.
201 Ibid.
202 Ibid, at 714.
‘Developing good relationships with NGOs provides the institution with information on human rights issues, feedback on their own work and partnerships for joint activities.’

Institutions that have a mechanism by which the relationship is monitored and problems dealt with on a regular basis may also function more effectively. As Kelly has noted with regard to NGOs, ‘legitimacy is considered an asset in campaigning and advocacy work that can change according to the performance of the organisation and because of changes in the external content. Maintenance of the legitimacy of the organisation or coalition of organisations is considered an important indicator of the ability of that organisation to achieve its planned outcomes.’

4. With other statutory or constitutional bodies

National institutions do not exist in a vacuum and they are unlikely to be the only body with some remit for human rights issues. Indeed, in an effective system, it should be the case that human rights are mainstreamed across the whole public sector. Often besides a national human rights commission there may be bodies mandated to inspect prisons, with remits over police complaints, and perhaps additional bodies dealing with equality or gender issues.

This requires that national institutions carve out a role for themselves. They will need to determine how they fit and work with these other bodies and how to ensure that work is not duplicated unnecessarily. In this regard, relationships should be developed with the various statutory and constitutional organisations for ‘exchanging views and information’. As has been said in respect of NGOs, ‘Much advocacy work is undertaken in coalitions or alliances of organisations and the most successful advocacy is built upon the strength of many different organisations undertaking different roles and approaching the key issue from different perspectives. The way organisations work together can therefore be critical to the success of the advocacy intervention and the decision making processes of a coalition therefore provide a useful indicator of the likely effectiveness of the alliance. In addition, mutual accountability between organisations in a network or alliance is considered a good indicator of the degree to which organisations are usefully engaged with each other’.

The process of drafting Memorandum of Understanding with various institutions and organisations, in itself, can improve relationships and consider solutions for areas of potential overlap and difficulty. Regular meetings between individuals on an informal or formal basis can also be of assistance.

NHRI may find themselves being the catch-all for human rights issues that do not fall into the remit of other bodies, in this respect being the secondary consideration if all else fails. It is submitted that, on the contrary, it is important that they establish themselves as the main port of call for human rights matters, even though it is likely, and preferable, that there may be occasions where matters need to be referred to another body. The extent to which a commission establishes itself as the authoritative voice on human rights for that jurisdiction is therefore important. It is likely, and indeed necessary, that other bodies should have some remit for human rights matters. A human rights commission must carve a niche for itself and set itself as the primary focal point for human rights.

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204 Kelly, *International Advocacy*, at p.3.
205 For example, the Independent Complaints Directorate in South Africa, [http://www.icd.gov.za/](http://www.icd.gov.za/)
206 For example, the Commission on Gender Equality in South Africa, [http://www.cge.org.za/](http://www.cge.org.za/)
208 Kelly, *International Advocacy*, at p.4.
5. The need to be accessible

Accountability to the public it is meant to serve can be achieved through making sure a commission’s reports are made public and distributed widely, and that complainants and those who approach the Commission are kept informed of their progress of their case or concern.209

A further indicator in this regard is the degree of fairness and openness displayed by the institution itself in its work and dealings with the public and those who approach it for assistance. The institution itself must operate in a manner that is fair, open and transparent. Many national institutions have in their mission statements such criteria.210 They can ensure this in a number of ways including by publication of their reports and findings, and maintaining regular contact with, and informing, those who contact it for advice of the progress of their matter. Other indicators including the extent to which a commission holds regular and open meetings with organisations and the public, and ensures that the minutes of its internal meetings are available in detail to the public. The use of a website and the availability of email can also help.

In this regard, it is important that the ‘populace must perceive that the institution can provide it with real benefits: through its right to complain about poor administration or human rights breaches, to obtain an impartial investigation of the matter, and to have some positive results if wrongdoing is found’.211 Secondly, the ‘status of all the other effectiveness factors…will affect the public’s perception of the institution’.212 As has been found, ‘their social legitimacy is not well understood, even though the credibility of national commissions and similar bodies depends in the longer term on their ability to earn and retain the trust of the public, whose needs they are intended to serve’. 213

Commissions need also to consider access to the most vulnerable in society, or those most likely to be hostile or wary of is work.214 Thus, as has been said of the Nigerian Human Rights Commission, it ‘remains…an urban-based elitist-oriented institution. Without closing this gap substantially, it will be most difficult, if not impossible, for the Nigerian Human Rights Commission to (as it should) transform positively the human rights situation of the vast majority of Nigerians. The point is not that it does not realise that it does have to make more effort in this direction. The point is that its efforts have not so far met with success’.215

The Paris Principles do not articulate many of these issues, simply requiring that be able to ‘address public opinion directly or through any press organ’, ‘maintain consultation with other bodies’ and ‘develop relations with the non-governmental organisations’.216 It is important, therefore, that more attention should be paid in evaluating human rights commissions to the extent in which they pay attention to the most vulnerable: ‘the extent to which these voices (and their concerns or experiences) have been reflected in the conception, design and operation of [NHRIs] has not been as adequate as possible’.217

209 Reif, ‘Building Democratic Institutions’, at 27.
210 For example, the Northern Ireland Human Rights Commission.
212 Ibid, at 28.
214 Okafor and Agbakwa, ‘On Legalism’.
215 Ibid, at 716.
Accessibility can be measured, it would appear, in a number of ways. Firstly, it can be examined through the extent of ‘public knowledge of the institution’.218 In this sense, surveys of public attitudes and awareness of the commission and its work may be helpful, and an examination into the number of complaints it has received, compared to the population and the number of violations reported elsewhere.219 A commission can increase its profile through ‘by various devices, which have different costs, ranging from advertising the office through radio, TV and brochures to opening up regional offices’.220 Translation issues may also be required if there are various languages involved in their jurisdiction. The visibility of the individual members, the meetings with a wide variety of groups and individuals and whether a commission is proactive in engaging with the most vulnerable are also important factors.

Another factor that appears to play a part in the accessibility of the institution is its location. Whether the institution is urban-based, and the area where it is located, may impact on the desire and physical ability of people to contact it, it may only therefore be approachable to certain sectors of the community that it is supposed to serve. The South African Commission, for example, was criticised in the past for having offices in an expensive suburb in Johannesburg.221 Having regional offices may of course be an expensive option, but it would appear to increase the institution’s profile and accessibility across all areas of the jurisdiction, particularly if they are located in rural areas that may not be served by other institutions.222 Many commissions have established regional offices, some more extensively than others, for example, the Ghanaian Commission on Human Rights and Administrative Justice has been seen as a model in this regard, with offices in each of the ten regions of the country as well as offices in most of the 110 districts.223

A further factor that impacts on the accessibility of the institution may be the background and profile of its members.224 The extent to which individuals are known and trusted in being objective and independent can therefore play a part in whether people feel comfortable approaching the body for assistance. In this regard, the character of the members as individuals and as a group is important, namely whether it is composed solely of one particular race, gender, religion, or class for example, may act to its detriment. Not all commissions, for example, have the requirement that membership should be gender balanced and the extent of civil society participation in the nomination and selection process, and even membership itself,225 for commissioners can also assist in this regard.226 This of course has to balanced against other factors, as noted above.

Where the services of the commission should be free, where there is ‘direct access to the office, e.g. the complainant should not have to complain first to a member of the legislature who then passes the complaint on to the institution’, and where the ‘access needs of disabled and confined complainants’ are met, this may assist.227 By focusing on prevention rather than reaction, a commission may ensure that those who are often neglected can use its services.228

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221 Although it then moved offices.
223 CHRAJ may fill an important gap in Ghana, however, where other institutions such as the police do not have local or regional presence.
225 Whether there is a presence of NGOs on the commission, a statutory requirement of the Nigerian commission, Okafor and Agbakwa, ‘On Legalism’, at 714.
226 Ibid.
228 Okafor and Agbakwa, ‘On Legalism’, at 695-698. A few national institutions, such as the Guatemalan Procurador de los Derechos Humanos and the Ghanaian Commission, have roles over private violations of rights, see Reif, ‘Building Democratic Institutions’, at 52.
Further, the ability and willingness of the institution to address economic, social and cultural rights is also a factor in this regard. Research has shown that institutions that address such rights are more likely to be seen as relevant and accessible to the public.

6. Relationship with the media

A human rights commission, to be effective, must be known and is therefore likely to occupy a high public profile. The Paris Principles simply state that national institutions should ‘publicise human rights...by increasing public awareness, especially through information and education and by making use of all press organs’ and that it should ‘address public opinion directly or through any press organ, particularly in order to publicise its opinions and recommendations’.

Experiences of national institutions have shown, however, that a coherent media and communication strategy is essential for the effectiveness of a commission, a body which, ideally, should be occupying a high profile role. Developing a relationship with the media ‘is necessary in order to develop social legitimacy, to further the educational side of the work, and to insert human rights in the news’. The South African Human Rights Commission decided to take, as one of its first activities, action against the media accusing it of subliminal racism. The ensuing controversy, despite the fact that this may have been an issue worthy of attention and may have propelled it into the public limelight, caused difficulties for the Commission in its later relationships with the media and some argue damaged its reputation.

Institutions can engage with the media in a number of ways including being aware of media attention on human rights issues, and on the institution itself, and developing a coherent policy to respond to such; ensuring there is someone in the institution who can maintain a line of contact with reporters for example, and being proactive about holding press conferences. Appointing a media officer can assist in this regard. A commission should monitor the number and background of those who contact it and use its facilities, and evaluate whether it is reaching all sectors of the society. It should focus its publicity on those who are most likely to be vulnerable or suspicious of its work and should survey knowledge of its work and its image on a regular basis.

Conclusion

The research has indicated that it is not one of these factors alone that can render a national human rights commission effective, but a combination of them. Some are clearly within the responsibility of a NHRI itself as to how it chooses to prioritise and organise its work, but a

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229 Okafor and Agbakwa, ‘On Legalism’, at 695-698. See further discussion on this issue below.
230 Paris Principles, paras A.3(g).
234 Romero de Campero, ‘The Ombudsman’s Relations with the Media’, at 17-22.
considerable impact on its effectiveness falls outside of its control. Thus, how effective it can be is either in the hands of those who create it in the first place, how others, including the government, choose to treat it once it is established, and the wider social, political and economic context in which it finds itself.

What is clear is that is essential that all these issues are carefully considered when deciding when and how to establish such a commission to ensure that these are reflected in legislation and founding documentation that does not later come back to restrict or hinder the work of the commission.

Our attention now turns to a closer evaluation of each of these issues with respect to the Northern Ireland Human Rights Commission. Applying these benchmarks and indicators, we will start by examining the manner in which the NIHRC was appointed and the political and constitutional context in which it found itself.
CHAPTER TWO

ESTABLISHMENT OF THE NIHRC:
Composition, Powers and Resources

The Northern Ireland Human Rights Commission, as established by the Good Friday/Belfast Agreement, was not the first body of its kind in the jurisdiction. In 1973 the UK government proposed a commission ‘charged with the duty of keeping in touch with the activities of all public agencies in the field of human rights and of producing an annual report, including recommendations as to any further statutory provision which it considers should be made’. However, as Livingstone notes, ‘by the time the proposals made it into legislative form they were considerably narrowed’. Thus the Northern Ireland Constitution Act 1973 provided that the Standing Advisory Commission on Human Rights (SACHR) should be ‘advising the Secretary of State on the adequacy and effectiveness of the law for the time being in force in preventing discrimination on the ground of religious belief or political opinion and in providing redress for persons aggrieved by discrimination on either ground; keeping the Secretary of State informed as to the extent to which persons, authorities and bodies mentioned…have prevented discrimination on either grounds by persons or bodies not prohibited from discriminating by that law’. As Livingstone noted, although the Commission did look at issues more widely than discrimination on religious or political grounds, ‘the narrowness of the formal mandate was a matter for constant dispute with the government and was one of the ways in which the commission’s legal basis inhibited its effectiveness’.

As noted in Chapter 1, the conditions under which a commission is created, the manner in which its members are appointed and the extent of its mandate and resources are crucial to its effectiveness.

Despite some successes, SACHR was widely perceived as ineffective given its lack of powers and perceived lack of independence. This led commentators to conclude: ‘Overall therefore SACHR has had a somewhat limited influence on policy making and implementation as regards the protection of human rights in Northern Ireland. Much of this can be traced to its limited powers…, limited resources, and government intransigence. However, it is also fair to observe that the Commission has not always made the best use of the powers and resources at its disposal. Given that it found its reports meeting little response at the national level, SACHR was somewhat slow to make use of international channels to highlight its cause. …The Commission did not do all it might have done to publicise its work, even within Northern Ireland. …On occasions SACHR seemed slow to react to new causes of concern with regard to the protection of human rights…and entered the fray only after the issue had been examined by NGOs. Finally, although the Commission extended its remit beyond its original mandate, it did not seek to extend it too far’.

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1 HMSO, Northern Ireland Constitutional Proposals, March 1973, Cmd.5259.
5 Its 1987 report on employment discrimination influenced the Fair Employment Act 1987 and produced a number of other reports which were also seen as important and led to other legislation, although it was less successful in terms of influencing terrorism legislation, Livingstone, ‘The Northern Ireland Human Rights Commission’.
6 It ‘would always face a struggle to establish its independence from government as its (part time) members were all appointed by the Secretary of State for Northern Ireland’, ibid.
7 In not taking up investigations which the Act did not prevent it from doing, ibid.
It was therefore hoped that the new institutions provided by the Good Friday/Belfast Agreement would be an improvement on what had gone before. The Good Friday/Belfast Agreement was reached in April 1998 and approved by political parties and then by a referendum on 22 May 1998 by just over 70% of the population of Northern Ireland, and over 90% of the population of the Republic. As well as setting up democratic institutions in Northern Ireland, cross-border institutions and British/Irish intergovernmental institutions, the Agreement contains significant provisions on human rights standards and also provided for two institutions in this regard, the Northern Ireland Human Rights Commission and the Northern Ireland Equality Commission. Thus, SACHR was dissolved and by referring to the Human Rights Commission as a body which should be ‘independent of government, with an extended and enhanced role beyond that currently exercised by the Standing Advisory Commission on Human Rights’, the Agreement gave some hope that it would have more powers than its predecessor.

The Good Friday/Belfast Agreement thus provides that Westminster legislation will create the NIHRC, ‘with membership from Northern Ireland reflecting the community balance’, and whose tasks would include ‘keeping under review the adequacy and effectiveness of laws and practices, making recommendations to Government as necessary; providing information and promoting awareness of human rights; considering draft legislation referred to them by the new Assembly; and, in appropriate cases, bringing court proceedings or providing assistance to individuals doing so’. Subsequently, the Northern Ireland Act set out the powers and remit of the Commission, the method of its appointment and funding and to whom it is accountable. The Commission reports annually to the Secretary of State for Northern Ireland. The functions of the NIHRC are set out in s.69 of the Act and require, in addition, that it advise the Secretary of State and the Executive Committee of the Northern Ireland Assembly of legislative and other measures necessary to protect human rights, promote understanding and awareness of human rights through, for example, research and education, conducting investigations, and publish its advice and the outcome of research and investigations. S.69(2) also required the Commission to make recommendations to the Secretary of State on its effectiveness at the end of two years.

The expectations of what the Commission could achieve were high, but perhaps not unrealistic. Many hoped that the new Commission would be stronger and have more influence than SACHR: ‘we had hoped that the Human Rights Commission would have the appropriate teeth in order for the Government to take the Commission seriously, and the issues seriously’. In this sense it was hoped that the Commission would be able not only to have courage to challenge government, but also to influence government policy:

‘I guess from our perspective we felt that the Human Rights Commission would have a key role to play in I guess influencing change within government in terms of policies, social policies, in terms of local administration, to deal with some of those problems and

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8 The previous Fair Employment Commission, Equal Opportunities Commission (NI), Commission for Racial Equality (NI) and the Disability Council were replaced by the unified Equality Commission for Northern Ireland.
9 Good Friday Agreement, Rights Safeguards and Equality of Opportunity, para 5.
10 Para 5(1) Sched 7 of the Northern Ireland Act.
11 Interview with Bairbre de Brun and Chrissie McAuley, Sinn Féin, 26 June 2003.
12 ‘That there would be a level of courage in speaking out against human rights abuses, not just conflict-related human rights abuses but the wider spectra of human rights abuses and a courage in challenging state denial of human rights or failing to protect human rights. And that it would be a, it would not be a research academic-type organisation, with all due respect to academics, but that it would be an effective instrument for change in terms of both promoting a culture of human rights and ensuring the protection of human rights, and that it would do so quickly’, interview with Paddy Kelly, Commissioner, 1 April 2003.
difficulties that people had and to maybe influence policy in a direction that was more proactive in terms of people’s rights and entitlements, responsibilities as well’. 13

Others hoped that the Commission would mainstream human rights 14 and have a high profile and be ‘relevant to the issues that concern the people of Northern Ireland’. 15 Many felt it important that it should be seen as part of the Good Friday/Belfast Agreement. 16

Appointments

Commissioners are appointed by the Secretary of State for Northern Ireland 17 following a selection process complying with the Code of Practice for Public Appointments. Parliament determined that the Chief Commissioner is also appointed by the Secretary of State, rather than being elected from among members of the Commission, as is the practice in a small minority of NHRIs. 18 Professor Brice Dickson was appointed to the position of Chief Commissioner on 18 January 1999 with effect from 1 March 1999. The first round of Commissioners appointed with effect from 1 March 1999 was Professor Christine Bell, Margaret Ann Dinsmore, Tom Donnelly, Rev Harold Good, Professor Tom Hadden, Paddy Kelly, Dr Inez McCormack, Frank McGuinness and Angela Hegarty. On 1 December 2000 Angela Hegarty resigned, 19 and with effect from 1 December 2001 all other existing Commissioners were confirmed in their positions and the membership was expanded to thirteen. The following individuals were appointed: Lady Christine Eames, Dr Chris McGimpsey, Kevin McLaughlin and Patrick Yu, each to serve for an initial term of three years. In September 2002 Christine Bell and Inez McCormack resigned with considerable press attention. 20 Then, in July 2003 Patrick Yu resigned citing concerns with aspects of the Bill of Rights proposals, although it was also apparent he had been offered the operations directorship of the Hong Kong Equal Opportunities Commission. 21 Shortly afterwards, two Commissioners, Frank McGuinness and Paddy Kelly, withdrew from participation in Commission business 22 expressing concerns with Holy Cross and the Action Plan. 23

13 Interview with Bob Stronge, AIAC, 8 October 2002. The Commission ‘would be a powerful force which could have some impact on government thinking’, interview with Martin O’Brien, CAJ, 12 November 2002.
14 Interview with former Commissioner, 16 May 2003.
15 Interview with Professor Brice Dickson, Chief Commissioner, 4 April 2003.
16 ‘Well I think an awareness of this thing of being part of, what we’ve been saying, the Belfast Agreement and being part of building a more peaceful society in Northern Ireland, a step forward for Northern Ireland’, Interview with Commissioner Christine Eames, 1 April 2003.
17 Section 68(2) of the Northern Ireland Act.
18 For example, the South African Human Rights Commission and the National Human Rights Commission of Togo.
19 With effect from 1 January 2001. She cited personal reasons.
21 See letter of resignation, letter to Paul Murphy, 7 July 2003. The letter did not make reference to the job offer.
22 They decided not to attend further meetings or act for the Commission, although they continued to receive papers and to be paid as Commissioners.
23 For example, feeling ‘that the Commission has not fully explored their concern’, and that the ‘Action Plan is not considered by them to be sufficiently reassuring that should divisions similar to that in the Holy Cross case arise within the Commission again, individual Commissioners might not react in a similar way’, Minutes of the Commission’s 59th meeting, May 2004, para 4.2.3. The Action Plan was adopted by the Commission in October 2003 as a ‘serious attempt to address concerns and to set minds at rest’, after a number of negative comments in preceding months.
McGimpsey had to resign on 3 November 2003 as he was standing as a candidate for the Ulster Unionist party in the forthcoming Assembly elections at the end of the month. Harold Good and Frank McGuinness stood down from the Commission in early 2004 when their terms expired. On 30 June 2004 Paddy Kelly resigned. There are thus, now, only five Commissioners, in addition to the Chief Commissioner, actively serving.

The initial Commissioner positions were publicly advertised and 23 applicants were shortlisted for interview before a panel composed of civil servants and independent assessors. The panel then made recommendations to the Secretary of State. The Chief Commissioner was appointed several weeks before the other Commissioners, with the eight shortlisted candidates being interviewed by a slightly different panel. Those applying for membership of the Commission were requested to indicate how well they satisfied a number of criteria including management experience and knowledge of human rights. The job specification for the Chief Commissioner stressed the need for the applicant to have ‘a good understanding of the law and practice relating to human rights and to have demonstrated at a senior level leadership, communication skills and management of resources (staff and finances)’. This encompassed ‘strong leadership and analytical skills’, but ‘prior knowledge of the law, human rights issues and/or security matters is desirable but not essential’.

In practice many of those to whom we spoke who went through the initial interview experience for both the Chief Commissioner and Commissioner posts commented on the emphasis put on management and team building experience rather than knowledge and understanding of human rights standards. In addition to the issue of applicants satisfying the individual criteria for appointment the Secretary of State was also placed under an obligation by Section 68(3) of the Northern Ireland Act to ‘as far as practicable secure that the Commissioners, as a group, are representative of the community in Northern Ireland’. Ironically the meaning or interpretation to be given to this provision was subsequently to be tested in a case in which the NIHRC itself intervened. Therein the Northern Ireland High Court rejected the proposition, advanced by the Commission among others, that the phrase had a broad meaning and included most if not all of the nine categories set out in Section 75 of the Northern Ireland Act. Specifically it rejected the argument that the Parades

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24 Northern Ireland Human Rights Commission, Press Release, 3 November 2003. This was a requirement of electoral law in Northern Ireland.
25 Paddy Kelly told the Irish News on 1 July 2004 that the failure of the NIO to respond to the Commission’s review of powers and provide it with adequate resources ‘raises the question if it was set up to fail in the first place’. She also noted concern with the failure to implement the JCHR’s recommendations on appointments and independence, S McCaffery, ‘Commissioner Resigns over “Flawed Process”’, Irish News, 1 July 2004.
26 These are: Margaret-Ann Dinsmore, Tom Donnelly, Lady Christine Eames, Tom Hadden and Kevin McLaughlin. Kevin McLaughlin and Christine Eames are to be offered a further term of appointment by the NIO in November 2004, see minutes of 64th meeting of the Commission, May 2004.
27 They attracted a considerable response, with nearly 300 expressions of interest, and 154 applications (47% from a Catholic community background, 47% Protestant background, 6% other).
28 ‘No specific qualifications are required, but candidates are likely to have general analytical skills. Prior knowledge of the law and human rights issues is desirable but not essential’. Among the list in which candidates should demonstrate competence was included ‘managing financial and physical resources’, www.nio.gov.uk/press/1998/dec/981202inf-nio.htm
31 See Interview with academic, 7 November 2002; Interview with Chris McGimpsey, Commissioner, 3 April 2003.
33 S.75 provides that ‘A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity between persons of different religious
Commission could not be representative of the community if it had no female members with Lord Chief Justice Carswell considering that the phrase was limited to referring to the unionist and nationalist communities.\(^{34}\) It does not appear, however, that those making appointments to the NIHRC conceived of the phrase in such a narrow way. The NIO has stressed that the appointments were made firstly on grounds of merit, but then in terms of representativity, this encompassed not only religious grounds but also geographical factors, ethnicity, gender, sexual orientation and disability.\(^{35}\)

In the end the initial composition comprised five men and five women, with six of the initial commissioners having a perceived Protestant community background and four being of a perceived Catholic background.\(^{36}\) In terms of occupation four were legal academics with a specialism in human rights law, including the Chief Commissioner, two came from the community and voluntary sector and there was one each from business, trade unions, legal practice and the church. In terms of gender and community background the Commission did appear fairly representative of the community and it also included representatives from nearly all the groups identified in the Paris Principles.\(^{37}\) Most of those appointed had an established record in academic or campaigning work on human rights in Northern Ireland and several held legal qualifications.

Nevertheless from the day of initial appointments there were those who were critical of its representativeness. Some of these critics noted the absence of any ethnic minorities, persons with disabilities or persons who were openly gay or lesbian.\(^{38}\) There are of course certain difficulties in accepting these criticisms when members of the Commission may wish to keep their disabilities or sexual orientation private. However the more fierce criticisms came from within the unionist community, including some from unionist politicians: ‘Mowlam had selected a Commission which was weighted towards Nationalists and that she had selected belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without’.

\(^{34}\) ‘I am not altogether persuaded that the phrase "representative of the community" in paragraph 2(3) of Schedule 1 to the 1998 Act was intended to mean that there should be gender balance, or at least some representation of each gender in the make-up of the Commission. … The phrase in question does not refer to gender or to the make-up of the population of the Province. It refers specifically to "the community", which in the context of parades is constantly used to denote the different sectarian blocks – see, for example, the reference in paragraphs 1.15 and 1.16 of the North Report to "another part of our community" and "the other part of the community", which are plainly references to the sectarian divide. In the context of the 1998 Act, therefore, it is in my view a tenable proposition, notwithstanding Mr Weatherup's concession, that paragraph 2(3) imposes a requirement only to ensure sectarian balance in the composition of the Commission. I should, however, prefer to have further argument directed specifically to this point before attempting to decide it finally, and in view of my conclusions on the practicability issue it is not necessary to do so in this judgment’, In the Matter of the Application by Evelyn White for Judicial Review, [2000] NIQB 11, 18 May 2000, paras 18-20.

\(^{35}\) Interview with representative from the NIO, 29 October 2002. See also interview with Gerry Loughran, Former head of the Northern Ireland Civil Service, 24 January 2003.

\(^{36}\) Which would roughly equate to the communal affiliations of the population of Northern Ireland as a whole.

\(^{37}\) The main exceptions being journalists, doctors, scientists and politicians.

\(^{38}\) Talking about the initial membership: ‘I would just add to that, that was likely because the membership of the Commission did not have a dedicated person from what we would call the Disability Movement…And therefore it wasn’t pushed inside’, Interview with civil society organisation, 23 January 2003. Others, including some from the church community, have argued the Commission was not adequately represented in terms of ethnic minority representation, although this was later redressed, ‘and was weighted heavily in favour of those with legal or human rights backgrounds’, Memorandum from Evangelical Alliance Northern Ireland, written evidence to the Northern Ireland Human Rights Commission Inquiry on the N I H R C, http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/132/132we11.htm
people from the pro-Unionist community who were thought to be malleable’. They argued that while six of the initial Commissioners came from a Protestant background none was an avowed unionist while two of those from a Catholic background formerly had links to the SDLP:

‘we took umbrage because while it was technically representative in terms of religion it was, as far as we were concerned, in no way representative politically. I mean they had gone to some glasshouse and found five (sic) non-Unionist Protestants! …You would expect that there would be some non-political Catholics and non-political Protestants, some political Protestants, some political Catholics. I mean that is what most people would interpret as representing the community. We didn’t expect five card-carrying members of the UUP. …We thought there would be some Unionists, some Nationalists and some in-betweenies’.40

‘I think the makeup of the Human Rights Commission was flawed at the outset and it is still flawed, and that whole matter needs to be readdressed’.41

More specifically unionists opposed to the Agreement stated, in relation to the 2001 appointments, that even if any of the Protestants on the Commission did have unionist sympathies they were clearly pro Agreement sympathies and that anti-Agreement unionists were left without any representation on the Commission.42

Some unionists, primarily of the pro Agreement variety, focused their concern on the failure to appoint certain specific candidates and indicated they were considering a judicial review of the appointments. While this did not come to pass dissatisfaction with the appointments remained, especially among those who identified themselves as Anti-Agreement unionists. They were clearly not assuaged by the appointment of the pro-Agreement UUP politician Chris McGimpsey to the Commission in the second round of appointments and it was our impression that generally this came too late to provide reassurance to those within unionism who had expressed unhappiness with the initial composition of the Commission. On the other hand this appointment, plus some of the resignations from the Commission, subsequently produced unhappiness from nationalists regarding its composition

‘If you even go back to the fact that, you know, since Angela Hegarty left the Commission you don’t have representation of women, Nationalists, and from a background in the field of human rights, you know, you’ve very few women there, even on the Commission but let alone that you haven’t had like replaced with like. I mean Angela Hegarty was replaced by Chris McGimpsey’.43

On 5 May 2004 the government announced its intention to appoint a Chief Commissioner and ‘between 8 and 10’ Commissioners to the NIHRC, with a closing date of 16 July 2004. It was expected that Commissioners would take up the positions late 2004 or spring 2005. Unfortunately, it would appear, even at this stage, that some of the criticisms relating to the initial appointments process have not been taken on board. The call for appointments has taken place without the government’s full response to the Commission’s review of powers being announced. There is no indication of how the Commission should manage the

39 Interview with Robert McCartney, UKUP, 19 September 2002. Obviously some Commissioners would take offence at this suggestion.
40 Interview with Dr Steven King, Political Advisor to David Trimble, 27 February 2003.
42 ‘There happened to be a disabled person and there accidentally happened to be a Chinese man (with all due respect to both those people) but there didn’t accidentally happen to be anyone who would disagree with any of the processes in the Belfast Agreement’, Interview with Bertie Campbell, Ulster Human Rights Watch, 11 November 2002.
43 Interview with Sinn Féin, 26 June 2003.
44 www.nio.gov.uk
45 See below.
transition involving a majority of new members. Although it was initially suggested that the appointment of new Commissioners would be staggered, with some joining the institution in the autumn and others in February 2005, the process has been delayed, with concerns that the government is actually trying to appoint a new Commission for February 2005, when the terms of most of the existing members will expire. As will be seen below, the concerns relating to the initial rounds of appointments with regard to criteria and procedure have also not been met.

Many to whom we spoke defended the initial composition of the Commission and stressed in particular the high quality of the human rights expertise and experience among its members. However it seems clear that concerns regarding the initial composition did create problems for the legitimacy of the Commission in exactly the community most skeptical to its initial creation. Further, the failure of the government to explain or defend its appointments, given the subsequent attacks on the Commission, deeply damaged the institution from the outset. This clearly should have been done differently. In addition, most suggestions as to how the process could have been improved continue to revolve around issues of criteria and procedure.

Criteria
As regards the criteria for membership we heard few calls for there to be explicit political party representation on the Commission, in the same way that there is on the Policing Board for Northern Ireland. This was a little surprising given that most of those critical of the initial composition of the Commission advanced as their main concern that it failed to encompass the political views of a significant section of the community. The vast majority of those we spoke to endorsed the idea that the Commission’s independence and impartiality would be best assured if it was entirely composed of people from outside of professional politics. However, it is worth at least considering whether some places should be reserved for elected representatives. There clearly are some advantages in doing this. Given that much of the Commission’s work involves dealing with issues that are politically contentious and engaging with the world of politics it might be valuable to include amongst its members people with experience of that world. The presence of elected representatives might also assist a Commission in developing relationships with politicians, something the NIHRC has struggled to do, especially in the context of the Bill of Rights debate. The presence of elected representatives might also arguably increase the accountability of the Commission to the public. Given the deeply divided nature of Northern Irish politics the issue of which politicians are appointed would be closely scrutinised for signs of advantage being given to one party or another but the Policing Board has provided a model of how this can be done in a broadly acceptable manner.

In the end however the Policing Board analogy should not be pushed too far. Whereas that institution is involved in the specific business of ensuring the accountability of the police service to the public, the Commission has a much broader range of functions. Several of these, notably commenting on proposed legislation or investigating public authorities, may

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46 The Policing Board is composed of 19 members, ten of whom are members of the Northern Ireland Assembly, and the further nine independent members coming from a public nomination process. All members are appointed by the Secretary of State. Sinn Féin has refused to take up its seats on the Policing Board.

47 ‘I don’t see why political experience, as in the case of Mervyn Taylor, should disqualify him, I think it is very useful. I mean, I would not like the Commission appearing to be party political in the sense that the government of the day put in people who are likely to be less critical of the Government because they are their own party members. I don’t like the whole segmentation of political activity into people who describe themselves as human rights activists and the rest of the political community by inference are put in some inferior category of just day-to-day politicians! I don’t admit a distinction between the two’, Interview with Irish Minister for Justice, Equality and Law Reform, Michael McDowell TD, 10 March 2003.
bring it directly into conflict with the policies of political parties, perhaps indeed the policies of all Northern Ireland’s political parties.\textsuperscript{48} The Commission’s confidence in dealing robustly with such issues may be dented if representatives of the governing parties are to be involved in its discussions on policy and strategy. There is also the possibility that elected representatives might bring into the Commission issues unresolved between them, with the risk that this would deadlock the Commission’s decision making processes. On some occasions the purpose of the Commission, to promote and protect human rights even if unpopular, means that it cannot be accountable to the current wishes of the people as expressed through their representatives.

On balance therefore we would be against making provision for elected representatives to have places on the Commission as of right, though the matter deserves more thought than it initially appears. However although shying away from endorsing the inclusion of elected representatives some of those to whom we spoke who were critical of the Commission’s initial composition argued that political views should have been given greater weight. This was especially the case amongst those complaining that no anti-Agreement unionist had been appointed.\textsuperscript{49} We see a number of difficulties with this view. To deal with the issue of anti-Agreement unionists specifically we feel there is a difficulty that some of those who wanted an anti-Agreement unionist appointed appeared to wish this essentially to secure the appointment of a person who would be hostile to the whole idea of a strong and effective human rights commission. Such an appointment would clearly be contrary to the whole aim of creating a commission and its purpose of promoting and protecting human rights. It is hardly surprising that no one expressing such views was appointed. Even accepting that some of those objecting to the absence of an expressed anti-Agreement unionist wished to see an effective commission we would still have a difficulty with expressly taking account of political views when making commission appointments. This is for a number of reasons. Firstly many of those considering applying for appointment to such a commission would be doing so with the objective of protecting the human rights of all in our society, they may only be discouraged if they feel an important part of the selection process will focus on discovering and interrogating their political views. Secondly such is the range of political opinions in Northern Ireland, within and beyond both unionism and nationalism, that it is unlikely a commission will ever be able to represent them all. Thirdly to focus on political opinions is to misunderstand the objective of having a commission that is ‘representative of the community’. This is not to mirror the political process, where the community may identify its representatives, but to ensure that a body that deals with a wide range of people in any society contains within it a good range of people from that society. Where a Commission is not ‘representative’ in this sense there is always the risk that, however well qualified its members, they will miss important areas of human rights concern or fail to understand the implications of their decisions for some sections of the community. However those appointed to the commission are not ‘representatives’ of a particular group or interest in that they are there primarily to actively promote or defend that group or interest.\textsuperscript{50} Rather they have the task, especially in a divided society such as Northern Ireland, of bringing that perspective to bear on a policy agreed by the entire commission. The South African Constitutional provision on the appointment of the SAHRC indicates that its membership should be ‘broadly

\textsuperscript{48} Especially if the NIHRC were to take issue with something approved in a Programme for Government agreed by all the parties represented in the Executive, these would likely also be the parties represented on the Commission.

\textsuperscript{49} See for example, Interview with Bertie Campbell, Ulster Human Rights Watch, 11 November 2002. None of the 154 applicants in the 1998-1999 round of appointments declared membership of the UUP or DUP, see John Taylor Parliamentary Question answered House of Commons, 10 March 1999, Col.286.

\textsuperscript{50} The NIHRC itself recommended the use of the term ‘reflective’ rather than ‘representative’, see NIHRC, \textit{Response to the 14\textsuperscript{th} Report of the Joint Committee on Human Rights in the Session 2002-03}, 29 March 2004, para 8.
representative of the community’. If one is not to have a certain number of the positions on the Commission reserved for political nominees or appointees it is difficult to see whether any more specific formulation than this would be appropriate.

Another argument put to us by some people was that the selection criteria in respect of individuals put too little weight on expertise in human rights and that this should have been the overriding if not perhaps the only criterion for appointment. This was not cited as an essential criterion in the initial round job specification that has surprised many. However, we are not convinced that this concern was borne out in the initial appointments as over half of those appointed had a well established background in academic, legal or NGO experience of human rights. Nevertheless we do feel that it was surprising that this was not a required criterion for those applying for appointment and that, it appears, more emphasis was given to management experience in the interviews for appointment. One might have expected that more emphasis would have been put on assessing candidate’s knowledge of human rights and commitment to their promotion and protection. This should not, however, have been confined to knowledge of human rights law or international standards. While a Commission requires people with expertise in these areas it also requires people with practical expertise in human rights issues. The perception of the Commission’s impartiality might be enhanced if, as the Joint Committee recommended in its report, the principal criterion for appointment should be ‘that of experience, knowledge and expertise in the field of human rights’, providing also that there remains an obligation on those appointing to ensure that the Commission reflects the composition of the community as a whole. Unfortunately, however, the NIO has rejected this suggestion with respect to the new appointments in 2004 on the grounds that it is ‘too restrictive’. Instead candidates for the post of Chief Commissioner, were asked to demonstrate ‘how they are able to formulate a vision for an organisation’, ‘excellent judgement, political sensitivity, personal resilience and the ability to operate in a complex and sometimes fraught context’, and show that they can ‘chair meetings of people with diverse views leading to consensus’. Candidates for all the Commissioners posts are required to indicate their ‘ability to participate effectively and impartially in reaching consensus and a commitment to collective responsibility’, ‘that they can formulate and follow through strategic management objectives, including prioritising to ensure value for money in decision making’. All candidates are asked to provide details on their political activities but it is stressed that this is to form no part of the ‘criterion for appointment (except where statute dictates specific representation)’. For both the Chief Commissioner and Commissioner positions, candidates ‘must be able to display expertise in human rights issues (domestically or internationally) or significant achievement in areas that are relevant to the work of the Commission, for example in the public or voluntary sectors, the law, the churches or trade unions’. This means that not all Commissioners are required to be experts in human rights and commitment to human rights is not made a criterion itself. As a result, it is therefore difficult to test consistently candidates’ commitment to human rights when interviewing. Despite concerns raised by some organisations, the NIO has not responded to this lack of a specific criterion.

Many we interviewed felt that members of NGOs being members of a human rights commission was not necessarily problematic as long as those concerned were clear about their

54 It is intended that the successful candidate will take up post on 1 March 2005.
role and responsibilities: what ‘hat they are wearing’. Most respondents viewed it as one of the essential criteria of being a human rights commissioner. As one international expert and a former head of a human rights commission stated ‘All of my commissioners had been in half a dozen NGOs. There wasn’t anybody who I would have as a commissioner on my commission who had not a background in human rights, either academically or in an NGO and in many cases both’.56

Therefore, like the JCHR we would also reject the view that considerably less weight should have been given to experience of working with human rights NGOs. Ulster Unionist peer Lord Laird in particular has questioned the Commission’s impartiality because several of its initial appointees had held prominent positions in the Committee on the Administration of Justice (CAJ), a Belfast based human rights NGO.57 It is not at all clear why the government did not explain its position in this respect. As the Joint Committee pointed out it is clearly seen as desirable internationally that NHRI’s draw on the expertise of human rights NGOs.58 Given the CAJ’s strong local and international reputation, and as the principal NGO working on human rights for more than twenty years in the jurisdiction it would have been difficult to imagine how a credible body could avoid drawing on personnel that had at one time or another been members of the CAJ. It was highly desirable that the Commission includes people from this background. Indeed the lack of such NGO representation on SACHR for much of its life was one reason why its commitment to vigorously protecting human rights was frequently questioned.59

When interviewed with respect to the initial rounds of appointments, the NIO stated that the criteria on which they appointed the Commissioners was ‘open to change according to the requirements of the Commission’.60 This is unsatisfactory. It would be helpful if a clear statement of criteria were to be produced for future appointments and if interviews were to reflect these criteria.61 Further, there appeared to be no clear system for renewing membership or appraising the conduct of Commissioners in deciding whether to reappoint them. Although the NIO stated that any appraisal was an internal process carried out within the Commission itself,62 this does not seem to be a satisfactory arrangement when it is not clear on what basis Commissioners are assessed in terms of their performance and how this feeds into the decision of the NIO to reappoint or otherwise.

A further consideration, in the most recent round of appointments, has been whether it would be appropriate to appoint individuals from outside Northern Ireland, and indeed it would appear that the NIO has encouraged individuals from outside Northern Ireland to apply to the

55 However some people did view their dual membership as problematic, for example a representative of the Ulster-Scots Heritage Council stated that membership of CAJ and the NIHRC ‘is a caucus within an organisation of that size, it is absolutely disgraceful, shouldn’t be tolerated’, interview held 5 December 2002.
56 Interview with Brian Burdekin, 27 November 2002.
57 The CAJ won the prestigious Council of Europe Human Rights prize in 1998. Three of the initial appointees, including the Chief Commissioner, were former CAJ chairpersons while a number of others were CAJ members. It should also be pointed out that one of the authors of this report (Livingstone) is a former CAJ chair and until recently was a member of its executive committee. The other author of this report, (Murray) and the research assistant on this project, Anne Smith, are also members of the CAJ.
60 Interview with representative from the NIO, 29 October 2002.
62 Interview with representative from the NIO, 29 October 2002.
Commission. The JCHR suggested this in their report\(^{63}\) although the Commission itself was not convinced, feeling that they may ‘not find it easy to feel fully part of the Commission, given that they may not be able to be physically present at many meetings’.\(^{64}\) Ensuring that the new Commission is perceived as legitimate, and how the issue will be dealt with in terms of ‘representative of the community’ of Northern Ireland, is likely to be more difficult if the Chief Commissioner, in particular, is not Northern Ireland resident. While some of these problems may be solved if there is a requirement that once selected the individual resides in Northern Ireland, it is important that the government think carefully about the implications of any such appointment.

**Procedure**

Aside from the issue of criteria many to whom we spoke expressed concern about the procedure by which commissioners were appointed. The NIHRC itself expressed this view in its Report on Effectiveness\(^{65}\) and its position was endorsed by observers both supportive and critical of the initial composition of the commission. The main concern focused on the fact that it was ultimately left to the Secretary of State to appoint (and subsequently to decide whether or not to reappoint) commissioners. In the latest round of appointments the process remains the same, although besides an independent assessor, there is also a human rights expert on the appointments panel.\(^{66}\) Many felt that putting the appointment process in the hands of the executive interfered at least with the Commission’s appearance of independence from government. Although this is the appointments procedure from most Non-Departmental Public Bodies (NDPBs) in Northern Ireland (the Equality Commission and Parades Commission are also appointed by the Secretary of State) there are alternatives.

One is to involve the legislature in appointments. The Joint Committee on Human Rights, in its report on a human rights commission for Great Britain, suggested that the appointing Minister might be required to consult with Parliament on any recommendations, while acknowledging that there are a number of ways in which this might be done.\(^{67}\) The legislature is involved in many countries including most Latin American states, several in Europe and Asia, and Africa, including South Africa, where members of the SAHRC are appointed by the President on the recommendation of the legislature after nomination by a committee of the Assembly and its majority approval.\(^{68}\) While this ensures greater distance from the executive, it does not necessarily provide reassurance that political influences do not play a part in appointments. As one former Commissioner commented:

‘I mean, you can see, you go there and you know you are going to be chosen. If you were nominated by key political bodies or key politicians you know you’re going to get the job’.\(^{69}\)

If this route is followed there is a question of which legislature? Current proposals for a Scottish Human Rights Commission envisage the Scottish Parliament being involved in managing the selection process and making recommendations to be approved by Parliament.\(^{70}\) Although the NIHRC is in a different constitutional position from any Scottish Commission,
having been established by Westminster legislation rather than that of a devolved parliament, it might be argued that since its activities impact exclusively on Northern Ireland if any politicians are to be involved in making appointments they should be those with a direct interest in its work. Alternatively, Parliament has a direct interest while the Union exists in Northern Ireland.

Another model is that an independent commission be involved in appointing or at least recommending commissioners, along the lines of what already operates for judicial appointments in Scotland and is now being recommended for other parts of the United Kingdom. Interestingly this approach was followed in respect of the Irish Human Rights Commission but controversy erupted following the refusal of the then Minister, John O’Donoghue, to accept all but one of the recommending body’s nominations. His central concern appeared to be that those nominated were drawn from too narrow a group of people, primarily from academia and human rights NGOs, and that the Commission needed a broader base of social and professional expertise if it was to do its job effectively. While such concerns may have had some validity the peremptory manner of the then Minister’s actions and the wholesale rejection of the independent nominating group’s recommendations did little to reassure the public that this was not an attempt by government to secure a commission more favourable to it. This action also undermined the independence of those commissioners government had appointed. Ultimately, following extensive media criticism, a compromise was worked out whereby most of those on the independent nominating committee’s list were added to the Commission, which necessitated legislative change to raise the maximum number of commissioners. Yet, this still meant that only half of the eventual commission had actually been recommended by the committee. Fortunately those to whom we spoke both within and without the Irish Commission, suggested that relations between the ‘new’ and ‘old’ commissioners were good and that perceptions of the independence of the commission had not been adversely affected by the initial controversy over the appointments. Indeed if anything the eventual outcome appeared to have strengthened the public perception of the Commission’s independence and certainly engendered a great deal more interest in and indeed ownership of the eventual product.

Clearly there are advantages and disadvantages in both approaches. Leaving things to politicians may lead to a perception that appointments will be the outcome of political horse-trading, with limited attention being paid to candidates’ expertise in human rights. Giving the task to an appointing commission may lead to politicians, who provide the body’s funds and powers, failing to take responsibility for working with it. One approach may be to combine the two, along the lines currently being proposed for judicial appointments commissions. An appointments body could include both some politicians, perhaps one for each party with a certain level of representation in the Assembly, and some lay people appointed by the Secretary of State. This would then have the task of interviewing and recommending candidates for appointment by the Secretary of State, who could refuse to accept recommendations but would have to do so publicly and offer reasons. While such an approach

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71 The NIHRC has also endorsed this approach, see NIHRC, The Commission’s Powers – A Supplementary Review, para 7.
72 Carol Coulter, Irish Times, 18 December 2000.
73 ‘Under our legislation the Government, in choosing the Commission, is required to make it broadly representative of our society and that particular requirement gave rise to quite a few difficulties at the beginning because unfortunately, although that was clearly provided that competence and experience in the area were statutory preconditions for appointment, unfortunately the view was taken, I think erroneously, that activism in the area was required firstly, and, secondly, that the “representative” notion was one which was heavily skewed towards NGOs and things like that’, Interview with Minister of Justice, Michael McDowell TD, 10 March 2003. Mr McDowell was Attorney-General at the time the decision was taken to reject most of those on the nominating committee’s list.
74 Those not added were subsequently appointed to other public bodies in Ireland.
75 Comments from NGO representative, 24 November 2004.
would increase the transparency involved in appointments but could still mean that those chosen would be selected primarily for their knowledge and commitment to the promotion and protection of human rights for all in the society, it could be potentially damaging.

To suggest that some changes could be made in the appointments criteria or procedures is not to suggest that if they had been made before the composition of the Commission would have been different. Still less is it to suggest that criticisms of the initial appointments to the Commission as demonstrating a lack of impartiality are well founded. As we have indicated we do not feel that the Secretary of State should have appointed someone who was avowedly anti-Agreement simply to ensure that viewpoint was reflected on the Commission and indeed the appointment of some who hold such views may well have undermined the purpose for which the Commission was created. In terms of what we feel is an appropriate interpretation of ‘representative of the community’ the initial commission was as representative as one might reasonably have expected. Where those who made the initial appointments may have erred is in appointing two people with a perceived background in the SDLP but no one with a clear background in unionist politics. In terms of reducing unionist concerns it might have been better to have appointed someone with a background in unionist politics or to have avoided appointing those with any background in politics at all, difficult though this may have been in a small jurisdiction. However we do not feel it would be appropriate to say that this failure to appoint a unionist or wholly apolitical group fatally undermined the impartiality of the Commission from the start. What is clear, however, is the consistent failure of the government to defend or explain its appointments. This was especially important when the Commission then came under attack for its membership and was left to defend itself in respect of an issue over which it had no control. Any pressure it may therefore have felt to respond to unionist politicians’ concerns is a matter we will consider when examining the development of the Commission’s strategy.

Full or part time
Before leaving the issue of composition it is worth discussing an issue which was raised with us more internationally than within Northern Ireland. This is whether the commissioners should be full or part time. The tradition in the United Kingdom and Ireland is for public appointments like this to be on a part time basis. In respect of the NIHRC the Northern Ireland Act 1998 departed from this only to the extent of providing for a full time Chief Commissioner. All other Commissioners are appointed on a part time basis.

However in the context of establishing a new commission in Northern Ireland, especially one facing such high expectations, there might have been some merit in the idea that commissioners are full time. With only the Chief Commissioner being full time it was always likely that an enormous responsibility would fall on his or her shoulders, especially given the lack of senior staff at the outset of the NIHRC. Brian Burdekin, former Federal Human Rights Commissioner of Australia and former UN High Commissioner’s Special Adviser on National Human Rights Institutions observed to us that he was not aware of a Human Rights Commission that had worked effectively on the basis of having primarily part time commissioners.76 It is interesting to note that both the JCHR in its report on a Human Rights Commission for the United Kingdom and the Scottish Executive in its discussion papers have leaned in the direction of a small number of full time commissioners. The South African Commission operates with a mixture of full and part time commissioners, though this has caused problems too in the past as part time commissioners, who have been in the minority, have complained that they are not fully part of the Commission’s decision-making processes. In a small jurisdiction such as Northern Ireland it could have been argued that it might have been difficult to find a number of people willing to give up other careers to become human rights commissioners (though this was not borne out by the number of applicants and the Chief Commissioner’s post was advertised widely and did receive applicants from outside the

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76 Interview with Brian Burdekin, 27 November 2002.
jurisdiction) and retaining a larger part time membership may offer greater opportunity to construct a commission which is ‘representative of the community’. On balance, while the commission would remain predominantly part time, it might have been better to have provided for a post of Deputy Chief Commissioner either on a full or more substantially part time basis. Such a person could have taken some of the administrative burden off the Chief Commissioner and might, for example, have taken primary responsibility for co-ordinating advice on a Bill of Rights. The NIHRC itself, in its review of its effectiveness, subsequently proposed an increase in the number of full time commissioners to three.

Having a single full time chief commissioner, when the rest are part time, inevitably requires that the job specification is distinct from that of other commissioners, whereas the South African Constitution provides for the Chair and Deputy Chair to be elected by the Commission. Though the Chief Commissioner of the NIHRC indicated to us that both the NIO and fellow commissioners saw his role as being first among equals there does appear to be some potential for confusion over the extent to which the Chief Commissioner is expected to lead the rest of the commission with them providing support as opposed to being primarily the chair of the commission with a responsibility to present the views of the Commission as a whole. It would seem that the Chief Commissioner’s role, within the current structure of the NIHRC, involves elements of both but it is a delicate balance to maintain.

**Powers**

The Commission is mandated under the Northern Ireland Act to:

- ‘keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights’
- ‘advise the Secretary of State and the Executive Committee of the Assembly of legislative and other measures which ought to be taken to protect human rights’
- ‘advise the Assembly whether a Bill is compatible with human rights’
- ‘promote understanding and awareness of the importance of human rights in Northern Ireland; and for this purpose it may undertake, commission or provide financial or other assistance for-
  - research; and
  - educational activities’
- ‘The Secretary of State shall request the Commission to provide advice of the kind referred to in paragraph 4 of the Human Rights section of the Belfast Agreement’,
- ‘For the purpose of exercising its functions under this section the Commission may conduct such investigations as it considers necessary or expedient’.
- ‘The Commission shall do all that it can to ensure the establishment of the committee referred to in paragraph 10 of that section of that Agreement’.

The Commission ‘may’ also:

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77 As the International Council on Human Rights Policy notes another advantage of part time, fixed term, commissioners is that it reduces the risk that weak commissioners will be more difficult to remove, International Council on Human Rights Policy, *Performance and Legitimacy: National Human Rights Institutions*, IPPR, Switzerland, 2000, p.77.
78 The Equality Commission for Northern Ireland has a Deputy Chief Commissioner who serves for one day a week while other commissioners serve for two days a month.
79 Subject to additional funding.
81 ss.68-71.
82 Namely in respect of the Bill of Rights.
83 I.e. the Irish Human Rights Commission.
- ‘give assistance to individuals in accordance with section 70; and’
- ‘bring proceedings involving law or practice relating to the protection of human rights’.

In general these powers comply with the Paris Principles. In particular, the NIHRC is given a broad mandate, with ‘human rights’ being stated to include Convention rights but not limited to them and no limitations being placed on the issues that the commission can investigate or receive complaints on. It has powers to promote human rights and to make recommendations on legislation. The NIHRC does not have power to adjudicate on complaints. However having this power has proved problematic for commissions in other parts of the world and the Northern Irish experience, especially in the context of Fair Employment law, is that it is better to separate out adjudication and advice functions. Instead the Commission is given powers to assist litigants bringing cases before the courts and to bring cases in its own right.

However there are a number of problems with the powers ascribed to the NIHRC, three of which are especially worth commenting on. The first is that the power to take cases in its own name is circumscribed by Section 71(1) of the Northern Ireland Act 1998, which indicates that the commission cannot bring cases alleging a breach of Convention rights or rely on such rights unless it can claim to be a victim within the definition contained in the Human Rights Act 1998. Potentially this significantly curtails the Commission’s power to bring cases in its own name as it is precisely in the absence of a potential victim willing or able to come forward when it may wish to use this power. Secondly the provision to give advice on a Bill of Rights for Northern Ireland, something specifically referred to in the Agreement, opened up a potentially enormous task for the NIHRC, one which could swamp its other activities. Thirdly the Commission was not given a specific power of investigation but rather a more general power in Section 69(8) to conduct ‘such investigations as it considers necessary or expedient’ and ‘for the purpose of exercising its functions’. This was not accompanied by any provisions indicating how it could exercise this power and from the outset there were concerns as to whether the Commission would be able to effectively conduct investigations in the absence of any express powers to obtain documents or subpoena witnesses. These were scarcely assuaged by government assurances, during the legislative debates on the Commission’s powers, that it would fully co-operate with the Commission.

Included in its statutory remit was the obligation to conduct a review of its own effectiveness and submit this to the Secretary of State within two years. The Commission undertook a review of its powers and reported in February 2001, submitting its proposals to the government for their consideration and requesting various changes to enhance its powers. The government in its only detailed response so far, in a consultation paper in May 2002, while claiming to embrace many of the NIHRC’s recommendations, in fact rejected most of them.

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85 Unlike, for example, the Indian Commission which under Section 19 of the Protection of Human Rights Act 1993 cannot conduct investigations into allegations that human rights violations have been committed by members of the armed forces but instead can only seek a report from central government.
86 As O’Cinneide observes ‘the dispute resolution role of the North American, Australian and New Zealand Commissions has tended to drain resources away from selective strategic initiatives towards a reactive, complaint-orientated approach’, C O’Cinneide A Single Equality Body: Lessons from Abroad, EOC Working Paper No 4, 2002.
89 NIHRC, Report on Effectiveness.
The Commission issued a further statement in August 2002 in which it noted the subsequent ruling by the House of Lords confirming the Commission’s power to intervene as a third party before the courts, thus making it unnecessary to argue for a number of the recommendations which were then withdrawn. The Commission reiterated its other recommendations but withdrew those relating to its request for powers to obtain warrants for search and seizure, and for the enactment of a formal duty of impartiality. The Commission then produced a supplementary review in April 2004 in which it affirmed previous recommendations and added a further four recommendations relating to its independence and casework functions. The final response of the government is still awaited, and although in its Joint Declaration of 30 April 2003 the UK government promised to issue its final response in October 2003 this was then extended again until after elections at the end of November 2003. The government confirmed in the summer of 2004 that a response would be produced before the appointment of new Commissioners. There was a very legitimate concern that potential candidates may have been discouraged from even applying to the Commission without the government’s final response. Thankfully, on 17 December 2004 the government announced that it would respond fully in 2005, but had decided in principle that the Commission should be ‘be granted the right of access to places of detention and the power to compel evidence and witnesses, subject to appropriate safeguards, in conducting its investigations’. We will examine the Commission’s recommendations further in the context of our discussion as to how it has exercised its powers in Chapter 4.

Funding

The Paris Principles indicate that a NHRI should have ‘adequate’ funding, such as will enable it to be ‘independent of the government and not be subject to financial control which might affect this independence’. The Commission was initially in its first three years provided with an annual core grant of £750,000. How this figure was arrived at is something of a mystery. The Chief Commissioner, who indicated that there had been initial suggestions that it would be reduced to £400,000, suggested that it was derived simply by multiplying the budget of SACHR by three. It quickly became clear that this budget was unlikely to be adequate, especially in respect of legal assistance, investigations and the Bill of Rights project.

The NIHRC was able to obtain increases in its funds for specific projects but each of these necessitated detailed negotiations with the NIO. Eventually the government increased the core funding to £1.3million for 2003-2004 and 2004-2005, then to £1.35m in 2005-2006. The JCHR, among others, has welcomed this increase stating that this ‘should remove the most pressing financial threat to the viability of its work’, but that the NIO should continue to monitor the funding. It did recognise, however, that the Hosking report had noted that the Commission’s funding levels were out of line with other national human rights institutions, and he had recommended core funding of at least £1.5m.

\[\text{Administration of Justice (CAJ) to the Government’s Response to the Northern Ireland Human Rights’ Commission’s Review of Powers Recommendations, July 2002.}\]
\[\text{The Commission issued a supplementary review in April 2004, NIHRC, The Commission’s Powers – A Supplementary Review.}\]
\[\text{NIHRC, The Commission’s Powers – A Supplementary Review.}\]
\[\text{NIO, ‘Competition for Chief Commissioner of the Northern Ireland Human Rights Commission’, 17 December 2004.}\]
\[\text{Although this is contested by the NIO, interview with NIO, 29 October 2002.}\]
\[\text{Joint Committee on Human Rights, Fourteenth Report: Work of the Northern Ireland Human Rights Commission, at paras 34 and 36.}\]
\[\text{Ibid, at para 35-36.}\]
That the Commission had to apply to the NIO for specific projects to be funded was seen as ‘highly unsatisfactory for an organisation for which independent policy strategies and decisions are the key to its credibility’. 98 There was some indication from evidence from two former Commissioners to the JCHR’s inquiry that the NIO debated with the Commission the nature of some projects for which it was requesting funding. 99 We would agree with the JCHR as a whole who believed that this system, which would still be required once baseline funding had been increased, did not comply with the Paris Principles and that there should be some independent scrutiny of the way of its funding was allocated. 100

The Political Context of Human Rights in Northern Ireland

As in South Africa, the Human Rights Commission in Northern Ireland was created in a society emerging from a period of violent conflict and as a result of a peace agreement that identified violations of human rights as one factor sustaining that conflict. 101 However in South Africa there was rather broader societal agreement about what had happened during that period of conflict and what was needed to provide for the better protection of human rights in the future. 102 The SAHRC began life with a Truth Commission and Bill of Rights already in place. The Northern Ireland Agreement contained neither and instead left a society still significantly divided over the causes of the conflict and the means to resolve it. 103 The place of human rights and in particular the issue of who were the victims and who were the perpetrators of human rights abuses reflected that division. International human rights law has had similar problems. To some, the perpetrators were primarily state agents such as the police and military and the violations mostly took the form of extra judicial killings, mistreatment in custody, unfair trials and discrimination against those from a catholic background. 104 To others, the perpetrators were primarily republican terrorists and the main violations the killing, injuring and destruction of property of those not engaged in terrorism, including police officers and soldiers. 105 Since most Northern Irish and international human rights NGOs focused their concern primarily on alleged human rights abuses by state authorities and called for reforms designed to investigate their activities in the past or curb them in the future, many from a unionist background viewed any reference to ‘human rights’ as being antithetical to their interests. Moreover in the political negotiations leading to the Agreement it was the nationalist parties who were most enthusiastic to secure enhanced human rights protections. 106

As a result the NIHRC faced a particularly difficult political context in which to work. As an institution reflecting a language nationalists had always appeared more comfortable with, and

98 Ibid, at para 38.
100 Ibid, at paras 42 and 43.
105 Ibid.
having been created primarily in response to nationalist concerns, it was always likely to be viewed with suspicion by unionists. As we have already seen that suspicion increased following the initial appointments to the Commission. Thereafter the Commission was always likely to secure the support of all sections of the community. Given its genesis in concerns that human rights had not been adequately protected in the past it would be expected to seek to remedy such deficits. However the issue of what deficits were most in need of addressing was always one where achieving widespread support was likely to be difficult.

Another consequence of the unresolved conflict that should not be overlooked was its impact on the position of the groups the NIHRC was likely to be involved in investigating or challenging. In South Africa the end of the violent conflict brought a change of government and an acknowledgement of human rights abuses by both the state authorities and armed opposition groups. Government supported the need for change in institutions such as the police, military and prison service and partnership with the SAHRC seemed inevitable as one way of bringing this about. In Northern Ireland it was much less clear that a need for change on a significant scale was recognised and the NIHRC was always likely to encounter greater resistance, especially if its activities involved examination of issues in the past. However the situation was not entirely bleak. The Agreement also created the policing and criminal justice reviews. In both the need to mainstream the protection of human rights as one of the key organising principles was quickly accepted. The creation of the Equality Commission and Police Ombudsman further strengthened the culture of rights in Northern Ireland and the means of their enforcement. Above all the introduction of the Human Rights Act 1998, making the ECHR rights part of Northern Irish law, fulfilled a twenty year old demand of SACHR and one which had been echoed by many human rights NGOs in Northern Ireland. It gave the NIHRC what had long been denied to SACHR, a set of legally enforceable human rights standards on which to base its recommendations and new litigation and investigation powers. Overall therefore the NIHRC faced a difficult political context in which to work, but also one that contained some favourable factors. In Chapter 3 we will explore how it responded to this context.

The UK-wide and Irish positions

Irish Human Rights Commission / An Coimisiún um Chearta an Duine

Just as the NIHRC was established as part of the Good Friday/Belfast Agreement, so was there provision for the setting up of an Irish Human Rights Commission.107 The Good Friday/Belfast Agreement provided for an ‘equivalent level of protection’ in the Republic as in Northern Ireland, including the establishment of a Human Rights Commission ‘with a mandate and remit equivalent to that within Northern Ireland’ as well as other legislative requirements for the protection of human rights.108 Yet, the Irish Commission has more powers than its Northern Irish counterpart109 and despite being proposed by the same document, the Irish Human Rights Commission has taken much longer to come into existence, having been faced with controversies over the appointment of its members, among other issues.

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107 Although this was not the first time that the possibility of having a human rights commission for Ireland was raised, with an independent review group set up in 1996 to examine the issue. No comments were received from the government on their proposals however, see M Manning, ‘The Irish Experience’, paper to Conference, Establishing Our Rights: Roles for Scotland’s Human Rights Commission, 17 February 2003, at 3.


109 ‘It is obviously in the interests of the United Kingdom administration that the NIHRC’s powers mirror those in the South, lest it has forever to try to justify the difference’, P Hosking, The Northern Ireland Human Rights Commission. An Evaluation of its Powers, Effectiveness and Structure, April 2001, on file with author, at 26.
Legislation detailing the membership and remit of this Commission was produced in the Human Rights Commission Acts of 2000 and 2001 and the Commission formally came into being on 25 July 2001, thus, over two years after the Northern Irish body came into existence.

The Commission is empowered to keep under review the adequacy and effectiveness of the law and practice in the state, examine legislative proposals, consult with international and national bodies, make recommendations to the government, promote understanding and awareness of human rights, conduct enquiries, prepare reports on issues, and apply to appear as amicus. In this regard it is provided with broad powers including the ability to demand documents and the presence of individuals for the purposes of an enquiry, assist individuals in legal proceedings, and institute legal proceedings itself. The Commission is accountable financially to the Public Accounts Committee of Dáil Eireann, and must present a report to the Minister and lay it before both Houses of the Oireachtas every year.

Section 5 of the Human Rights Commission Act 2000 initially provided for nine Commissioners including a president to be appointed by the government for up to five years. In their appointment the government is required to ‘have regard to the need to ensure that the members of the Commission broadly reflect the nature of Irish society’. There has been considerable controversy over the appointment process. In July 2000, shortly after the Human Rights Commission Act 2000 came into force, Donal Barrington (a former judge of the Supreme Court) was appointed as president but with no open process. An independent selection panel was then set up to make recommendations to the government on the other eight places. This panel was chaired by Dr TK Whittaker and Frank Murray from the Civil Service Appointments Commission, and included well-known human rights figures Martin O’Brien, Inez McCormack and Mary Murphy. There were 177 applications and the committee shortlisted 16 and, of those, recommended eight to the government. This process was conducted by paper and without interviews. However, the government rejected the entirety of this list, apart from one, Fionnuala Ní Aoláin. It then proceeded to appoint another three persons from the others short-listed but not recommended, and four individuals who had not been short-listed at all. The considerable controversy that ensued, particularly given the political affiliations of two of the final four selected, and criticism from the President Donal Barrington, prompted the Minister for Justice, Equality and Law Reform, John O’Donoghue TD, in December 2000 to say that he would widen the range of interests on the Commission and expand the composition of the Commission by six. The new six members all came from the original shortlist of the committee. The present membership of the

111 Human Rights Commission Act 2000, s.9.
112 Human Rights Commission Act 2000, s.10.
113 Human Rights Commission Act 2000, s.11.
115 Human Rights Commission Act 2000, s.23.
116 Human Rights Commission Act 2000, s.5(12).
117 When Inez McCormack agreed to serve on the panel she was already a member of the NIHRC. Some questioned the appropriateness of her involvement in this regard.
119 Jane Liddy, Suzanne Egan and Robert Daly.
120 William Binchy, Mervyn Taylor, Olive Braiden and Tom O’Higgins.
121 Mervyn Taylor is a former Labour Minister for Equality and Law Reform and Olive Braiden was a former Fianna Fáil candidate.
Commission is thus now composed of fourteen individuals, with equal split male/female as required by the legislation. The first meeting of the Interim Human Rights Commission took place on 6 March 2001 and the Commission was formally launched on 25 July 2001. The presidency of the Commission was taken over by Maurice Manning in August 2002, with Alpha Connelly having been appointed as Chief Executive only shortly before in June 2002. Staff are appointed by the Commission, with the consent of the Minister of Finance. So far the Commission has obtained consent for the appointment of some staff, although this has often been on lower grades than the Commission would initially have wished for. The Commission has undertaken some work and commented on legislation, but as Maurice Manning admits, this has been in ‘an ad hoc rather than systematic fashion’.

The NIHRC is required to do all it can to ensure the establishment of a joint committee between the two commissions and this committee met for the first time in November 2001. There is an annual plenary meeting between the two Commissions. The two commissions organised the Second Round Table for European National Human Rights Institutions in November 2002. The Joint Committee has also established sub-committees, one to look at the issue of racism, publishing in September 2003 the ‘User’s Guide to the International Convention on the Elimination of Racial Discrimination’.

The Good Friday/Belfast Agreement also envisaged ‘the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland’. The joint committee of the two commissions is working on this issue and in May 2003 issued a pre-consultation document setting out possible models for a Charter. Many view this as premature until the Bill of Rights for Northern Ireland is further advanced and submissions to this process appear to have been limited. Unfortunately it is not entirely clear from the two Commissions how they intend to proceed. At a conference in Cork in October 2004, for example, while Dr Maurice Manning stressed the need to engage political parties in the process and that he would be contacting them ‘as a matter of some urgency’ to ask their views...

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124 Human Rights Commission Act 2000, s.5(2).
127 So far the following are in post: A senior caseworker and assistant; a senior legislation and policy review officer and assistant; a senior human rights awareness officer; a general administrator, a financial and human resources administrator, two clerical officers and a desk officer.
131 Good Friday Agreement, Rights Safeguards and Equality of Opportunity, para 10; Northern Ireland Act, s.69(10). The Irish Human Rights Commission has a similar duty, s.8(i) Human Rights Commission Act 2000.
132 It was initially agreed that it would be composed of the full membership of both Commissions.
133 Good Friday Agreement, Rights Safeguards and Equality of Opportunity, para 10.
135 See BIRW, Director’s Report, July/August 2003.
in this regard, Professor Dickson was less forthcoming. The sub-committee dealing with the Charter will meet in December 2004 to discuss the matter further.

**A Scottish Human Rights Commission**
The idea of having a Scottish Human Rights Commission has gathered pace, following the establishment of the Scottish Human Rights Forum in 1999, composed of public and voluntary sectors, to campaign for a commission. Proposals were presented to the Scottish Ministers in March 1999 recommending a Scottish Human Rights Commission and this prompted a debate in the Scottish Parliament on 2 March 2000 where there was cross party support for such a body. As a result of the establishment, in June 2000, of a cross party parliamentary group and a commitment by the Deputy First Minister to a process of consultation in a speech to a human rights symposium, a consultation was launched by the executive in March 2002 for three months. The results were that, of those who responded, there was majority support for a commission. On 4 February 2003 a further consultation paper was launched by the Scottish Executive containing proposals for the mandate and remit of the commission and leaving a consultation period till the end of June 2003 for responses to be received. This proposed that the Commission would only deal with devolved matters and would not have a formal relationship with Westminster or UK ministers. Its functions would include promotion, education and awareness raising; giving guidance to public authorities; advising the Scottish Parliament on legislation during the passage of a bill, although with no requirement that the Scottish Parliament take the advice into account; review and assess law and practice and publish breaches of human rights; the power to investigate and report on human rights issues with powers of access to information, but with no enforcement powers and no power to take on individual cases nor fund such individuals before courts; offer expertise to the courts including amicus curiae, and would be restricted to civil matters in the Court of Session at appeal stage or judicial review. It also proposed that the Commission be composed of three or four full time Commissioners, including a Chief Commissioner with ‘broad representation of Scottish society as a whole’, who should be appointed by the Scottish Parliament Corporate Body and accountable to it. Its funding should come from the Scottish Consolidated Fund. A proposed annual budget of £1m was suggested, although additional funding would be provided for set-up costs. The responses to the second consultation and an analysis of them were published in May 2004. The Scottish Executive is now considering how to proceed, although ministers have confirmed their commitment to the establishment of the Commission.

**A Human Rights Commission for the UK?**
The debate on whether to have a human rights commission for the UK predated the Human Rights Act and was raised in a pre-election paper by the Labour Party in 1996 in relation to

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136 A Charter of Rights for the Island of Ireland, University College Cork, 2 October 2004.

After the government produced its proposals for a Single Equality Body in May 2002 to replace the existing Disability Rights Commission, Equal Opportunities Commission and Commission for Racial Equality,\footnote{See Cabinet Office, Equality and Diversity: Making it Happen, www.womenandequalityunit.gov.uk/equality_body/Cons_text-only.htm.} the JCHR produced an Interim Report in September 2002, publishing the evidence it had received so far. It stated briefly that

‘we consider that the subject of our inquiry and the question of arrangements for the promotion of equality being addressed by the government are closely linked, and the evidence we have heard so far has reinforced that conclusion. We conclude that it would be a serious omission for the government’s forthcoming consultative proposals on a single equality body to fail to give full weight to the element of the project’s terms of reference relating to the promotion and protection of human rights. If any proposals for measures to protect and promote equalities fail to address the relationship between those powers and functions and arrangements for promoting and protecting human rights, they are likely to be incoherent, incomplete and ineffective’.\footnote{House of Lords, House of Commons Joint Committee on Human Rights, The Case for a Human Rights Commission: Interim Report, Twenty-Second Report of Session 2001-2002, HL Paper 160, HC 1142, 2 September 2002, at para 11.}
In March 2003 the JCHR produced its final report\(^\text{151}\) in which it found that there was little evidence of a quick development of a human rights culture and that public authorities did not give high priority to human rights in their work. A human rights commission could have a clear role in developing this culture and understanding. It recommended that a commission should be primarily promotional, rather than litigious, and should have a range of powers including undertaking research, educational activities and provision of advice. It should also be given powers to conduct inquiries, intervene as amicus before the courts and support other cases. It would not have the power to examine individual complaints, but should be able to use alternative dispute resolution mechanisms. Parliament should have a role in the appointment of members and in the allocation of the budget. In light of the government’s proposals for changes to the equality legislation and the developments in Northern Ireland and Scotland, the JCHR recommended that there be an integrated human rights and equality body, and that an interim UK Human Rights Advisory Council be set up to facilitate coordination among the devolved institutions. The JCHR called for additional consultation on specific issues.

On 30 October 2003 the government announced its intention to create a single Commission for Equality and Human Rights.\(^\text{152}\) The resulting White Paper, *Fairness for All*, recommended that this body would have promotional and protective powers in respect of human rights and equality, although it is clear that the proposed powers for the latter are considerably broader. It makes practically no mention of Northern Ireland, although it does recognise, albeit in limited form, devolution issues in relation to Scotland and Wales. The JCHR also raised concerns with respect to the exact nature of powers and functions of the Commission on human rights matters, among others.\(^\text{153}\) Responding to the White Paper the NIHRC stated that it preferred a specialist human rights commission but it would work cooperatively with whatever body was established. There did, however, need to be greater clarity over the proposed Commission’s remit on equality and human rights given the existence of the NIHRC, Equality Commission of Northern Ireland and the proposed Scottish Human Rights Commission.\(^\text{154}\) On 18 November 2004 the government issued its response to the consultation on the White Paper\(^\text{155}\) and confirmed on 23 November in the Statement to Parliament that it would establish the Commission for Equality and Human Rights, appointing Commissioners and the Chair in 2006 in order for it to be in operation by 2007. These proposals made more specific reference to Scotland and Wales, but absolutely no reference to Northern Ireland, despite receiving submissions from both the Equality Commission and NIHRC.\(^\text{156}\)

Although the CEHR is to be for Great Britain, rather than the UK as a whole, these developments have implications for the Northern Ireland Human Rights Commission. Indeed, the NIHRC itself has already stated that it was not in favour of a UK wide human rights commission but that there should be one for each jurisdiction:

> ‘With the recent devolution of powers to Scotland, Wales and Northern Ireland, it would be retrogressive to create a single Commission for the whole of the United Kingdom. The Northern Ireland Commission can deal with non-devolved as well as devolved matters as


far as the protection of human rights in Northern Ireland is concerned. We think that is how it should be in the other constituent parts of the United Kingdom also'.

There does not appear to have been a great deal of thought given to the impact of such proposals on the Northern Ireland institutions. It is particularly disappointing that no mention of Northern Ireland is made in the government’s response to the consultation on the White Paper. The proposals are central to an evaluation of the NIHRC, as the UK government in its responsibilities to the NIHRC must take into account the constitutional implications of these various developments. Arguments have been raised as to whether it is appropriate to have ‘two levels of government with essentially the same legislative power’, with some arguing for ‘harmonisation of human rights protection not only throughout the United Kingdom but also through these islands. Such harmonisation would, we believe, strengthen the Northern Ireland peace process’. On the other hand some believe there would be problems in having differentiated standards applicable across various parts of the UK. In this regard lessons from Australia and other federal systems may provide some assistance.

Of particular concern in the Scottish context is likely to be how much is devolved to the local assemblies in terms of human rights or human rights related matters:

‘We have been concerned by evidence in Northern Ireland of attempts by the Ulster Unionist Party, led by First Minister David Trimble, to politicise human rights and to use the mechanisms of the Northern Ireland Assembly to attack the Northern Ireland Human Rights Commission and human rights NGOs. This has led us to question the wisdom, at least in the Northern Ireland context, of devolving responsibility for human rights to local assemblies. However, we recognise that Northern Ireland is unique in the United Kingdom in that it is a very deeply divided society that is still emerging from conflict and may yet slide back into serious violence’.

Lessons learnt in Northern Ireland show what a Commission can achieve and highlight areas for development for this future organisation. As Des Browne, former Parliamentary Under-Secretary of State for Northern Ireland, stated during the debates in Westminster on the Northern Ireland Bill, the Human Rights Act would work best with a human rights commission for the UK and at that stage he hoped that the establishment of the NIHRC ‘will

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157 NIHRC, Response of the Northern Ireland Human Rights Commission to the Joint Committee’s Call for Evidence on Whether there should be a Human Rights Commission for the United Kingdom, July 2001, at 2 and 4. However, if a body were established for the UK as a whole, then the NIHRC has said it would want to develop a Memorandum of Understanding with it.


160 British Irish Rights Watch, United Kingdom Human Rights Commission? Response to a Consultation Paper by the Joint Committee on Human Rights, June 2001, at paras 1.4-1.5.

161 Further, ‘the trends towards devolution and multiculturalism mean that there is room for some local diversity, and the reality is that, a human rights commission having been established for Northern Ireland, it would be politically difficult to remove it and replace it with one UK-wide commission. …An overarching UK wide commission is therefore desirable in order to ensure that matters affecting all four countries were dealt with uniformly. …Logically, a UK wide human rights commission could be drawn from the four local commissions, rather than being stand-alone’, British Irish Rights Watch, United Kingdom Human Rights Commission? Response to a Consultation Paper by the Joint Committee on Human Rights, June 2001, at paras 1.6-1.7.


act as a catalyst for setting up a similar body in Britain.' An evaluation of the effectiveness of the NIHRC at this stage, therefore, is essential to this debate.

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CHAPTER THREE:
STRATEGY AND ORGANISATION

Introduction

As we discussed in Chapter One, developing a collective vision and a clear and well-focused strategy is an important need for any National Human Rights Institution. Especially where, as with both the Northern Irish and South African Commissions, the NHRI is given a wide range of powers and a broad mandate of human rights standards to consider it risks being overwhelmed. Such a risk is increased where, as has again been the case for both these commissions, there are high societal expectations of it. Even if the NIHRC’s mandate were limited to the rights contained in the Human Rights Act it would still be faced with significant choices as to which among these rights it should be most concerned with. However the Northern Ireland Act does not limit it to this and the Commission, in line with the expectations of most of those who have dealt with it, has taken the view that at the very least it should consider the full range of international human rights standards to which the United Kingdom is a party. This is a very wide range of human rights standards to promote, let alone protect. To try and cover all these rights simultaneously would leave the Commission very stretched and probably unlikely to be able to do much about any of them. Wisely it has sought to prioritise and develop a strategy.

However although developing a strategy is essential if a Commission is to have any chance of being effective it is almost inevitable that this will lead it to devoting more energy to the concerns of some groups than others. This in turn may endanger its legitimacy as some groups may take the view that the Commission is not interested in the human rights they stress. Such a risk is especially pertinent in a divided society such as Northern Ireland where the very meaning of human rights is contested. The NIHRC has certainly been faced with this problem and has, in effect, seen its priorities as regards human rights promotion and protection pulling in somewhat different directions. It is a problem not unfamiliar to the SAHRC too.

Determining the strategy of the Commission is one of the key tasks of Commissioners. There is no single answer to this question and we must be wary of simply second guessing the Commissioners in what is a very difficult task. However while acknowledging that the choice of strategy is something reasonable people may disagree on we would not be endorsing the view that so long as the Commission has a strategy one cannot really take issue with what it is. Rather we would note, as we indicated in Chapter One, that there are certain issues of which the development of a strategy for an NHRI must take account if the strategy is likely to increase the chances of a Commission proving effective. These include:

- The need for the strategy to address the most serious human rights issues in the society in which the Commission is located. For example it would be remiss of a NHRI to focus its issues on a few technical breaches of privacy law where there are extensive reports of disappearances. However the issue of what are the most serious human rights issues in any society is often a matter of significant controversy in itself. Certainly that has been the case in Northern Ireland and South Africa.
- The need for the strategy to reflect the human and material resources available to the Commission. Although the needs a NHRI faces will nearly always exceed its available resources it should still seek to identify matters on which it can have an influence and to orientate its strategy towards maximising that influence.
- The need for the strategy to reflect on whether the Commission is the organisation best placed to advance change in this particular area. For example although deaths in custody may be a major issue in a society a NHRI may find that the courts or a
prisons inspectorate are already effectively tackling the issue and there is little more that they can add. However where the issue is a serious one a Commission will always find it difficult to avoid becoming involved, lest it feel its credibility will come under threat.

- The need for the strategy to be orientated towards achieving outcomes. These may be long or short term but the Commission must not give the impression that it is simply ‘interested’ in an issue without really knowing what it is going to do about it. The Commission must carefully consider how it will use its powers to further the aims of its strategy
- The need for the strategy to demonstrate both independence and responsiveness. It should be developed after discussion with a wide range of groups to ascertain their concerns, but should remain the Commission’s policy, even if others disagree with it.
- In addition there is a need for a Commission to reflect regularly on its strategy, especially in response to challenging events.

**Formal Strategy: Devising a Strategic Plan**

For many organisations the means of responding to these issues is to devise a strategic plan covering a number of years, supported by a business plan which indicates how the organisations resources will be used each year to advance the objectives of the strategic plan. The NIHRC has gone down this route and produced a number of plans. It first produced a draft strategic plan in September 1999. This was superseded, after wide consultation, by a more extensive first strategic plan in May 2000. A second strategic plan was issued in March 2003, to cover the period 2003-6.

The initial draft strategic plan set out a broad commitment to address manifest abuses of human rights, promote a human rights culture and prioritise the ‘most affected and marginalised groups in Northern Ireland’. In addition to stressing its work on the Bill of Rights, human rights education and the rights of victims, it picked out five groups in respect of which the Commission was especially anxious to work. These were children, people with a disability, the elderly, ex-prisoners and persons discriminated against on the grounds of sexual orientation. In respect of some of these groups there were very clear plans of action. For example in respect of those discriminated against on grounds of sexual orientation the Commission committed itself to conducting a comprehensive review of law and practice during 2000. In respect of others the way forward was much less clear, in respect of ex-prisoners for example, there was simply a general commitment to work closely with other organisations in the field.

When it came to producing the first strategic plan however most of these more specific commitments were dropped in favour of a more procedural tone, one that focused more on the Commission’s powers and how they would exercise them. The plan acknowledged that ‘given that we have limited money and time at our disposal we have to target our work carefully and systematically’. It maintained a desire to ‘assist the most affected and marginalised groups in Northern Ireland’ and listed 15 questions it regarded as relevant when choosing between strategic options. Drawing upon the consultation to the plan four of these questions were identified as the most significant, namely

- Is the issue a human rights issue?
- Is the issue one on which an internationally accepted rule or principle exists?
- Would working on the issue contribute to the creation of a culture of human rights?

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1 In this field it was essential that the NIHRC worked closely with the Equality Commission given the overlap in their remits.
Does the Commission have [those] resources at its disposal?3 These still leave the Commission with a fair amount of discretion for if the issue is a human rights one it is likely that a human rights principle will exist on it and that working on it will contribute to the rather general notion of ‘creating a human rights culture’. This leaves only the issue of resources, whose allocation is what the strategy is supposed to help one to decide. Given that the plan also indicated the Commission’s belief that ‘it is more important to work on issues which we have been asked to work on than those which simply appear to us to be required to be worked on’4 this was always likely to leave it vulnerable to a wide range of requests for action. The rest of the strategic plan does little to narrow this focus as it is primarily a description of the Commission’s powers with a discussion of the procedures for utilising them. Only in respect of the heading of ‘Keeping Law and Practice Under Review’ are any specific commitments given.5 As Jane Winter of British Irish Rights Watch commented of the plan ‘It does list a whole number of areas that it is interested in but in a sense that looks more like a wish list than a focused set of priorities’6

Given its breadth the impact of the first strategic plan on the Commission’s work is difficult to assess. The three specific reviews were done by 2003 and the Commission has continued to work on the areas set out in the plan. However apart from progressing the Bill of Rights (to what extent is to be discussed further below) and producing its review on effectiveness it is difficult to see that the things the Commission spent most of its time on in 2000-3 resulted from the strategic plan. The Commission appeared to accept that the first plan was too broad in character and produced a differently structured second strategic plan.7 This offered four overall aims, namely

- Delivering a Bill of Rights for Northern Ireland
- Identifying and Addressing Human Rights Violations
- Promoting Understanding and Awareness of Human Rights
- Increasing the Effectiveness of the Commission

Under each of these aims are between 7 and 16 objectives, supported by between 7 and 12 performance indicators each. The second strategic plan clearly marks an advance over the first in terms of clarifying the NIHRC’s priorities and setting out what it is seeking to achieve. The overriding priority of the Bill of Rights, which appeared implicit in a lot of the Commission’s work 2000-2002, is made explicit. There is greater clarity on whom education is to be targeted at and what sorts of things research, casework and education are to be focused on. Issues of the Commission’s own internal organisation and the efficiency of its service delivery are highlighted and discussed. Overall while both the first strategic plan and, to an even greater extent, the draft strategic plan emphasised research and policy formulation the second strategic plan places a greater stress on influencing others, monitoring outcomes and producing change. Its Business Plan 2004-5, produced in May 2004, aims to reflect a ‘sharper focus on key areas of human rights violations and on moving the organisation to a new level of effectiveness’.8

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3 Ibid, at pp.16-17.
5 To produce reviews of laws, policies and practices on the rights of victims of violence, the rights of older persons and the rights of persons discriminated against on the basis of their sexual orientation or sexuality. These were three of the six groups mentioned in the draft strategic plan. Commitments on people with disabilities are dropped, perhaps because the Equality Commission had by this time gained enforcement powers in this area, but so are those on children and ex-prisoners.
6 Interview with Jane Winter, British Irish Rights Watch, 13 November 2002.
However, both the Strategic and Business Plans are still arguably too broad, even for an organisation whose resources are set to increase. Most of the commitments that the Commission had prior to 2002 remain and some new ones, such as work on medical negligence and the right to a fair hearing are added. In respect of some of the work which is not given such a prominent focus, such as those discriminated against on grounds of sexual orientation, it is unclear whether the Commission has decided these are no longer problems or has simply moved them into the category of activities where its recommendations have been made and it will now simply seek to implement them.\(^9\) Relatively little evidence is offered for why the Commission focuses on some of the things it does. For example, in relation to the second topic of ‘Identifying and Addressing Human Rights Violations’ the Commission indicates that its work will focus especially on five rights protected under the ECHR, namely the right to life, protection against torture, right to a fair hearing, right not to be discriminated against and right to education. The NIHRC indicates that it ‘feels that the interests represented by these rights are the ones which most need to be secured at the present time in Northern Ireland’. No further explanation is given for this approach. It remains unclear exactly what the Commission will do in respect of some of the matters it highlights. Although the Business Plan 2004-5 is more specific on some of the issues, setting out specific targets for each of the Strategic Plan’s objectives, it does not do this for all of them. So, for example, the Strategic Plan indicates that the Commission will ‘work on the prevention and investigation of torture and inhuman or degrading treatment and punishment perpetrated by state and non-state bodies’. The Business Plan provides no further detail. Violations of human rights by non-state actors pose dilemmas for human rights organisations. Whereas some NHRI and NGOs follow the traditional route of concentrating on the state’s responsibility for upholding human rights, others are willing to consider violations by non-state actors. This raises difficult issues such as the breadth of who may be included within the term ‘non-state actors’ (violent partners, paramilitary organisations, multinational companies, private employers, etc.) and how to work with and address the issue of paramilitary groups, who may often be illegal organisations. The issue of what the NIHRC should be doing on the actions of non-state bodies has been a contentious issue within the Commission since its outset, yet this statement in their Strategic Plan offers little by way of indication how this will be taken forward. Finally it is not clear how this Strategic Plan will be taken forward and whether it will guide the NIHRC’s future actions. As we shall see below a complaint of some, both within and without the Commission, was that the 1999-2002 Plan was not followed to any great degree. The Commission’s minutes since the plan was adopted do not indicate whether any reports are given on the progress in implementing it,\(^10\) though in truth many of these meetings have been largely taken up with responding to external criticism of the Commission.

It is not only the NIHRC that has had difficulty formulating a clear strategic plan. The South African Commission has also been criticised for failing to develop a set of priorities as opposed to reflecting the diverse views of individual Commissioners. As one NGO representative we interviewed commented, the Commission ‘is a motley crew…depending on the personality and background of the individual concerned they would ride their hobby horse and the collective hobby horses somehow make up the Commission’s work’. The SAHRC had a rather less formal process for identifying its strategic priorities with a Statement emerging from a 1997 conference of academics, civil servants, lawyers and NGO activists

\(^9\) In respect of victims, as will be discussed in Chapter 4, the NIHRC’s work to date is well short of offering clear recommendations for change. However some of this may well be pursued in work promised in the 2003-6 plan on victims of breaches of Articles 2 and 3 of the ECHR. Note Northern Human Rights and Victims of Violence, Northern Ireland Human Rights Commission, July 2003.

\(^10\) Although it is apparent that the reports are discussed at planning meetings of the Commission. In September 2004 Commissioners and staff met to discuss progress on the Strategic Plan.
playing an important role. This set out six priority areas but, as with the NIHRC, it has been argued that the South African Commission has not maintained its focus on its declared priorities and instead has devoted a predominance of its resources to the single issue of racism. However it does not appear that the debate over what to prioritise had quite the same divisive effect within the South African Commission as in Northern Ireland. To this we now turn.

Informal Strategy: responding to events

The NIHRC spent a long time over developing its initial strategic plan in particular, with discussions on its content occupying the best part of a year. However, as noted above, it is unclear what influence this first strategic plan exercised on what the Commission actually did for most of the 1999-2002 period. One reason for this was, as already discussed, the fact that the plan was broad and contained few specifics. In respect of powers such as casework, investigation or education it did not really give much of an indication as to what the Commission was to focus on, still less an idea of how the use of these powers was to be co-ordinated towards any strategic end. Another was that by the time the plan was finally adopted the Commission had already been operating for over a year and already significant differences of opinion had emerged as to what matters it should be prioritising. The plan did not resolve these differences and indeed its broad character symbolised their postponement and the lack of influence the planning process had on them. One former Commissioner observed ‘the strategic plan increasingly turned into everything, that we would do everything with no clear notion for how you prioritise’. Another Commissioner stated ‘certainly I’m not sure we actually adhered to it in terms of the initial operation of the Commission’.

According to several Commissioners the point where these divisions first appeared to arise was in the third Commission meeting on 22 March 1999 when the Chief Commissioner tabled, under Any Other Business, a draft press release, condemning a loyalist ‘punishment beating’ of a 13 year old boy in Newtownards. Although a press release on the murder of human rights lawyer Rosemary Nelson by loyalist paramilitaries several days after the Commission became operative had been approved without much debate, this proposal ran into significant opposition within the Commission as several Commissioners questioned whether such a position was consistent with the Commission’s commitment to draw on international human rights standards as the basis of its work. There has been a long debate, both within Northern Ireland and internationally, as to whether human rights institutions (both NHRIs and NGOs) should limit themselves to work on state action or should also look at whether the actions of others, such as businesses or armed opposition groups, infringe human rights. Increasingly international human rights NGOs and even some national groups have begun to move in this direction, with many drawing on international humanitarian law standards to

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13 Interview with Commissioner, 4 April 2003.
14 Interview with Christine Bell, former Commissioner, 16 May 2003.
15 Interview with Paddy Kelly, then Commissioner, 1 April 2003. However, the Commission wished to stress that neither Christine Bell nor Paddy Kelly registered dissent when the Plan was discussed at Commission meetings and decisions on the Strategic Plan and Business Plans were adopted by consensus.
16 Commission Minutes, 3rd Commission meeting, 22 March 1999, point 3.6.
scrutinise the actions of armed opposition groups.\textsuperscript{18} However in Northern Ireland the main human rights NGO, the Committee on the Administration of Justice (CAJ), had consistently decided against working on non-state abuses of human rights.\textsuperscript{19} Several of those associated with CAJ were now members of the Commission and immediately displayed discomfort with the Commission apparently being ‘bounced’ into a position antithetical to that they had previously held. The response to this initial dispute also set the tone for how the Commission would attempt to resolve such differences. Different Commissioners agreed to produce papers on the topic and it also seems to have been suggested that the victims committee would look at the issue. However discussion on the topic kept being adjourned, either because the papers were not ready or an agenda was too full. Eventually on 11 May 2001, nearly two years after the issue first arose, the Commission did issue a press statement on non-state abuses which called for a more co-ordinated approach to respond to punishment beatings. Even then the matter was again remitted to the victims committee, which has yet to devise a clear strategy on the issue. For the last two years Commission Annual Reports have indicated that the NIHRC is ‘monitoring’ community restorative justice schemes but without indicating any conclusions regarding them.\textsuperscript{20} More recently, however, the Commission appears to have been willing to state that ‘punishment attacks’ are violations of human rights.\textsuperscript{21}

Although it was the catalyst non-state abuses was only to prove one of a number of issues on which divisions arose within the Commission. Another was parades, where some Commissioners were more interested in monitoring the situation than others and where the Commission’s initial decision to launch an investigation into the issue became downgraded to a research report on international human rights standards, which was eventually issued under the researchers’ names and not in the name of the Commission.\textsuperscript{22} The Commission also struggled to obtain a clear position on how to deal with inquests and threats to lawyers.\textsuperscript{23} Perhaps the most significant divisions arose over issues of both process and substance regarding the Bill of Rights, which will be discussed more fully in Chapter 4. The Commission did not really begin discussing the Bill of Rights until six months after it was established and then launched its consultation in March 2000 without any clear consensus within the Commission as to how it would be taken forward or what it would contain. The lack of consensus on these issues became more pronounced as the Bill of Rights process progressed.

Differences of opinion among Commissioners undoubtedly made some contribution to these divisions. One Commissioner observed that people were ‘not prepared to give up their pet

\textsuperscript{18} At the 7\textsuperscript{th} International Conference for National Human Rights Institutions there was discussion and agreement amongst institutions for the need for work on non-state abuses.

\textsuperscript{19} For more explanation of CAJ’s rationale see K McEvoy, ‘Beyond the Metaphor: Political Violence, Human Rights and New Peace Making Criminology’,\textsuperscript{7} (3)\textsuperscript{ Theoretical Criminology} (2003) 319-346.

\textsuperscript{20} Such schemes have been established to provide a non-violent form of local or community justice. One of their objectives is to provide an alternative to both the formal criminal justice system and violent forms of local justice, such as punishment beatings. Their operation and, in particular, the involvement of those connected to republican and loyalist paramilitary groups in the administration of such schemes, has been a matter of considerable public debate. See Review of the Criminal Justice System in Northern Ireland, 2000, p.189. The Commission has organised a number of meetings to discuss punishment attacks and published a report into Victims Rights in July 2003. For a fuller discussion of the background and issues raised, see K McEvoy and H Mika, ‘Restorative Justice and the Critique of Informalism in Northern Ireland’, 43(3)\textsuperscript{ British Journal of Criminology} (2002) 534-563.


\textsuperscript{22} Commission minutes of the 56\textsuperscript{th} meeting on 11 August 2003 also reveal uncertainty as to how to respond to the Quigley report on parades.

\textsuperscript{23} Work on inquests was delayed by lack of resources, with the NIO initially turning down a supplementary bid to fund this work. The Commission did not, for example, endorse calls for a public inquiry into the murder of solicitor Pat Finucane until May 2000 or Rosemary Nelson until May 2002.
Arguably the differences over particular issues reflected the broader divisions we discussed in Chapter 2 over what the most important human rights issues in Northern Ireland were and what the appropriate role of a Human Rights Commission is. Some of those on the Commission appear to have wanted to prioritise issues of state violations of human rights. These were the issues previously stressed by local NGOs such as CAJ and British Irish Rights Watch as well as most of the international human rights NGOs that have worked on Northern Ireland. This included special courts, mistreatment in custody, police violence, collusion between the security forces and non-state forces and discrimination. They felt that these were key human rights issues and that the Commission should pursue them even if it ran into significant political opposition from unionists. Others felt there was a need to broaden the Commission’s agenda to consider non-state actors and to focus on how human rights could be promoted in a divided society. At an early stage in the Commission’s life Chief Commissioner Brice Dickson indicated that he would not mind if it became known as a ‘Better Society Commission’ as opposed to a Human Rights Commission. Another Commissioner indicated to us, in respect of whether the Commission itself had any responsibility to respond to Unionist concerns about lack of representativity, that

‘There were a number of issues on which it was quite clear to me that the Commission wasn’t, in its early stages, terribly balanced. I made suggestions that it would be a good idea to have a little bit greater balance’.26

Given that, as we have discussed in Chapter 2, in Northern Ireland nationalists were critical of the British state and abuses by the state, and unionists were supportive of the state and generally critical of any opposition to the state, it would be tempting to look at the divisions in the Commission around the state v non-state issue as essentially sectarian. Tempting but far too simplistic. For a start it is not suggested that either of these views were advanced by people because they thought they would advance the interests only of unionists or nationalists in Northern Ireland, they were advanced as different views of what the key human rights were and what the role of a human rights commission was for all of the people of Northern Ireland. Secondly, to describe certain views as ‘sectarian’ is often to suggest that there is an entirely neutral and non-sectarian position that people have chosen not to espouse. However in a deeply divided society such as Northern Ireland such an assumption is questionable. Rather it may be that all views on such complex and controversial issues as human rights are shaped by peoples’ backgrounds and experiences. Thirdly each approach clearly had significant merits. Those who wished to concentrate primarily on investigating and challenging state violations could argue that this was the classic function of a National Human Rights Institution and that this function was different from a body concerned with promoting good community relations. Moreover even if stressing this role would incur the wrath of one section of the community the Commission would generally be able to invoke well established international human rights standards to justify its work, standards that were open to all. Against this view those who felt there was a greater need for ‘balance’ and listening to unionist concerns could argue that this was a new institution designed to make human rights relevant to all sections of the community. In addition this was not a NHRI established to respond to a period of government oppression or to advance the concerns of excluded minorities in a stable society but rather one set up in a divided society post conflict. In these circumstances both the role of NHRIs and the content of relevant international standards was developing, the NIHRC should not be too confined by models designed with other types of society in mind.

If, as we have suggested above, the divisions in the Commission mirrored broader divisions in Northern Ireland it may be suggested that it was hardly surprising that Commissioners were unable to reach agreement on their overall vision in relation to such contentious issues.

24 Interview with Christine Bell, former Commissioner, 16 May 2003.
25 ‘Can people-power get the better of politics?’ Independent, 14 September 1999.
26 Interview with Commissioner, 30 May 2003.
However we are not so sure that the initial position was as bleak as it subsequently came to appear. Whatever the concerns as to their representativeness it was generally agreed that the initial Commissioners were all people of integrity with a strong commitment to advancing the human rights of all in Northern Ireland. It might have been hoped that they would be able collectively to find a way through these difficulties and produce a unified vision for the Commission. However it is unclear whether the problems were ever fully addressed. While the Chief Commissioner indicated to us his belief that the Commission had debated long and hard to reach consensus positions others disagreed. For example one former Commissioner observed

‘In a sense there was never, ever a serious discussion of what we consider the purpose of the Human Rights Commission to be’. 27

As noted earlier more than one Commissioner has indicated that the manner of introducing difficult issues, namely without sufficient space to debate them, notably the Commission’s position on non-state abuses, did little to facilitate considered debate as opposed to taking to the barricades. This broadened into a concern that the Chief Commissioner did not always play the role of chair of these debates as well as he might have, as opposed to being a protagonist in them. It was suggested to us that on one occasion he prolonged debate on a matter agreed on by the rest of the Commission while on others he either scheduled issues too low on the agenda to enjoy proper debate or subsequently disregarded agreed positions of the Commission. 28

These issues raise again the ambiguity in the role of Chief Commissioner we discussed in Chapter 2 and will explore further later in this chapter. Although not fully raised in the interviews we conducted we suspect that the fear of being accused of sectarianism inhibited genuine debate as it does in many public institutions in a divided society such as Northern Ireland. As noted earlier in this section the charge of sectarianism gains its force from the assumption that there is always an alternative ‘neutral’ position. Yet each protagonist in a debate will assume that their position is the ‘neutral’ one, hence claiming that the other is influenced by sectarianism while being indignant that any claims that their own position is influenced by their background or sympathies. Such an environment is hardly conducive to an honest exploration of the different perceptions people have of what human rights are and what role they play in our society and people often prefer evasion to beginning down that path. It is no surprise that the Commission appears to have found it easier to agree to support work in areas unrelated to the application of human rights to the political conflict in Northern Ireland, such as in relation to the elderly and the mentally ill. This is valuable work, indeed it may ultimately turn out to be the most valuable work the Commission does. However, as one of the authors of this study commented when the Commission was established, even this work may not have the influence it should if the NIHRC does not gain authority through the work it does on the most politically sensitive topics. 29

Whatever the reasons it appears to us that the NIHRC was not, as a corporate body, able to get beyond the ‘storming’ stage in the first few years of its existence. 30 Instead there appears to have been allegations of bad faith, 31 an increasing emphasis on proceduralism 32 and extensive leaking of divisions within the Commission to those outside, including political parties and governments. At times the lack of trust seems to have paralysed the Commission

27 Interview with former Commissioner, 16 May 2003. Although the Commission claims that there was the opportunity to raise such concerns at away days and other meetings.
28 Interview with former Commissioner, 16 May 2003.
31 Interview with former Commissioner, 16 May 2003.
32 The minutes of the 9th Commission meeting on 9 September 1999, for example, disclose extensive discussion of minutes of previous meetings and concern by the Chief Commissioner that he has to obtain the agreement of all Commissioners before making a statement.
and these divisions contributed significantly to the resignations, which we will consider later in this chapter. Although the Commission did identify some topics which might be ideal for working through these debates, notably victims and the Bill of Rights, we shall see in Chapter 4 that they have not proved as fruitful as might have been hoped. These problems were already in existence well before the Holy Cross dispute, which we discuss later in this chapter, but were to become much more visible when this erupted.

Once again these problems are not unique to the Northern Irish Commission. Former Chair of the South African Commission, Barney Pityana, has written that ‘As a commission we have struggled among ourselves about constructing a common vision and acting together on it…there have been times where the point of difference has not been about our political allegiances but about strategies to be adopted’. 33 The SAHRC too has experienced a number of resignations over issues of policy, with those who have resigned being highly critical of the remaining Commissioners. 34

Organisation and Staffing

Role of Commissioners

The Commission operates through monthly Commission plenary meetings and through a number of committees. Initially it established four committees, on Legislation and Policy, Education and Research, Investigations and Casework. A number of working groups were also established and some of these, such as the working groups on the Bill of Rights and on Victims, subsequently became full Commission committees. A Finance and General Purposes Committee was also established at a later stage. In September 2003, in response to one of the internal reviews of the Commission, it was decided to reduce the number of committees to just two, Finance and General Purposes and Casework, with a larger number of working groups supporting the Commission’s other functions. However, in December 2003 it was agreed that the Legislation and Policy Committee should continue and that the committees be reviewed in April 2004. In April 2004 a committee with responsibility for research and education was established and it was also agreed that experts should be co-opted onto the Working Groups or Committees as advisers. 35 At present there are four committees in existence, 36 and a number of working groups, some ad hoc, and others more permanent. 37 Thus, whereas internal reviews of the NIHRC had expressed concern over the number of committees that appears to have put a strain on Commissioners’ participation, the responding reduction of the number of committees appears now to have been reversed. Whereas attendance at plenary Commission meetings has generally been good, with Commissioners sometimes attending by phone if they were unable to be there in person, concern has been expressed at times about the inability of committees to meet due to the lack of a quorum, even though this is only three Commissioners as opposed to six for the plenary. 38

34 See R Khadalie, ‘Defy Barney’s Thought Police’, Mail and Guardian, 18 February, 2000. Rhoda Khadalie resigned from the Commission over concerns about its management and subsequently criticised the decision to conduct an investigation into racism in the media.
35 Minutes of Commission’s 63rd meeting, April 2004, paras 8.9 and 8.10. It is not clear the extent to which this has actually been done.
36 Finance and General Purposes, Casework, Research and Education, Equality.
37 There are working groups on Victims’ Rights, Policing and Criminal Justice, Articles 2 and 3, the Single Equality Bill and crisis intervention. Two others, on communication strategy and the Courtney report, are no longer sitting.
38 For example Commission minutes for 10 September 2001 indicate that a number of committee meetings have been deferred for lack of a quorum and those on 24 May 2002 indicate that it was agreed the Chief Commissioner should talk to other Commissioners regarding attendance at Commission meetings. Following a number of resignations and withdrawals, with no new Commissioners having
As noted in Chapter 1, each meeting should have clear outcomes and goals. The minutes of
the plenary meetings, which the Commission has placed on its website, reveal discussion of a
wide range of topics. Most of this is, as one would expect concerned with issues of
establishing the Commission’s policy on a number of issues. However a significant amount of
time also appears to be devoted to revising minutes of previous Commission meetings and
receiving reports back on meetings or correspondence. The minutes indicate, as
Commissioners have confirmed to us in interviews, that the Commission has struggled to get
through the long agendas prepared for each meeting. This has become even more true since
the summer of 2001 as more time has been devoted to internal issues of Commission
procedure, notably around casework, and responding to external criticism. On a number of
occasions the Commission has had to postpone and reconvene meetings to cover the full
agenda, even though it revised its Standing Orders in November 2002 to allow decisions to be
made by ‘sufficient’ consensus despite the disagreement of up to two Commissioners. It is
interesting to note that, although the Commission has done work on a broad range of human
rights issues, most of the discussion at NIHRC meetings appears to have focused on issues
directly related to the political conflict in Northern Ireland, such as non-state abuses, parades,
inquiries into allegations of collusion, victims and the Bill of Rights. As noted above these
appear to be the matters on which the Commission is most divided and where it has had most
difficulty reaching agreement, often deferring the matter from one meeting to the next.

At many meetings discussion on contentious issues has focused on papers, sometimes
competing papers, drafted by Commissioners themselves. While this might have been
inevitable in the early days of the Commission, when it had few staff, and does allow the
Commission to draw upon the expertise of Commissioners it also has a number of
disadvantages. Firstly, apart from the Chief Commissioner, Commissioners are part time
appointments with a range of other commitments. Although some Commissioners often
volunteer to write papers, it is asking a lot if they are expected to produce things like detailed
Commission policy papers, indeed delays on occasion in producing Commission papers no
doubt was due in part to this. Secondly it is staff who most members of the public will meet
and hence it is important that they are fully involved in the development of the Commission’s
work. Thirdly, and specifically relating to some of the divisions in the Commission, the fact
that policy papers come forward for discussion from staff rather than particular
Commissioners may lead to them being considered more objectively by all Commissioners.

The focus of Commission meetings around papers produced by Commissioners also tends to
reinforce the overly academic character of the Commission’s work that a number of observers
have commented to us on. While Commission meetings are the appropriate place for the
formulation of the Commission’s policy and one would expect a fair amount of time to be
devoted to debating and formulating this, they are also a place for reporting back on the
implementation of agreed policy and evaluating its impact. It is important that there are
specific meetings on the Strategic Plan and other policy documents. However there is little
indication from the minutes of Commission meetings that, for example, the Commission has
examined the extent to which objectives set out in its Strategic Plan have been realised. The
committees, organised around the NIHRC’s functions, might have been a place for doing this

been appointed, the Commission agreed to reduce the number needed for a quorum at plenary
Commission meetings to five. Since the expiry of Harold Good and Frank McGuinness’ terms on 28
February 2004, the quorum is now four.

39 Although the present Commission claims that the tendency to argue over minutes was particularly
prevalent when Inez McCormack and Paddy Kelly were Commissioners and since their resignations
the minutes have been agreed more easily.

40 For example the Commission debated for nearly a year the issue of whether to call for a judicial
inquiry in the case of the murder of solicitor Rosemary Nelson, while waiting for two Commissioners
to produce papers on the issue, before agreeing to this in May 2002.

41 Although the Commission met in September 2004 to discuss the Strategic Plan, see above.
but as noted earlier there have been some problems with arranging meetings of these and discussion of their activities appear to come at the end of the Commission’s agenda, sometimes not being reached before the conclusion of a meeting.

**Role of the Chief Commissioner**

In its report on the effectiveness of NHRIs the International Council on Human Rights Policy observed that ‘National institutions stand or fall by the quality of their personnel – especially those at the top’.42 While, as our research indicates, the effectiveness of a NHRI is not solely determined by the Chief Commissioner, given the structure of the NIHRC, with only one full time Chief Commissioner supported by a number of part time Commissioners, a lot would turn on this individual’s performance. The burden on the Chief Commissioner was even greater at the outset of the Commission, when it had very few staff. If the Commission was to obtain the high profile it wished to from the start this would be largely down to the efforts of the Chief Commissioner. Almost all of those we spoke to indicated that the NIHRC’s first Chief Commissioner, Professor Brice Dickson, had risen impressively to this challenge. The Chief Commissioner received consistent praise for his accessibility, commitment and industry. Many of the statutory and civil society organisations we spoke to indicated that their primary contact with the NIHRC had been with the Chief Commissioner, as did most of the journalists. The high standing internationally of the NIHRC is also in part due to the industry of the Chief Commissioner, who has attended a number of gatherings of NHRIs in different parts of the world. However, as already discussed, there were some within the Commission who felt that the Chief Commissioner had done less well when it came to chairing the Commission and ensuring that an agreed corporate view was reached on issues. There are indications that it has not been an easy body to chair, one Commissioner observing that

‘you have a whole pack of wannabe Chief Commissioners in the Commission who could probably do it much better than he could and probably would be saying it’.43

While Commissioners themselves also have responsibility to work towards achieving a corporate view, in so far as one of the key tasks of the Chief Commissioner is to chair the Commission it remains primarily his or her responsibility to ensure that this collective vision is arrived at. It has been suggested to us that the Chief Commissioner has struggled to achieve this, especially when dealing with particularly sharp divisions in the Commission, as he has been closely identified with the advocacy of one position or another, notably in respect of non-state abuses and some of the provisions of the Bill of Rights.44 Others, outside the NIHRC, have questioned whether the Chief Commissioner has underestimated the political dimension of the role, something which has contributed to a number of strategic errors to be discussed below and which has allowed the Commission to be sidelined by government.45

The role of Chief Commissioner of the NIHRC, especially set up the way it is and in the context in which it operates is a tall order. As David Stevens of the Irish Council of Churches commented ‘I think it requires skills of a very high order and there are not too many people

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43 Interview with Christine Eames, Commissioner, 1 April 2003. Another Commissioner also observed that she was ‘shocked’ by the way the Chief Commissioner was treated by some Commissioners and added that he was ‘very patient and tolerant’.

44 As one former Commissioner said to us regarding one debate at a meeting of the Commission, ‘Now that went on for an hour at least and he was the only person at that meeting who took the position that he took’, interview with former Commissioner, 16 May 2003.

45 For example, although the NIHRC has sought help from the UN High Commissioner on Human Rights with regard to increasing its powers and functions there is little evidence of efforts to lobby politicians at Westminster, still less influential Irish-American politicians, to support the NIHRC’s efforts on these issues.
around with these’.\textsuperscript{46} Given the pressures imposed on a single person occupying this role it might be wise to revisit some of the issues discussed in Chapter 2 and consider whether there should be more than one full time Commissioner or at least a role for a Deputy Chief Commissioner. Such a person might take some of the administrative burden from the Chief Commissioner (such as responding to requests for talks or chairing some of the Commission’s key committees) allowing the Chief Commissioner to devote more time and energy to strategic issues. They might also be able on occasions to chair the Commission when divisions arise and the Chief Commissioner desires the freedom to advance a particular argument.\textsuperscript{47} At such times there may be a conflict between the Chief Commissioner’s role of providing leadership and being the public face of the Commission and their role of chairing the Commission and seeking consensus. Concern that the chair of the Commission is not necessarily advancing the agenda of the whole Commission as opposed to their own view has arisen in South Africa too, especially during the period of Barney Pityana’s chairmanship. However there the presence of a group of full time Commissioners does appear to have contributed to a more collective style of leadership and ensured that the Chair can not run too far ahead of his or her colleagues.

**Commission Staff**

The same International Council on Human Rights Policy report, which stresses the importance of the leadership of the NHRI, also notes that often too much attention is paid to the commissioners and not enough to the staff.\textsuperscript{48} The opportunity to appoint its own staff, in line with the Paris Principles, was a significant gain for the NIHRC over the experience of SACHR but the formalities of making appointments meant that it took some time to get staff in place.\textsuperscript{49} Before this was done the Commission had already organised itself into a number of committees, based largely around its functions and the priority issues identified in the draft strategic plan. The initial scheme for staffing largely tracked this committee structure with staff being appointed to deal with casework, education, investigations, legislation and policy, a development worker for the Bill of Rights and a number of administrative staff. Rational though this initial structure may have been it must be asked if the initial idea of appointing a staff member per committee has given rise to some uncertainty as to whether the role of staff members was essentially limited to providing administrative support to the committee, which then would be doing most of the work of the Commission, or whether it was staff who would be developing the Commission’s work, in line with policy developed by Commissioners. Some of the Commissioners’ actions seemed to incline towards the former, such as the initial decision not to allow staff to attend Commission meetings and the fact that Commissioners have regularly taken on the task of writing policy papers for both full Commission and committee discussion. While this might have been inevitable at the outset when few staff had been appointed it is undesirable that it continued for a number of reasons. As time has gone on and as staff have gained greater experience in their posts it does appear that they have taken a greater role in developing the work of the Commission and there appears to be greater clarity about the respective roles of Commissioners and staff. This may be less of a problem in the future. The issue has also arisen in South Africa where there has been disagreement as

\textsuperscript{46} Interview with David Stevens, former General Secretary Irish Council of Churches, 14 November 2002.

\textsuperscript{47} One of the NIHRC’s former Commissioners has indicated that they proposed rotating the chair of Commission meetings when difficult issues came up for consideration but said this was rejected by the Chief Commissioner. The Chief Commissioner in response stated to us that the Commissioner’s suggestion did not gain sufficient support among other members of the Commission.


\textsuperscript{49} The Commission initially had the support of two staff members who had been employed by SACHR until it was able to appoint its own staff. Formally paragraph 4(1) of Schedule 7 to the NIA 1998 indicates that the number of staff and terms on which they are appointed is subject to the approval of the Secretary of State. It does not appear that in practice this requirement has been a major difficulty but the Commission recommended its removal in its review of effectiveness and the NIO indicated in its May 2002 response that it was ‘content’ to remove this requirement.
to whether a Commissioner should be, in the words of one former Commissioner, a ‘boots-on Commissioner’ operating in the field or someone who supervises the work of staff.

Initially the NIHRC operated without a Chief Executive, with Commissioners apparently believing that the Chief Commissioner could execute most of the staff management functions as well as leading and promoting the Commission. The Commission subsequently came to realise this was asking too much of the Chief Commissioner, especially at the start of the organisation’s life and decided to appoint a Chief Executive. This has contributed to a smoother organisation for the Commission but the delay was clearly unfortunate. It meant in particular that the Chief Executive had no input into the initial structure and staffing design of the NIHRC, something where the experience of a senior administrator would clearly have been valuable. As one Commissioner observed it was a ‘fundamental mistake’ not to appoint a Chief Executive earlier.

Since its original design the staffing structure has changed with the appointment of an information officer and more recently three new management posts. The lack of an information officer was an important omission for an organisation which was always likely to have a significant relationship with the media and may reflect concerns raised earlier that difficulties in deciding what the Commission was going to do meant that it did not really get round to deciding how it was going to do it. The appointment of an information officer was supposed to be accompanied by the development of a communication strategy but this has yet to emerge, in part due to funding difficulties. As noted in Chapter Five responding to press inquiries remains the task of the Chief Commissioner and Chief Executive rather than the Information Officer. It is significant that those journalists we interviewed for this project still largely saw direct contact with the Chief Commissioner, rather than anyone else within the Commission, as their main source of information about the Commission’s activities.

The Commission’s structure appears to have worked better in some areas than others. In respect of investigations and research, education and legislative advice it has appeared to have made good use of outside consultants to supplement its own resources, though at times this can inhibit the development of expertise within the Commission. On the other hand as regards casework and the Bill of Rights it has appeared stretched to respond to the demands placed on it. In nearly all of its work it has been driven to rely significantly on the efforts of interns and short-term staff, some of whom have been excellent but which is not an ideal situation for such key areas of the Commission’s work. With the Commission’s budget having risen there may be an opportunity to revisit the staffing patterns and draw upon experience accumulated as to where particular needs exist, consistent with the overall strategic objectives. This should certainly mean more staff to deal with casework and may also require more staff to work on the Bill of Rights, if this is to remain a central aspect of the Commission’s work. It may also mean more staff at a senior level, to relieve the Chief Executive of the responsibility of line managing all staff and enable her to play a greater role in co-ordinating the different activities of the Commission to achieve its strategic aims. Indeed the Commission committed itself in its Action Plan of October 2003 to appointing three senior managers. Three new management posts, Head of Corporate Services, Head of Legal Services, Research and Policy and Head of Information, Education and Development, were advertised and discussed by the Commission in June 2004. These individuals have now been appointed.

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50 Interview with Frank McGuinness, 4 April 2003. The Chief Commissioner in his interview also felt that this was a mistake.
51 See below.
52 Morrow Communications were appointed in December 2003 to produce a strategy by March 2004. The strategy was received by the Commission in May 2004 and it is in the process of being discussed.
53 Minutes of 65th Meeting of the Commission, June 2004, para 5.1.1.
54 Mr Don Leeson, started on 4 October 2004; Mr Ciarán Ó Maoláin, started on 1 October 2004; and Mr Peter O’Neill, started on 8 November 2004, respectively.
The NIHRC has recognised the need to review the way in which it is organised and staffed. The two reviews it has initiated, by Peter Hosking and Roger Courtney, have concentrated primarily on issues of internal organisation. Hosking’s review highlighted several of the issues raised above, such as the lack of a media strategy, the autonomy of committees and the need for greater clarity in the respective roles of Commissioners and staff. Hosking also recognised the need for increasing the staff resources in certain areas. However interviews with Commissioners revealed a certain degree of dissatisfaction with this report. Staff were even more critical, arguing that Hosking did not adequately consult them before recommending changes to their roles. They appeared happier with Courtney’s review and the Commission devised a plan to give effect to this, supervised by a working group of Commissioners and staff. We have not been given access to the Courtney review, even though it was completed in March 2003 and its availability is referred to in the Commission’s action plan of October 2003. At its meeting in April 2004 the Commission’s minutes recorded that ‘The Commission has agreed to publish the recommendations and implementation report associated with the Courtney Review. The Chief Executive expressed concern that the implementation report contains a level of operational detail that is unnecessary and unusual to put into the public domain. Given some criticisms, however, Commissioners agreed that the report should be posted on the Commission’s website’. This has not yet happened. What information we have been able to glean from the Commission’s minutes suggests progress is slow, although the recommendations we understand to have been separated into those requiring immediate, three month and year implementation.

Responding to Crises: Holy Cross and Resignations

As indicated at the start of this Chapter one important test for a Commission is how it responds to crises. These may test the soundness and coherence of the strategic direction the Commission has chosen to follow. The Commission in its short existence has faced two major crises. The first concerns its response to protests at Holy Cross Girls School in June and September of 2001, the second the fall out from the resignation of a number of Commissioners.

**Holy Cross**

The Holy Cross dispute first surfaced in June 2001 but became significantly more intense in September 2001. Although the original cause of the dispute remains unclear it crystallised into a protest by Protestants from the Glenbryn area of North Belfast against the route taken by Catholic children and parents from Ardoyne to the Holy Cross Girls Primary School. The Protestant residents argued that Catholic children and parents could take another route to the back door of the school, which did not involve them passing through Glenbryn. Initially the police sought to deal with the problem by routing those attending Holy Cross away from Glenbryn but in September the then Chief Constable of the RUC decided to deploy officers in order to clear a path for the parents and children to enter by the front door. There then followed several weeks of extraordinary scenes, captured by the world’s media, where parents and children, flanked by riot police, ran a gauntlet of angry demonstrators who shouted and spat at them and on at least one occasion threw urine over those walking to the school. Pictures were flashed around the world of children crying as protestors screamed at them. The

55 A former New Zealand Human Rights Commissioner.
56 Minutes of the 63rd meeting, April 2004, para 3.3.4.
same scenes were repeated, with diminishing intensity, for much of that autumn before the protest was suspended after a number of political interventions promising greater security measures for Glenbryn residents against attacks from Ardoyne.\(^{58}\)

The Commission first discussed the issue in September 2001 and initially undertook an information gathering exercise, with Commissioners and staff visiting the area and talking to both Ardoyne parents and Glenbryn residents. On one of these occasions the Chief Commissioner was filmed being criticised by parents for refusing to walk all the way with them to the school.\(^{59}\) However the NIHRC then struggled to reach a clear position on what to do in response to this incident. Some Commissioners appear to have felt its role was simply to explain to all the rights and of all involved, including children, parents and protestors. Others clearly wanted to take a more proactive role and for the Commission to be seen as strongly endorsing the rights of children as paramount in this situation. The divisions are revealed in the minutes of the 8 October 2001 meeting where it is decided to redraft a press statement and also agreed that Commissioners should visit the area but in a private capacity. The press statement was duly issued on 12 October and stressed that while parents and residents had rights, it was totally unacceptable for children to be intimidated on their way to school. Six days later the Commission issued a further statement indicating that two Commissioners, Inez McCormack and Christine Bell, would visit the school and accompany children on their walk home. Over the next few days the Chief Commissioner and several other Commissioners visited the area at the times children were going or returning from school, though more in an observing than supporting capacity.

Discussion then shifted within the Commission to the issue of the policing of the demonstration and whether the police were doing enough to protect the children and parents from attacks on them. On 24 October the Casework Committee of the Commission called an emergency meeting to discuss whether the Commission should take a case in its own name against the police and/or Secretary of State that the event had not been policed properly. The Committee voted in favour of a case being taken, but felt that the Commission as a whole was the appropriate forum to decide the matter. The Commission sought legal advice from Michael Lavery QC and his opinion was debated, as part of a heated discussion among all members of the Commission, at a meeting on 26 October. In between these two meetings, however, on 25 October, the Commission met with the Chief Constable to discuss the policing issue.

Having decided not to take a case in its own name, the Commission decided on a number of other steps, including considering whether to support a case from a victim involved in the dispute. On 5 November the Commission’s Casework Committee was urgently convened after a request was received from solicitors Madden and Finucane\(^{60}\) to support a parent who wanted to take a case against the police. The Committee agreed to do so\(^{61}\) but at the full meeting of 12 November some Commissioners expressed concern about the decision of the Casework Committee. Shortly after this the Chief Commissioner agreed that Commissioners who wished to provide an affidavit in support of the parent’s application be allowed to do so. As the Chief Commissioner wished to rely on notes of the meeting with the Chief Constable on 25 October in his affidavit, the notes were made public on 19 November, despite the fact that consultations among members of the Commission on the suitability of doing so were yet to be concluded. The Chief Constable of the RUC telephoned the Chief Commissioner to express his concerns as to the Commission’s decision. The Chief Constable also expressed concerns that the Commission had chosen to support the case without informing him and that

\(^{58}\) See ‘Joy at school route peace’ \url{http://news.bbc.co.uk/1/hi/northern_ireland/1677082.stm} \\
\(^{59}\) He went part of the way but stopped to talk to protestors and the police. \\
\(^{60}\) Submitted the previous working day. \\
\(^{61}\) The Casework Committee had agreed to allow funding for a QC and Seamus Treacy was already involved in the case, the applicant having attached an opinion from him.
notes of the meeting had been released as evidence to support the applicant’s claim. This was reported to the Commission meeting on 26 November.

The Chief Commissioner wrote to the Chief Constable on 27 November and 4 December and indicated that at least three Commissioners were not happy with the decision to support the case, did not agree with Commissioners swearing affidavits on behalf of the applicant, and with sending the Commission’s notes of its meeting with the Chief Constable on 25 October 2001 to the High Court. Brice Dickson also added in the letter that he did not think the police action amounted to a breach of the Human Rights Act. This correspondence was criticised as a breach of confidentiality at the subsequent Commission meeting on 10 December 2001. In March 2002 the Chief Constable wrote to the Chief Commissioner asking the Commission to reconsider its funding of the case, and threatening to disclose Brice Dickson’s letter to him publicly in court in the event that funding was not withdrawn. Professor Dickson responded with a request that this matter not be disclosed until after a Commission meeting on 8 April, where he tabled an item on initially on ‘Chief Constable’s letter’ whereby he proposed to withdraw funding of the Holy Cross case on the grounds of expense. The Commission, after a heated discussion, deferred this on the grounds that it did not have a procedure for withdrawing support for cases already approved and subsequently did not return to it (although it did later develop criteria for review and withdrawal of funding). The correspondence between the Chief Commissioner and Chief Constable became public in April 2002 and received greater attention after the Joint Committee on Human Rights published its report on the Commission in July 2003, leading to a range of concerns being expressed about the Commission’s independence by political parties. These are discussed more fully in Chapter 5. The case was heard in September 2003 and judgement delivered on 16 June 2004. Drawing upon evidence presented by the Commissioners, the High Court of Northern Ireland held there had been no violation of Convention rights by the police. In some ways this was a disappointing judgement, the fact that it was lost having been attributed in part to the Chief Commissioner’s involvement, and it was criticised for failing to engage with the human rights principles in detail. Yet it is to be welcomed that in its statement that ‘the so-called protest directed towards the young children of Holy Cross school for girls is one of the most shameful and disgraceful episodes in the recent history of Northern Ireland’, the court on one view endorsed the Commission’s approach that children were the victims.

It is generally agreed, including by all Commissioners past and present, that the Commission’s involvement in the Holy Cross dispute proved a disaster for it. The most positive thing that can be said is that the Commission’s willingness to become involved in this very difficult issue displayed significant courage at a time when many other organisations decided it was safer to stay away. A positive engagement with Holy Cross might have considerably enhanced the NIHRC’s public presence and standing. However it was always difficult to see what a positive engagement might be for such a small organisation with limited resources in dealing with such a bitter and difficult dispute. In the event the Commission’s involvement seems only to have deepened internal divisions and damaged its relationship with both unionists and nationalists in Northern Ireland. Unionists felt the Commission had in the end sided with the nationalists demanding a right to walk (albeit for their children on their way to school) through a unionist area, including suing the police for failing to provide them with sufficient protection, and contrasted this with the Commission’s reluctance to become involved in the parading disputes involving Orange Order marches through nationalist areas. Some nationalists were unhappy that the Commission did not

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62 This was written on official Commission letter headed paper in respect of the case that the Commission was itself supporting.
initially display clearer support for the children’s right to walk to school as they wished. Many more were to become unhappy once the correspondence between the Chief Commissioner and Chief Constable was disclosed, feeling this undermined the independence of the Commission and suggested at least some in the Commission, including the Chief Commissioner, were too anxious not to undermine good relations with the police.

The involvement in the Holy Cross dispute magnified divisions within the Commission and demonstrated the difficulties it could run into where it failed to agree a clear strategy and fell prey to pressures to be seen to be doing something. From the outset the Commission appeared to be uncertain as to what its role in the dispute should be, whether it was to observe, mediate or seek to intervene on one side or the other. In the face of such a high profile public dispute, which highlighted sectarian divisions in Northern Ireland, it seems crucial that the Commission did a number of things. Firstly identify what the human rights issues were and the extent to which they were covered by its own strategic priorities, secondly if it decided this was a matter germane to its strategic objectives identify how it could best deploy its powers and resources to promote and protect human rights and thirdly, perhaps most significantly, ensure that whatever actions it took were endorsed by all Commissioners. Initially the Commission did appear to identify a clear line of recognising the rights of peaceful protest but stressing the paramount right of the children to get to their education peacefully and calling on all parties, including the police, to ensure and respect these rights. This was a relatively cautious line but arguably as much as the NIHRC could do given that it lacked the resources or expertise to mediate the dispute. However it was a line it was unable to hold as some Commissioners clearly felt it should go further and be seen to be more actively supporting the rights of the children. This led to a number of Commissioners making appearances at the school, it not always being clear when they were or were not then in a Commission capacity. Although it is accepted by all that the NIHRC’s procedures at the time clearly allowed the casework committee to support an individual application despite the dissent of one of its members, it must again be asked whether this case would have been funded if there had not been a desire to be seen to be doing something about such a high profile dispute. Although the casework committee was within its rights to take the decision it did one may ask whether for the Commission to decide to support the case in such haste was wise. However once the decision was taken it was a Commission decision, there was a duty to the client, and the previous existence of internal divisions within the Commission cannot justify the Chief Commissioner writing to one of the respondent’s indicating his lack of support for the case. As the Joint Committee on Human Rights observed this ‘must be a cause for concern’ and it further undermined any efforts to reach an agreed position as well as jepoardising the Commission’s independence.

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66 It was noticeable that in interviews we conducted with NGOs and individuals for this research those from a nationalist background generally criticised the NIHRC for not becoming involved earlier and much more extensively, those from a unionist background felt it had gone too far.
67 The casework criteria include whether the case raises a question of principle, whether it would be unreasonable to expect the Commission to deal with the case, whether it falls within the Commission’s current policy priorities, or whether there are particular circumstances which merit its examination, and whether it has a reasonable chance of success. There must also be regard to the priorities of the Commission’s strategic plan, see Northern Ireland Human Rights Commission, Annual Report 2002, October 2002, Appendix 5.
68 The decision was taken without all the members of the casework committee being present in the same room, two were involved via telephone from Derry and a station platform in Dublin.
69 Brice Dickson has since admitted he made a mistake in writing to the Chief Constable. Although he states that his decision to do so was the result of pressure within the Commission at the time, he believes now that this was not an appropriate way to act, see ‘Rights Head Admits Dispute “Flaws”’, BBC News, 23 July 2003, http://news.bbc.co.uk/1/hi/northern_ireland/3088615.stm
Overall the response to the Holy Cross dispute indicates the problems a commission can run into where it has failed to work out a clear strategy and where it is then placed under significant pressure by a high profile dispute, and a state actor. Faced with this pressure the NIHRC failed to produce a clear and collective response. Nor, highlighting again its lack of an effective media strategy, did it succeed in getting its response across to the public and in particular to the parties to the dispute. As Irish Times journalist Carol Coulter put it:

‘They seemed to be saying one thing one day and another the next and Brice Dickson seemed to have a different position from some of the Commissioners. I mean that is very damaging for the credibility of the organisation’.72

One important issue to consider is whether the various interventions of the Commission did have any impact on the resolution of the dispute. The Chief Commissioner himself felt that the Commission’s role was limited: ‘the reality was that we were too small and too unimportant an organisation to achieve very much’. However, the policing of the dispute did change, although it is possible that this may have been more in response to political interventions than in response to the litigation the NIHRC endorsed. What is clear is that the way in which the Commission dealt with the dispute significantly deepened its internal divisions and distrust and led directly to the withdrawal of two Commissioners and later resignation. It has also damaged its standing among a number of groups, as will be seen in Chapter 5. While the main responsibility for failing to achieve a unified position must rest with the Chief Commissioner, whose task it is to manage and lead the Commission, it must also be acknowledged that he was not alone in failing to establish and maintain a corporate position. Finally so traumatised was the Commission by the divisions around Holy Cross it was some time before it really seemed to have reflected on the implications of the dispute itself and in particular what role human rights norms and institutions have in dealing with such intense community conflicts, which remains a very significant issue for the future of Northern Ireland.75

**Resignations**

The Commission has experienced six resignations to date. The first of these, of Angela Hegarty, was on personal grounds and was not accompanied by any publicity. However it appears already at that time divisions within the Commission were having an impact. The next two, of Inez McCormack and Christine Bell, in September 2002 did make the press though it says something of the low profile of the NIHRC in the media generally that the story disappeared from view within a few days. The fourth, of Patrick Yu in July 2003, received significantly more coverage and this was sustained following the publication of the Joint Committee report a few days later. Several of those in the Commission criticised them for resigning without, they felt, raising their concerns with their fellow members. The fifth, Chris McGimpsey, was on grounds of having been nominated in the 2003 Assembly elections and was made without any comment on the Commission’s activities. In addition in September 2003, two Commissioners, Paddy Kelly and Frank McGuinness, indicated that they were withdrawing from the daily work of the Commission. While they remained as members of the Commission they called for the resignation of the Chief Commissioner, a view endorsed by three of those who had previously resigned. Paddy Kelly then resigned in July 2004.

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71 The costs of the case have been significant, around £90,000 in respect of the applicants and a similar amount for the police. The Commission’s yearly budget for casework in total is £100,000.
72 Interview with Carol Coulter, journalist, 14 February 2003.
73 Interview with Brice Dickson, Chief Commissioner, 4 April 2003.
74 Lady Christine Eames, who joined after Holy Cross commented ‘when Holy Cross was mentioned it was clear there were deep feelings among Commissioners and the atmosphere became tense’, 1 April 2003.
75 The Commission is now working on developing a strategy for responding to crises.
Commissioners who have publicly resigned have each given slightly different reasons for their resignation. Bell and McCormack both invoked the lack of funding and resources, displaying particular dissatisfaction with the NIO’s response to the Commission’s review of powers document. The former also stressed concerns with the Commission’s lack of strategic direction while the latter expressed dissatisfaction with the direction the Bill of Rights process was taking and how this risked undermining key provisions of the Agreement. Yu stressed primarily continuing concerns with the Bill of Rights and of how the desire of some on the Commission to transpose international provisions on minorities into a Bill of Rights provision on the right to choose whether or not to belong to a community would undermine minority rights and key provisions of the Agreement, although some we spoke to believed had had resigned because he had been offered a job in Hong Kong and in anticipation of the publication of the JCHR’s report on 15 July. As noted in Chapter 2, Kelly and McGuinness on their withdrawal stressed concerns with the way Holy Cross was dealt with. As will be clear from what has been discussed earlier in this chapter we feel there were legitimate concerns over the Commission’s strategic direction, as well as good reason to be unhappy with the lack of resources and powers. Whether resignation was the best way to change things is another issue, and it must be noted that the resignations of Bell and McCormack obtained limited press attention until the publication of the Joint Committee report in July of 2003 brought matters to public attention generally. The issue around the Bill of Rights is a more difficult one to grasp, with those who remained on the Commission stressing that any proposals were still very much at a draft stage and that all was still to play for. There appears to be something of a difference in perspective between people as to how ‘draft’ the relevant proposals were. The South African Commission has also experienced resignations in its first ten years but not on the same scale and with a smaller number of those who have left expressing dissatisfaction with the way the Commission has operated.

One issue that produced sharply differing responses in our interviews was whether the resignations of Christine Bell and Inez McCormack were a surprise. Those who remained on the Commission generally indicated that they were, acknowledging that there had been some differences but believing that they were being worked out. On the other hand the resigning Commissioners suggested that they had made clear their dissatisfaction for quite some time, and that they had raised these issues on a number of occasions. Several of those we interviewed outside the Commission also indicated that the resignations did not come as a surprise. It may be that this difference of opinion indicates how significantly communication had broken down within the NIHRC. The Commission produced a very limited response to the resignations of Bell and McCormack.77 This largely agreed with the comments on powers and funding, noted that the Bill of Rights was still in the process of being drafted and argued that concerns around strategic direction were being dealt with in the development of a new strategic plan. After these resignations several Commissioners we interviewed suggested that, while they regretted the loss of talented Commissioners, things had gone more smoothly since this occurred.78

The resignation of Patrick Yu, which was quickly followed by the Joint Committee report and the revelations concerning the funding of the Holy Cross case, eventually produced a more detailed response in the form of an Action Plan issued in October 2003.79 This stressed, among other things, the need for further discussion and international advice on the relevant parts of the Bill of Rights dealing with community and minority issues. As is discussed in Chapter 5, the Action Plan was designed to reassure a range of constituencies and to encourage those Commissioners who had withdrawn to return to the full work of the

77 Although the Commission argued that as they refused to meet with the Commission after announcing their resignations, it was difficult to be more specific.
78 For example one Commissioner commented ‘we can do our business in a better and happier way, no doubt’, and Brice Dickson stating ‘we are less fractured than we were before’.
79 http://www.nihrc.org/files/14oct.htm
Commission. Any hope that this would be achieved was largely scuppered by the leaking of e-mails to the *Irish News* early in November 2003 which indicated that the Chief Commissioner had sought the views of the NIO on the Action Plan and had taken on board suggestions ‘for making it more watertight against further criticisms from our critics’. Whilst the Commission believed this as a useful way to get another perspective on its ideas, the two Commissioners who had then withdrawn saw it as further compromising the Commission’s independence and called for the Chief Commissioner’s resignation.

The Commission does appear to have recognised recently that it must find a way of dealing with future crises. To this end staff and some Commissioners have prepared papers that have been discussed at Commission meetings on how best to proceed. They recognised ‘the importance of establishing clear criteria describing situations in which the Commission could be proactive’, ‘the need for relevant training in undertaking on-site investigations and in managing conflict’, resolving to set up a working group. Whether this is too late, however, to alleviate concerns of potential applicants to the Commission remains to be seen.

**Conclusion**

As we indicated at the start of this chapter to be effective a NHRI should have a clear vision, a strategy to achieve that vision and an organisational structure that facilitates the realisation of that strategy. The NIHRC faced a difficult environment in which to develop its strategic aims and, for a number of reasons, struggled to define them. Developing a corporate vision has been particularly difficult. As one academic observed ‘the basic choice is that you let others dictate your priorities or you dictate your own priorities. I think they never really bit the bullet in terms of prioritising themselves’. Perhaps as a result of devoting so much energy to ultimately inconclusive discussions around strategy it did not devote as much attention as it might have done to issues of organisation and staffing. As our comparison with South Africa indicates such problems are by no means unique to Northern Ireland and certainly need not be fatal to a NHRI. Such institutions can do a lot of valuable work even if their strategy and organisation is flawed. Indeed, as we shall see in Chapter 4, the NIHRC has been able to do a significant amount of important work even though such matters remained problematic. Moreover new institutions inevitably go through a learning process and with the development of its second strategic plan and organisational changes occasioned by the Hosking and Courtney reviews the NIHRC was making progress towards a more satisfactory strategy and the means to realise it. However until this was achieved it remained vulnerable to events exposing and deepening its internal problems. That event duly arrived in the autumn of 2001 in the form of the Holy Cross crisis. As Duncan Morrow of the Community Relations Council suggested ‘in an ideal world [this would only occur where] you have a commission which has a long record for being for human rights that is clearly distinct from one party or the other’. Instead the NIHRC encountered this issue relatively early in its existence, with its internal divisions still unresolved and, as one Commissioner put it, ‘everybody took to their trenches’. Holy Cross might have been the incident that really put the Commission on the map as regards public respect and confidence. Instead things went the other way. Robert Archer of the International Council for Human Rights Policy comments

‘Clearly there are just now and then political moments when you engage with a difficult unpopular issue which is make or break or you don’t. And that is decisive for

80 Minutes of the 64th meeting of the Commission, May 2004, paras 16.2-16.5.
81 The SDLP have already raised this issue with the Commission suggesting that the resignation of Paddy Kelly may affect appointments to the Commission and requesting that the process be slowed down, Minutes of the 66th meeting of the Commission, July 2004, para 4.2.1.
82 Interview with an academic, 7 November 2002.
83 Interview with Duncan Morrow, 5 May 2003.
84 Interview with a Commissioner, 4 April 2003.
levering up the reputation. If they really do it and do it well they get respect. If they are seen to walk round it or be too late they lose. It is very difficult to recover.  

The NIHRC has struggled to recover from the impact of the Holy Cross crisis, which fed into the public controversy once the Chief Commissioner’s actions were revealed. If it is to do so it is important to acknowledge that there have been significant divisions within the NIHRC regarding the appropriate role for a Human Rights Commission in Northern Ireland. These raise difficult issues but it is crucial that they are addressed, in addition to concerns about powers and funding, if a truly effective NIHRC is to emerge. The Action Plan of October 2003 simply offers clarifications of a number of the Commission’s positions, promises of improved procedures, better presentation of its policies and broader consultation on its activities. It was unlikely this plan would satisfy those who had expressed concern, even before the information on its generation emerged in the *Irish News*. The Commission is also intending to hold a Consultative Forum debate on crisis intervention with other statutory bodies sometime before the end of 2004. We would suggest more thorough measures are required to restore confidence and discuss these in more detail in Chapter Six.

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85 Interview with Robert Archer, 27 November 2002.
CHAPTER FOUR
EXERCISE OF POWERS

Introduction

As indicated in Chapter Two, the Commission was allocated a broad range of powers by the Northern Ireland Act 1998. These included virtually all the powers that the Paris Principles indicate a NHRI should have to ensure the protection and promotion of human rights. In common with NHRIs in many common law countries it was not given a power to resolve complaints but was given a power to support applications brought to court by others. From the outset the main concern for many both within and without the Commission was the extent to which it had adequate powers to conduct investigations. In addition the Commission’s limited funding raised doubts as to how effectively it would be able to exercise these powers.

In this chapter we explore how the NIHRC has exercised its powers in the limited time that it has been in existence. This limited time is important to bear in mind as many of the things the Commission is trying to achieve may take several years to come to fruition. Indeed, requesting the Commission to undertake a review of its powers two years after its establishment scarcely gives it time to test them. As one person we interviewed commented with respect to efforts to create a human rights culture, a key objective of the Commission’s education functions, ‘I think creating a human rights culture is a task of 30 years, changing cultures are not things you do in two or three years’. As we noted in Chapter One an important test of the effectiveness of an NHRI is how extensively it uses the powers it has and what outcomes the exercise of these powers produces. We would argue that the NIHRC has shown a willingness to exercise all of its powers and has already demonstrated considerable industry in their use. However it is far from clear that it has really been able to influence government or others. In part this has been due to impediments placed in its way by others, notably Parliament in failing to give it sufficient powers, government in failing to give it sufficient funding and the courts in originally curtailing its powers unnecessarily. However the Commission must also bear some responsibility for how it has exercised its powers on occasion. Here the lack of strategic direction, which we discussed in Chapter 3, has meant that the use of powers has neither been as well focused nor as well co-ordinated as it might have been. The functions are allocated to different committees of the Commission but, again as we noted in Chapter 3, the NIHRC lacks a clear mechanism, either at Commission or staff level, to co-ordinate the work of its different committees. While the Commission has displayed commendable energy it is not always clear that this has been expended on the most appropriate things or in a way that is likely to produce the most significant impact.

Investigations and Research

The Commission’s power to conduct investigations was left somewhat unclear in both the Agreement and the Northern Ireland Act. The Agreement did not expressly refer to the Commission having the power to conduct investigations and the Act simply states in Section 68(8) that ‘for the purpose of exercising its functions under this section the Commission may conduct such investigations as it considers necessary or expedient’. This suggests that the NIHRC has a general power to conduct investigations to assist its other functions such as advising the Assembly and the Secretary of State, providing recommendations on a Bill of Rights or promoting understanding and awareness of the importance of human rights. It does not indicate that it has a specific power to investigate allegations of human rights abuses,

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1 Interview with David Stevens, former General Secretary Irish Council of Churches, 14 November 2002.
either in the form of single events or a pattern of events. This is a remarkable omission since investigating and reporting on allegations of human rights abuse can be a significant function of NHRIs. Even where a commission does not have the power to make binding rulings which effect change it is by verifying whether allegations of human rights abuse are valid and making recommendations as to how to prevent or end them that many commissions do their most important work. The South African Human Rights Commission has utilised its investigative powers extensively, conducting inquiries into prisons, the treatment of children in the criminal justice system, immigration detention and racism in schools and the media. The Australian Human Rights and Equal Opportunity Commission has also used its power to hold public inquiries to generate significant reports that attracted considerable media attention. Observers often judge the seriousness of a national human rights institution by its willingness to undertake and thoroughly execute investigations into disputed claims of abuses of human rights. As Richard Carver and Paul Hunt have commented

‘most human rights institutions, whether Ombudsmen or Commissions, are vested
with quasi-judicial powers to subpoena witnesses or documentation and to conduct
on-the site visits to the scene of alleged human rights abuses’.3

The omission is even more surprising given that the Equality Commission for Northern Ireland does have specific investigation powers.4

Since there is no specific power to conduct investigations into alleged human rights abuses the government did not provide the commission with the powers to subpoena persons or documents that would be necessary to conduct such investigations. This omission did not go unnoticed by those who campaigned for the establishment of the commission and significant efforts were made to have investigation powers included when the Northern Ireland Act went through parliament. The government offered two arguments for rejecting these. Firstly, that the parties had not expressly committed themselves to providing such powers in the Agreement and secondly, that government would give an undertaking of full co-operation with the commission in the conduct of any investigations.5 The first argument always seemed somewhat dubious given that most participants in the talks leading to the Agreement would acknowledge that many of its provisions, especially in Strand One, were the subject of less than detailed argument.6 It has been rendered almost untenable by the House of Lords decisions in the NIHRC and Robinson cases which clearly reject the idea that the Agreement is to be read as a detailed contract whereby what is not expressly referred to must be deemed to have been left out.7 The second claim always appeared fragile given that it was unclear whether autonomous agencies such as the police or prison service would be bound by it. In practice it has proved to be less than effective.

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4 For example in Article 11 of the Fair Employment and Treatment (Northern Ireland) Order 1998, Article 57 of the Sex Discrimination (Northern Ireland) Order 1976 and Article 46 of the Race Relations (Northern Ireland) Order 1997. The terms of these investigation powers differ somewhat in each statute.
6 As Steven King of the UUP observed the issue of investigation powers ‘never came up’, interview on 27 February 2003.
7 See Robinson v Secretary of State for Northern Ireland [2002] UKHL para 32, where Lord Bingham observes ‘The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland but it is in effect a constitution…the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody’.

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The government accepted a proposal proffered in the course of Parliamentary debate to review the situation in two years and invited the NIHRC to come back to them on the necessity of such powers in this two-year review. It was no surprise when a demand to include proper investigation powers featured strongly in that review. The Commission observed that its initial efforts to conduct investigations into the care of children in juvenile justice facilities and the use of baton rounds had been met with difficulties. In respect of the former several staff refused to meet with the Commission, documents were withheld by both government agencies and voluntary organisations on confidentiality grounds and interviewing young people with experience of detention was delayed by the need to seek parental permission. Similar problems arose with obtaining files from the police in respect of the plastic baton round investigation. The NIHRC therefore strongly called for strong powers to obtain documents, conduct on site investigations and compel witnesses. When government finally responded to this effectiveness review in May 2002 it accepted the report but in reality challenged most of the recommendations, though Minister of State Des Browne indicated to the Joint Committee that the issue of further investigatory powers was still open. Government objections took a number of forms. Firstly that giving powers to enter places of detention duplicated those already held by institutions such as the Police Ombudsman, lay visitors and the Commissioner for Detained Terrorist Suspects. Secondly that giving the Commission power to compel the production of persons and documents would ‘seriously muddy the waters between the role of the Commission and those of the courts and the police’. It would do so by putting the Commission in a quasi judicial position alongside its powers to assist individual applicants before the courts, indeed the government response argues that a conflict of interest could arise where the Commission was initially involved in a investigation and is then asked to assist someone involved in a dispute arising from the matter they were investigating.

The Joint Committee was not entirely convinced by these arguments and nor are we. In practice the Commission has had very few problems gaining access to places of detention. In respect of the first point, relating to overlapping jurisdiction with other bodies empowered to investigate places of detention, it is clearly not being suggested that the NIHRC should replace these bodies. Given its limited resources any Human Rights Commission may decide to leave any concerns to be dealt with by some other institution but it needs to retain the capacity to intervene where it feels this is necessary to protect human rights. In all societies it is in places of detention that the most serious violations of human rights are likely to occur. Government is clearly not saying that the Commission should not have an interest in the treatment of people in police custody, prisons, immigration detention etc. It would be difficult for a human rights commission to retain any credibility if such areas were excluded from its mandate. If they are to have an interest then it is important that the have the powers to effectively pursue this interest, even if they may only resort to them infrequently. Given the closed nature of official places of detention often the only way to gain information is by gaining entry to them. Moreover it is far from clear that all the other institutions the government refers to do see their mandate as being concerned with the protection of the full range of rights of those held in detention. Northern Ireland does not yet have the equivalent of a Prisons Ombudsman, for example, visits of HM Prisons Inspectorate are infrequent and lay visitors are limited in what they can say publicly. The NIHRC has been able to visit prisons to

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10 Indeed the NIHRC has called on other bodies such as the Department of Health to conduct statutory inquiries.
look at the conditions of detained asylum seekers, for example, but remains dependent on the authorities agreeing to permit them access on whatever terms they see fit.\(^{11}\)

In respect of the second argument the government has the difficulty, as the Joint Committee pointed out, of getting round the fact that investigation powers are granted to the Equality Commission for Northern Ireland and similar equality bodies in Britain despite the fact that they too have a power to assist individual applicants. Such powers are also given to the Irish Human Rights Commission, which again also has a power to assist applicants. As with the issue of powers to enter places of detention the government response appears to overestimate the extent to which the Commission will want to use these powers. Often, as the NIHRC itself has pointed out, the knowledge of their existence will be sufficient to produce co-operation; certainly this has been the case in both Australia and South Africa.\(^{12}\) As for conflicts of interest between the Commission’s different functions the experience of other bodies which have these powers is that they seek to use them strategically but in the alternative. In other words they may either support a number of individual cases or conduct a formal investigation, whichever appears to be the most likely to produce change.

Overall therefore the government’s arguments, which could have been made when the Act went through in 1998 but took until 2002 to appear fully, were not convincing and did not adequately respond to the claim that it is with regard to investigation powers that the Commission diverges most from the Paris Principles. These indicate that a National Institution shall ‘hear any person and obtain any information and any documents necessary for assessing situations falling within its competence’. The absence of adequate investigation powers has considerably hampered the Commission’s work in this area although some have argued that the NIHRC has not done all that it could have to test the extent of these powers.\(^{13}\) It would appear this criticism has now been taken on board as the Commission has initiated judicial review proceedings against the Prison Service and the NIO, the former of which has resulted in internal documents being disclosed. Further, as noted in Chapter 2, it is to be welcomed that the government now appear to have accepted the need for enhanced powers in this regard for the Commission.

The Commission did establish broad criteria for deciding what matters to investigate, namely

- Where a pattern of alleged abuse has been identified or
- Where a serious human rights abuse has allegedly taken place

And indicated that investigations can be thematic or can examine individual cases. However it is not entirely clear if these criteria have been translated into practice. The first investigation the Commission decided to conduct, on the detention of young people in Northern Ireland, did address an issue other commentators had frequently raised and where detailed information was not publicly available.\(^{14}\) However the Commission felt that the second, on the rights of individuals and communities affected by parades, seemed less amenable to such treatment because it involved less the examination of whether abuses of human rights had taken place than examining ‘the diverse and sometimes competing issues involved in the marching

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12 Former Federal Human Rights Commissioner of Australia, Brian Burdekin, observed ‘Now I had these powers for eight years in Australia. I issued two subpoenas in eight years because you use these sort of quasi judicial powers very judiciously if you are not a judge….but if you don’t have these powers you can be ignored with impunity’, interview of 27 November 2002.
13 As one representative of a civil society organisation we spoke to said, ‘it hasn’t really got off its feet to do anything much’, interview of 9 December 2002. See also *Written Submission to the Joint Committee by Professor Christine Bell and Dr Inez McCormack*, at para 5.3. The government response to the report on effectiveness also argued not enough had been done to test existing powers in order to make a case for increased powers.
issue'.\textsuperscript{15} Perhaps not surprisingly this was eventually converted to a research study on the legal and human rights issues surrounding marching.

The Juvenile Justice report\textsuperscript{16} was an excellent example of what investigation powers can achieve. The work yielded a detailed report which produced new information, analysed law and practice with regard to international standards and offered a detailed set of recommendations which have informed the Commission’s subsequent work in the field. Moreover the Commission has followed this up with lobbying around the closure of Lisnevin Juvenile Justice Centre and its replacement. In addition, in June 2004 the Commission made an application for judicial review of the NIO decision not to grant the Commission access to the Rathgael Centre for Children and Young People in order to monitor implementation of its recommendations. Leave was granted on 7 July 2004. It appears to us that, properly resourced, investigations could play an important role in the Commission’s work in protecting human rights. The investigation power enables the Commission to take action relatively quickly in respect of patterns of concern about human rights abuses where litigation on individual cases may not be appropriate. Aside from the police and, to a lesser extent in Northern Ireland, the prison service, there are many public institutions with a capacity to infringe human rights where no independent institution exists capable of undertaking investigations such as these. As government continues to struggle with the issue of what forms of inquiry are appropriate to alleged human rights abuses that have happened in the past in Northern Ireland\textsuperscript{17} it was especially disappointing, though not incomprehensible, to see it refusing the NIHRC powers which might allow it to deal more quickly with such problems in the future. The recent statement that such powers may now be provided to the Commission is therefore to be welcomed.

The Commission’s committee structure combines investigations with research. Especially in light of the difficulties in conducting investigations most of its work has been focused on the production of research reports. These have included the three studies promised in its first strategic plan\textsuperscript{18} and a number of other studies on matters such as plastic baton rounds and the rights of young gay and lesbian people. The output is impressive over the four years and compares well with longer established commissions, such as that in South Africa.\textsuperscript{19} Most of these reports have been well produced and well received. The work on the rights of older people and of people discriminated against on grounds of sexual orientation filled important gaps in Northern Ireland and provided a valuable basis for the development of human rights policy in this area in the future. A report significantly critical of PSNI student training on human rights, gained significant media attention and was cited by the police themselves as being very valuable in developing their training on human rights.\textsuperscript{20} While the police were less happy with a research report produced by the Omega Foundation on Plastic Baton Rounds,\textsuperscript{21} this was also generally very well received as providing new information on an important debate. The threat of judicial review has also helped to persuade the MoD to publish

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\item\textsuperscript{16} NIHRC, \textit{In Our Care}.
\item\textsuperscript{17} ‘Blair shows “bad faith” in delaying murders report’, \textit{Guardian}, 19 December 2003.
\item\textsuperscript{18} On the rights of older people, of victims and on those discriminated against on the grounds of their sexual orientation.
\item\textsuperscript{19} Although the SAHRC has the power to undertake studies concerning fundamental rights in practice most of its publications have been investigation reports.
\item\textsuperscript{20} M Kelly, \textit{An Evaluation of Human Rights Training for Student Police Officers in the Police Service of Northern Ireland}, NIHRC, November 2002. In an interview with Phil Shepherd and Andrea Hopkins of PSNI on 2 December 2002 they described the process of discussing the training report as being ‘very constructive’.
\item\textsuperscript{21} Northern Ireland Human Rights Commission, \textit{Baton Rounds: A review of the human rights implications of the introduction and use of the L21A1 baton round in Northern Ireland and alternatives to the baton round}, March 2003, the police refused to provide information to the researchers.
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guidelines to the army on their use. More recently the NIHRC has produced a report on mental health issues and human rights, another area which has not been given a great deal of attention in the past. This report, which compares existing Northern Irish law and practice to international human rights standards, should also provide a good basis for legislative reform.

The Commission’s recent report into transfer of women prisoners from Mourne House in Maghaberry Prison to Hydebank Wood Young Offenders Centre is also an example of some excellent work. This examined the treatment of women prisoners and the implications of the decision to move them from female units in a high security male establishment to one of low security where there should be shared facilities. It condemned the conditions in which women were held and recommended that the women should not be transferred and that there should be a broad consultation on the future of women prisoners in Northern Ireland. This report has been well received and drew considerable media interest, prompting calls for a full inquiry into the conditions at Maghaberry prison. It is a testament to high quality of work that can be commissioned by the Commission and supports the suggestion that the Commission should have adequate powers to visit places of detention.

However this aspect of the Commission’s work has not been without its difficulties. Some research commissioned by the NIHRC, such as the report into the rights affected by the policing of parades, has not been endorsed by all the commissioners and has had to be released under the researchers names rather than unequivocally as a Commission paper. Not all of it has been as well focused as it might have been. Although the difficulty and sensitive nature of the task should not be underestimated, the report on victims, for example, is particularly disappointing in this regard for a matter to which the NIHRC gave such a high profile in its original strategic plan. Based on an extensive survey of the views of victims and victims’ organisations it remains largely that and does not really get beyond the issue of stating what victims and victims organisations want, while acknowledging that not all victims want the same thing. It neither assesses whether the claims of victims organisations are well founded or examines existing law and practice for compliance with international human rights standards. The Human Rights Act is scarcely referred to and international standards on

22 G Davidson, M McCallion and M Potter, Connecting Mental Health and Human Rights, NIHRC November 2003. The Chief Commissioner indicates in the foreword that the Commission endorses both the report and its recommendations.


24 ‘The much maligned Human Rights Commission deserves credit for uncovering what can safely be called a public scandal over the conditions in which female prisoners are being held in Northern Ireland’, ‘Prison report is a cause for concern’, Belfast Telegraph, 19 October 2004.


27 ‘Why has the HRC not so far been granted permission to check on conditions at Hydebank? …If the authorities want to address public concerns, the best way would be to grant the HRC immediate access to Hydebank’, ‘Prison report is a cause for concern’, Belfast Telegraph, 19 October 2004. Further, ‘the fact that the human rights commission has been denied entry to this prison will raise further questions about the conditions in which women are being held’, ‘Jail report is alarming’, Irish News, 20 October 2004.

28 It was published as M Hamilton, N Jarman and D Bryan, Parades, Protests and Policing: A Human Rights Framework, NIHRC, March 2001. The Commission also determined that it would not promote this report. The timing of the report and impact it may have on the sensitive situation in Portadown were said to be considerations in this regard.

victims are largely examined in the abstract, with little reference to whether they are currently being realised in Northern Ireland. Key issues, such as the role of victims in the criminal justice process, the compatibility of amnesty provisions with international human rights law or the potential for a truth commission in Northern Ireland are either not discussed or are treated in a fairly cursory way. Many of its recommendations are general. Given the continuing difficulties of dealing with the immediate past of conflict in Northern Ireland and the impact this has on the prospects of a more harmonious society in the future, it is an issue crying out for a thoughtful contribution from a public body such as the NIHRC. It also offered an opportunity to deal with some of the tensions within the Commission as the importance of victims was an issue all appeared to agree on, even if there were differences on how it should be addressed. However it seems again that such matters are deferred rather than resolved and what could have been an important catalyst for public debate is presented instead as an invitation to further discussion, within and outside of the Commission.

The commitment at the end of the victims report to saying that it will lead the Commission to doing further work on an issue one might have thought the report, after three years of work, would have provided guidance on raises a more general concern about the Commission’s research. This is that it appears to be produced without any clear plan as to how it will be followed up. In practice, the Commission has undertaken some follow up including holding a seminar for representatives. As noted earlier the PSNI Training Report was followed up by discussions with the police on how they would take forward their human rights training. Despite some action in respect of older persons and the reports on sexual orientation,30 there have been no detailed proposals and no clear strategy for implementation. While there is a value in the Commission doing human rights research for public education purposes it also should provide a basis for practical work orientated towards securing the better protection of human rights. This is something the Commission needs to pay attention to if it is to enhance its effectiveness.

Casework

Casework appeared to be potentially a very important function for the NIHRC and one of the things which marked it out clearly as being different from its predecessor, SACHR. The possibility of supporting cases before the courts gave the Commission the possibility of actually delivering change for those whose human rights had been infringed. Northern Ireland’s anti-discrimination commissions, notably the Fair Employment Commission, had developed their profile considerably through supporting important tribunal cases. These both demonstrated that equality laws were more than paper declarations and indicated to individual members of the public that the commission could do something for them, hence increasing their influence and legitimacy.31

However the Human Rights Commission was always likely to be operating in a somewhat different manner than equality agencies. Whereas they operated primarily in the (relatively) inexpensive world of employment tribunals, it was likely that most of the NIHRC’s litigation would be pursued in the more expensive venues of civil actions and judicial reviews in the High Court. This was one area where the Commission’s limited budget was always likely to restrict what it could effectively do. The Commission’s initial staffing structure provided for only one caseworker to deal with what was always likely to be a very high level of inquiries. Not surprisingly that caseworker soon became overwhelmed and the Commission appointed a temporary assistant caseworker in November 2000. Since the resignation of the caseworker in

30 There has been some follow up, for example, with regard to sexual orientation, including contact with local groups and lobbying the OFMDFM for improved Sexual Orientation Regulations.
November 2002, an assistant caseworker has been acting up in the role and has been responsible for dealing with both all the inquiries reaching the Commission and all those it subsequently decides to support. This is a significant burden. The 2003 annual report indicates that the Commission now receives over 600 inquiries a year and at least half of these required further action by the caseworker. Most of the cases that come to the Commission already have a solicitor involved. While this may reduce the considerable pressure on Commission staff it may not always be the most cost effective means of pursuing casework.

Though some of those submitting inquires to it may have seen the Commission as essentially a legal aid agency, commissioners appear to have quickly grasped that it could never fulfill that function and should instead focus on developing a strategy to decide which relatively few cases it could fund. One of its problems in doing so is that the Legal Aid Department was obliged through the Legal Aid Regulations that it would not provide funding if this could be obtained from another source, such as the NIHRC. The Commission had therefore to consider some applications which it was never likely to support in order that the applicants could then apply to the Legal Aid Department with some hope of success. Agreement was reached with the Legal Aid Department in September 2002 that cases should be referred to the NIHRC only when a 'core' human rights issue is involved, an agreement which has led to a significant decrease in referrals. To allow it to manage its caseload the Commission has developed a fairly extensive list of criteria to be considered in order to decide whether to support a case or not. These go beyond the statutory criteria set out in Section 70 NIA to include matters such as whether it relates to areas of work identified as a priority in the strategic plan and whether there is another body better placed to assist the applicant.

In its first three years the Commission granted assistance to only 34 of the 155 applications it considered, a figure of just over 20%. Two judicial review applications related to the clash between freedom of expression and other rights, such as fair trial or privacy. Other supported cases have included applications on the right to marry, adoption and detentions under the Mental Health Order. The strategic value of these applications and the extent to which they relate to other aspects of the NIHRC’s work is not immediately apparent. We have already discussed whether the decision to support the challenge to the policing of the Holy Cross dispute, a decision reached very swiftly by the casework committee, fitted into a sense of using litigation to achieve strategic goals rather than respond to a particular incident. In addition to the selection of cases the procedure by which they are selected has not always worked perfectly and some of the surprises in case selection may reflect this. A number of people, both from within and without the Commission, commented to us on how decisions to fund some important cases, even given the urgency of the situations, were reached hastily, without all the commissioners involved in the decision being in the same room and without a full examination of the strategic issues involved.

32 They were also supported by an assistant for several months.
33 The latest version is reproduced at Appendix 4 of the 2003 Annual Report. s.70(2) of the Northern Ireland Act provides that assistance may be granted (a) where the case raises an issue of principle; (b) where it would be unreasonable to expect the person to deal with the matter without assistance because of its complexity, or because of the applicant’s position to another person involved, or for some other reason; (c) whether there are other special circumstances which make it appropriate for the Commission to provide assistance. The NIHRC’s additional criteria specifies what it will take to be ‘special circumstances’. The NIHRC revised its criteria, see Northern Ireland Human Rights Commission, Annual Report 2003, Appendix 4 at 54. The NIHRC has indicated that it may wish to recommend specific amendments to s 70(2) in order to make it more clear and precise. See Northern Ireland Human Rights Commission, Report on Effectiveness, at 21.
34 See the discussion of the Holy Cross application in Chapter Three. The decision to initiate a judicial review in relation to the BBC’s filming of an attempted suicide was taken not by a full discussion of all but by the requisite number of commissioners in a last minute ‘phone round. See C Bell and I McCormack, The Northern Ireland Human Rights Commission: Written Submissions to the Inquiry by the Joint Committee on Human Rights, 2003, on file with author, at 8.
Most strategic enforcement agencies will veer away from their overall strategy at times to support cases which appear significant and some decisions will always have to be taken under pressure of time.\textsuperscript{35} What may be a greater concern as regards the NIHRC is that few of these cases have had a successful outcome. Indeed in the Commission’s own strategic plan for 2003-6, where it seeks to review its own performance in its first three years the only casework ‘success’ it lists is the judicial review on its power to apply to intervene in court proceedings (of which more later). This was a case aimed primarily at restoring a power the NIHRC originally thought it had. Many of the other judicial reviews were lost and sometimes in ways which did not even provide significant guidance on the law.\textsuperscript{36} As with many things regarding the Commission it may be too early to say anything definitive as the outcomes of a significant number of cases the NIHRC has been involved in are still pending, including those it has taken to clarify the scope of its own powers to obtain documents. However it would be difficult to claim at this stage that the litigation supported or initiated by the Commission has been particularly influential in advancing the protection of human rights in Northern Ireland. Nor is it clear how results of cases the Commission has already supported are co-ordinated with the other activities it is engaged in.

One casework strategy of the Commission that was innovative and did appear to have an impact was its decision to seek to intervene in cases brought by others. This provided the NIHRC with a much less expensive way of becoming involved in litigation and also allowed it to focus directly on the development of human rights standards by the courts. It has sought to intervene in cases in the Northern Irish courts, in the European Court of Human Rights and in an English House of Lords case the Commission felt important issues relating to the application of Article 2 of the ECHR, so crucial to disputes regarding the investigation of suspicious deaths in Northern Ireland, were at issue.\textsuperscript{37} Although one cannot point to occasions where the Commission’s intervention was referred to by the court as being especially influential it did appear to Commissioners that their arguments were being considered seriously by the courts and were helping to develop their understanding of international human rights provisions, notably the ECHR.\textsuperscript{38}

However this process came to an abrupt end when the Lord Chief Justice of Northern Ireland, Sir Robert Carswell upheld a decision by the coroner in the Omagh bomb inquest not to permit the Commission to intervene.\textsuperscript{39} The then Lord Chief Justice Carswell had already expressed some scepticism as to the value of the Commission’s interventions, ruling in the White case, that it could only make a written intervention and that leave to make an oral submission should be given ‘sparingly’ and ‘only where there is an issue of sufficient consequence which cannot be adequately dealt with by counsel for one of the parties to the

\[\text{\textsuperscript{35} Considering the litigation strategy of both NGOs and Statutory Agencies with a power to support litigation Harlow and Rawlings comment ‘On this side of the Atlantic, it is hard to find instances of a planned and well co-ordinated test case strategy which would satisfy a purist’ C Harlow and R Rawlings \textit{Pressure Through Law}, Routledge, 1992, p.305.}\]

\[\text{\textsuperscript{36} One example of a partial success though was a case concerning the BBC screening an attempted suicide. Although the court found the BBC had a right to do this the broadcaster did agree to pixellate the footage to ensure the person’s identity was not disclosed. The NIHRC has yet to receive written judgment in some key cases, such as its unsuccessful challenge to \textit{Panorama}’s screening of allegations in respect of the Omagh bombing. The Commission has been able to refer to the unreported judgement, however, to support other action that it has wanted to take.}\]

\[\text{\textsuperscript{37} \textit{R (on the application of Amin) v Secretary of State for the Home Department} [2003] UKHL 51. The decision makes brief reference to the NIHRC’s submissions, [2003] 4 All ER 1264, 1280d. The Commission was then granted permission to intervene in this case and two others, Middleton and McKerr.}\]

\[\text{\textsuperscript{38} Interview with a Commissioner, 1 April 2003.}\]

\[\text{\textsuperscript{39} \textit{Re Northern Ireland Human Rights Commission’s Application} [2001] NI 271.}\]
application’. In the Omagh inquest case he concluded, on a strict construction of the Northern Ireland Act, that the Commission had no power even to seek leave to intervene. Worse was to come for the Commission in the Court of Appeal where its appeal was rejected by a 2-1 majority. In addition to endorsing the views of the Lord Chief Justice on the interpretation of the Northern Ireland Act, Lords Justices MacDermott and McCollum cast doubt on the value of the Commission’s interventions. McCollum LJ stated that, aside from the issue of whether Parliament had given the Commission power to intervene that ‘It does not appear to me to be desirable that the Commission should be involved in possible controversy in a case in which it is not a substantive party…If a judge were reluctant to respond to submissions about human rights from a party entitled to make them within the terms of Section 71(1) of the [Northern Ireland] Act he would be unlikely to be more responsive to intervention by the Commission’.

The Commission eventually prevailed at the House of Lords where a 4-1 majority took the view that such a power was implicit in the powers given to the Commission by the Northern Ireland Act and that Parliament had not, by omission, intended to deprive it of the power any body has to seek the leave of the court to intervene where it has an ‘interest’ in the matter at issue. In addition several of the Law Lords indicated the desirability of the Commission contributing its expertise to the deliberations of the court on important human rights issues.

Although the NIHRC eventually prevailed in this case and restored a power both it and the government (which submitted supporting arguments to the Lords) always thought it had, the whole episode was not a happy one. For one thing the Lord Chief Justice’s initial ruling prevented the Commission from intervening in any cases between December 2000 and June 2002. Since the Human Rights Act became operational throughout the United Kingdom in October 2000 this was an especially unfortunate time to be excluded. In the early period NGOs in fact had more powers than the Commission. The comments of the majority in the Court of Appeal suggested a tendency to see arguing for the implementation of human rights standards as a form of political advocacy rather than legal interpretation. Given the importance of any human rights commission developing a positive relationship with the judiciary, where the courts show a willingness to draw upon the specialist expertise of the commission in interpreting human rights standards, this did not bode well for the future. Fortunately it does not appear to have been repeated after the House of Lords gave its ruling in the NIHRC’s case and the Northern Irish courts have again proved willing to consider

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40 In the matter of an application by Evelyn White for Judicial Review [2000] NIQB 11.
41 [2001] NI 271, 282-283 McCollum LJ went on to question the extent to which the Commission’s intervention would be seen as disinterested or impartial, commenting ‘It does not appear to us that in any matter relating to human rights arising in the course of legal proceedings in which adversarial interests are engaged that the Commission would be likely to have the necessary disinterested quality that one seeks in an amicus curiae. The Commission will always be seen as a champion and upholder of human rights and, therefore, presumably will favour the party whose human rights are the strongest. There may, moreover, be competing rights not protected by the Convention and the person relying on them would certainly not regard the Commission as disinterested’. This is an odd statement as it appears to suggest that the Commission would have to argue both ‘for’ and ‘against’ human rights to appear to be disinterested.
42 In re Northern Ireland Human Rights Commission [2002] UKHL 25. Therein Lord Woolf stated at paragraph 34 ‘The successful introduction of human rights into the domestic law of the United Kingdom is substantially dependent upon the courts giving proper effect to those rights. This is a challenging and new undertaking for the courts. The Commission should be in a position to give substantial assistance to enable the courts to fully appreciate what is involved in properly applying human rights in the litigation which comes before them’.
43 As a result of the Commission requesting it to do so.
interventions from the Commission. The Commission has also received a favourable hearing from the European Court of Human Rights when it has sought to intervene there.45

The UK Parliament Joint Committee on Human Rights concluded that ‘it is impractical for human rights commissions to have a leading role in providing legal assistance to individuals bringing human rights claims’.46 We agree. Although the NIHRC may not have always made the best choices as regards the first cases it chose to pursue it will probably always face difficulties in making a major use of litigation. As noted earlier the equality commissions operated largely in the tribunal sphere, where costs were lower and where there was a real need for their services in the absence of legal aid. This allowed them to become ‘repeat players’ with a significant capacity to impact on the development of equality law. In contrast the NIHRC operates in the much more expensive arena of civil actions and judicial review, but also where legal aid is available to support those who claim their human rights have been infringed having access to experienced solicitors and counsel. Without the budget to have a large legal staff all the Commission can do when it decides to fund a case is to follow the carriage of the case by one of these lawyers. Even if some degree of control is maintained over what arguments are placed before the court, its capacity even to shape the development of the law is limited.47 However we feel it would be undesirable for the Commission to lose the function of being involved in litigation entirely. This is one way in which it keeps close to what is happening on the ground and can demonstrate its immediate value to people. Further development of its third party intervention role is one way it can do this effectively, now that the courts seem supportive of this. It may also want to develop a specialist role, for example in supporting litigation before the European Court of Human Rights or other international tribunals. It might also be assisted by a change in the law allowing it to take cases in its own name where it alleges a breach of the Human Rights Act. This could enable it to take forward issues where there is not a victim who might otherwise access legal aid.

In its Supplementary Review of its Powers, the Commission recommended the insertion of a new subsection in the Northern Ireland Act to allow it to resolve disputes by ‘mediation, conciliation or negotiation’.48 While it is not unusual for national human rights commissions to have such a power, and indeed it would have proved potentially useful in some situations, this would have to be accompanied by adequate training of Commissioners and staff and an increase in resources.

**Legislation and Policy**

The Northern Ireland Act conferred on the Commission a general power to advise both the Secretary of State and the Executive Committee of the Assembly on measures which ought to be taken to protect human rights and a specific power to advise the Northern Ireland Assembly of the compatibility of proposed legislation with the Bill of Rights.49 The latter was an especially important power as Section 6(1)(c) of the Northern Ireland Act provides that the Assembly does not have competence to pass legislation which is incompatible with Convention rights. From the start the NIHRC also drew attention to Section 14(5)(a) of the Act, which indicates that the Secretary of State may decide not to submit for Royal Assent a

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45 See, for example, Jordan v UK, Judgement of 4 May 2001.
47 Although the Commission has recognised the need to increase in-house management of cases, see Minutes of 62nd meeting, March 2004, para 5.3.
49 Section 69(3) NIA. Section 13(4) (a) also provides for the Presiding Officer of the Assembly to send the Commission a copy of each Bill as soon as is reasonably practicable after introduction into the Assembly.
Bill which he considers would be incompatible with any of the United Kingdom’s international obligations, to suggest that any advice it would give should go well beyond the ECHR to embrace other international human rights provisions to which the United Kingdom is a party. These provisions gave the NIHRC a potentially very important and powerful tool to influence the development of legislation in Northern Ireland and ensure that human rights considerations were ‘mainstreamed’ into it. It also posed potential difficulties in that under Section 69(4)(a) the Commission has an obligation to advise the Assembly ‘as soon as reasonably practicable after receipt of a request for advice’. If all proposed Bills in the Assembly were to be referred to it the Commission could find itself overwhelmed and struggling to respond. However if the Assembly did not decide to refer proposed legislation Section 69(4)(b) still left the Commission with the power to provide advice.

The potential difficulty has not arisen due to the stop/start nature of the Assembly and the very limited amount of legislative business it has done to date. Of the legislation that has been passed little of it has had significant human rights implications but nevertheless the NIHRC has responded to a reasonable amount of it. Conscious that the most important stage to influence legislation is usually before it has even become a Bill the Commission has also sought to develop relationships with sponsoring departments in order to feed into the development of their legislative proposals. Although initially the Commission found the responses of departments ‘quite variable’, it has commented that ‘most departments and their respective agencies routinely copied legislative proposals and policy contributions to the Commission’. The Commission also sought to improve the quality of human rights scrutiny of legislation, publishing a report on the Assembly’s Standing Orders and legislative procedures, which called for the establishment of a Standing Committee on Human Rights and Equality in the Assembly which would, among other things, have to examine all Bills for compliance with human rights standards. This was considered by the Assembly’s Procedures Committee in the course of a general review of Assembly procedures but did not find favour with it.

In the absence of much legislative action at Stormont, the NIHRC has found itself more engaged with commenting on proposed Westminster legislation. It has offered extensive responses to such major legislative initiatives such as the Terrorism Act 2000, the Anti-Terrorism Crime and Security Act 2001, and the Justice (Northern Ireland) Act 2002. In addition the Commission has commented extensively on various government proposals and responded to an extensive range of consultation processes. The 2003 Annual Report indicates that it issued 107 responses or other submissions. Clearly its industry cannot be faulted and most of those to whom we spoke commented positively on the quality of what the Commission had to say.

In terms of having an impact it is of course difficult to say what influence the Commission has had. Often it will only be one of a number of bodies proposing some changes to legislation, especially if it has not had sight of it before it is published, and it will be difficult to isolate who is responsible for any changes made. However the Commission itself has expressed the view that it ‘has not been satisfied that the Government has taken sufficiently

51 The 2003 Annual Report, for example, notes that the Commission commented on 25 of the Bills it was sent.
seriously the points made to it on legislative and policy proposals. The reasons for this may
be several. For one thing the NIHRC itself has frequently complained that its work in this area
is `hampered by a repeated failure to get early sight of proposed Bills and Orders'. These
included the Anti-Terrorism Crime and Security Act, the Flags (Northern Ireland) Order 2000
and the Criminal Justice and Police Act 2001. On some of these occasions Commissioners
were further distressed by discovering that NGOs had actually had sight of some proposals
before the NIHRC. Some of these problems can be traced directly to the difficulties of
concluding Memoranda of Understanding with bodies such as NIO or OFMDFM which
led to those departments feeling that in the absence of such a Memorandum of Understanding
there had to be limited engagement with the Commission, whereas there was no such
constraint in respect of NGOs. Unfortunately, the existence of the Memorandum of
Understanding has not ensured consultation will actually happen, with the Commission not
being consulted prior to the introduction of the Justice (NI) Bill in December 2003, and the
Home Office’s discussion paper on Counter-Terrorism Powers of 2004. Even recently one
Minister seemed unaware of even the existence of the Commission. One might have
expected government departments to be seeking out the expertise of the Commission on
proposals with human rights implications. In its Review of Effectiveness the NIHRC sought a
change to the Northern Ireland Act to provide that `The Secretary of State and the Executive
Committee of the Assembly shall have due regard to the Commission’s advice’. In its
response the government rejected this as blurring the distinction between the Commission’s
advisory role and the legislative role of Parliament. In this regard, at the very least it might be
better to provide for the need for Ministers, when stating that legislation is compatible with
Convention standards, to indicate if they have received any contrary advice from the NIHRC.

A second concern is that while the NIHRC has produced a large number of recommendations
and policy responses it appears to have done relatively little to follow up on them. Several
politicians to whom we spoke commented that the Commission did not have a particularly
visible presence at the Assembly and even less visible a presence at Westminster. Resources
are again a factor in this but there is also a sense, revealed in some of the Commission
minutes, that the Commission may compromise its independence by becoming too involved
in lobbying and working with politicians. While undoubtedly such interaction does carry risks
that the Commission, or even individual commissioners, may be dragged into endorsing the

56 NIHRC, Report on Effectiveness, at p.19. The Chief Commissioner also observed ‘Like the purely
advisory body which preceded us in Northern Ireland – the Standing Advisory Commission on Human
Rights – we cannot honestly claim that the UK government has taken our concerns or legislative
proposals seriously’ B Dickson ‘The Contribution of Human Rights Commissions to the Protection of
Human Rights’ [2003] Public Law, 272, at 280. In its 2001 report though the Commission noted that
the Assembly had not taken its advice on any of the provisions it argued contained provisions in breach
of the Convention.

57 NIHRC, Report on Effectiveness, at p.15.

58 For example the Committee on the Administration of Justice observed that they saw draft Codes of
Practice on the detention of people held under emergency legislation before the NIHRC.

59 A civil servant observed that in respect of the draft legislation for the Children’s Commissioner
NGOs were consulted before the NIHRC as `without the protocol we couldn’t bring them in. I mean
Ministers are sensitive enough about bringing NGOs in. Unionist ministers in particular are hyper
sensitive about the Commission and without political cover I couldn’t do it’, interview of 20 November
2002.

60 NIHRC, Response to the 14th Report of the Joint Committee on Human Rights in the Session 2002-3,
29 March 2004, para 2. See also in respect of Draft Northern Ireland Act 2000 (Modification) (No.2)
Order 2004, Mr Swayne’s question as to why the NIHRC was not consulted, 9 September 2004,
Col.011.

61 During discussion of the draft Anti-Social Behaviour (Northern Ireland) and Draft Criminal Justice
(No.2) (Northern Ireland) Orders 2004, Lady Hermon questioned whether the minister had consulted
the NIHRC, to which Mr Leslie replied ‘I do not know about the specific organisation that the hon.

positions of one political party or another there is also the risk that in this area, as with the Bill of Rights, that the commission’s impact on the effective protection of human rights will be significantly diminished by insufficient engagement with the political process. In our interview with the legislative and policy committee it was indicated that the NIHRC was unaware of how many of the Commission’s recommendations had been accepted and acknowledged that their monitoring and follow up in general was ‘something they could develop further’.  

As we have noted earlier one area where the Commission might have had a significant impact on policy formulation and practice is in respect of government’s reception of the Human Rights Act 1998. Given that this legislation requires all public authorities to act in conformity with the main provisions of the ECHR it should have occasioned a significant review by public authorities in Northern Ireland to examine whether their policies and procedures were in fact compliant. The Joint Committee on Human Rights observed in its report on a proposed Human Rights Commission for Great Britain that research suggests English public authorities may not have been doing this to the extent expected. It suggested that promoting such mainstreaming was an ideal task for a Human Rights Commission. However although the NIHRC published an information booklet for public authorities and participated in the UK wide task force on implementation of the HRA it does not appear to have fully audited what Northern Irish public authorities were doing to prepare for the implementation of the Act. The Commission can rightly point out that this was primarily the responsibility of the Human Rights Unit of OFMDFM and that some of the things public authorities wanted it to do, such as provide extensive staff training on the HRA, would have been an unjustified drain on resources. It may also have felt that auditing the steps public authorities were taking would also have diverted too many resources from other things it wished to prioritise. However arguably a valuable opportunity was missed, one which the NIHRC could have lobbied government for extra resources to do. The HRA, unlike some of the other standards the Commission was advocating, is part of the law which public authorities must operate and they had a clear need to learn more about it and how it applies. The Human Rights Commission, rather than an NGO, would appear to be the obvious place for government to turn for such advice. In addition to giving the Commission the opportunity to influence the making of government policy at a number of levels the opportunities it provided for raising the Commission’s profile within government and developing an understanding of the Commission’s work could have proved valuable to some of the Commission’s other activities. If the Commission were to see a Bill of Rights adopted there would no doubt be a need for extensive training on this and work on the Human Rights Act could have provided a valuable pilot exercise and potential template. However the opportunity was not taken, with government not apparently approaching the NIHRC to take on this sort of work and it not actively pushing the issue.

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63 Interview with a Commissioner, 4 April 2003.
65 The Commission did at one time agree to appoint a person to conduct training on the Human Rights Act on a short-term basis but this does not appear to have been pursued.
66 The former Head of the Northern Ireland Civil Service, Sir Gerry Loughran, indicated that human rights was ‘still something of a mystery’ and he had not met with the NIHRC during his term of office as Head of the Civil Service. In contrast, the relationship with the Equality Commission was wider and deeper, interview with Sir Gerry Loughran, 24 January 2003.
Education

Section 69(6) of the Northern Ireland Act 1998 gives the Commission power to ‘promote understanding and awareness of the importance of human rights in Northern Ireland’, in particular through education and research. The NIHRC has taken this commitment to human rights education very seriously, creating an education committee and appointing an education worker among its first batch of appointments. Its work on education has focused on a number of themes. These include

- Keeping education law and practice under review. The Commission’s work here has focused especially on the human rights implications of proposed changes to post primary selection in Northern Ireland. The Commission has issued its views on the Burns report and has held a seminar in September 2001 on the topic, though a proposed follow up plan has yet to emerge. It has also produced, in partnership with the Department of Education, a Guide for School Management to the Human Rights Act 1998.

- Work on the development of human rights education in the Northern Ireland curriculum. Here the Commission has established a Human Rights Education Forum and has developed a partnership with Education and Library Boards to promote teaching on the Bill of Rights.

- Providing general education on human rights. This has been focused especially on the Bill of Rights project and on providing training which will strengthen the capacity of a variety of groups to contribute to the Bill of Rights consultation. The Commission has produced a variety of education materials to support this activity and organised awareness seminars throughout Northern Ireland. In its first batch of human rights training for trainers it trained 400 people at 18 seminars, a follow up exercise reached a further 583 people.

- Providing specific education to various occupational and professional groups. The Commission appears to have provided a limited amount of this to various groups on a request basis. Some groups have been more enthusiastic in seeking out the Commission’s assistance than others and there appears to have been relatively little engagement with key professional groups such as the Prosecution Service, Prison Service, legal profession and judiciary. The Commission has received several requests for assistance from the Police Service but has apparently decided not to become significantly involved in directly providing training but rather in auditing the human rights component of training provided by the PSNI itself. As already seen when discussing research, it has produced two significant reports on this issue which received extensive press coverage and also appears to have contributed to further work with the police regarding its recommendations. The Commission has argued that lack of resources prevents it from becoming more extensively involved in providing training to professional groups, especially as it has been prohibited from earning income for the training it provides.

Education is an area many people we spoke to expected the NIHRC to be heavily involved in. In South Africa former Chair of the Commission said it was agreed that it should take ‘pride of place’. While it is true that education is normally the area that most human rights commissions find it easiest to work in, generally the Commission’s work on education has on

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the whole been well received. It has wisely sought to develop partnerships with those already involved in the development of human rights education, especially in schools, rather than initiate completely new developments. The consultation on the Bill of Rights did provide the opportunity for a more widespread human rights awareness campaign although some difficulties are involved in simultaneously having to explain to people what rights they have under current law and what rights they feel they would like or need to have. One interesting aspect of this is the Commission identified under its statutory equality duty review a lesser take up of training in Protestant/unionist areas and took steps to respond to this.\(^{69}\) Given that unionist hostility to the Commission and to ideas of human rights generally appeared to spring in part from a lack of awareness and engagement with human rights ideas in that community\(^{70}\) this was certainly a desirable move.

With the training on the Bill of Rights largely completed the Commission has chosen to focus its efforts on schools and influencing police training. The former is obviously an important area of work for the Commission and the extent to which human rights becomes mainstreamed in the educational curriculum will be one indicator of its success in this field. However it would be unfortunate if the work with voluntary and community groups which marked the Bill of Rights education project was to be lost. This is an important sector to inform in the medium term, both as regards informing people about their rights and countering some of the myths about human rights which may cause hostility towards the Commission in some sectors. The limited engagement with professional organisations is a matter of some concern, given that this is an area where promotion can link with protection through seeking to influence those who have a capacity to affect the enjoyment of human rights, for good or ill. In South Africa the Commission has been extensively involved in human rights training of those working in the criminal justice system as its training of human rights activists working with immigrants and asylum seekers has been particularly praised.\(^{71}\) It is noticeable though that the NIHRC appears itself to have recognised that greater engagement is needed in this area. One of its performance indicators in the 2003-6 Strategic Plan is ‘the number of organisations and professional bodies which the Commission has met with to discuss the provision of training and information on human rights’.

**Joint Committee with the Irish Human Rights Commission**

Section 69(10) of the Northern Ireland Act provides that the NIHRC ‘shall do all that it can to ensure the establishment of the committee referred to in paragraph 10 of that section of the Agreement’. This is the Joint Committee with the Irish Human Rights Commission. Due to the delays in establishing the Irish Commission this joint committee was not able to meet, even on an informal basis, until May 2001. Its first formal meeting took place in November 2001. Since then the Joint Committee has sought to meet on a quarterly basis. The Joint Committee is composed of all the members of both commissions and, perhaps not surprisingly, there have been difficulties in ensuring a full attendance on all occasions. More concrete work has been done in the two sub-committees which have been established. One of these concerns racism in Ireland, North and South. Its main achievement to date is the publication of a user’s guide to the UN Convention on the Elimination of All Forms of Racial Discrimination. The other focuses on the one specific piece of work assigned to the Joint

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\(^{69}\) The 2002 Annual Report indicates an increase in take up by those from the unionist community and people with a disability.

\(^{70}\) As a spokesperson for Ulster Protestant Movement for Justice commented ‘our community…has serious difficulties with human rights as a concept, it is not through a lack of [the NIHRC’s] willingness to engage, it’s a lack of information, it is a lack of education, it is a negative perception that has built up over the years, it’s a lack of capacity and skills’.

Committee, namely the ‘possibility of establishing a charter, open to signature by all
democratic political parties, reflecting and endorsing agreed measures for the protection of
fundamental rights of everyone living on the island of Ireland’. The Joint Committee has
produced a pre-consultation document on the Charter in May 2003 which sets out options for
both the form and content of the Charter. In respect of form it considers three possible
models, a purely declaratory statement, a ‘programmatic’ statement which would set out a
number of principles for progressive development and a charter which would immediately
become law north and south. The Joint Committee has expressed an initial preference for the
second of these options. The proposed content has a strong emphasis on the rights of
particular groups, such as children or refugees and the progressive realisation of economic,
social and cultural rights. The pre-consultation document originally sought responses by 1
September 2003 but this was subsequently put back to 1 December 2003.

Thus far Commissioners, both North and South, appeared to feel the Joint Committee is
working well, with the one reservation that meetings are not always as well attended as they
might be. With only three years under its belt the Joint Committee is still very much in its
infancy and has only really begun to set out areas where joint work is possible. However it is
noticeable that, in contrast to the immediate demands placed on the NIHRC, there do not
appear to be many people coming forward with burning issues they think the Joint Committee
should take up. We heard few references to it among those we interviewed, especially in
Northern Ireland. Clearly work on the Charter is one important area, though if the NIHRC has
had difficulty engaging Northern Irish parties on the Bill of Rights it seems an even more
uphill task to engage political parties, North and South, on the Charter. What form this might
take does not appear to have been given much consideration by any of the parties to the
Agreement, though there does appear to have been some agreement that it should take the
form of a political declaration rather than an enforceable legal document.72 One unresolved
issue is the relationship between the Bill of Rights and the Charter. The original timescale of
the NIHRC would have seen advice on the Bill being submitted well in advance of any final
form of the Charter being devised. Although it still seems that this is likely to be the case the
timetable of the two is coming closer. In that case the design of the Charter might exert a
greater influence on the content of the proposed Bill of Rights than originally seemed the
case. However at this stage the proposals for what should be included in the Charter appear
very similar to those the NIHRC has proposed for the Bill of Rights and it is important that
the Bill of Rights process in Northern Ireland is completed first.

The Bill of Rights

The Commission has spent considerable time and energy on its Bill of Rights project,
identifying it as a priority area.73 It has been one of the main issues with which it is most
identified and therefore the success of the project was crucial to the Commission’s own
credibility and reputation. Despite considerable initial enthusiasm from many, this has
diminished as the project has been postponed, and the Commission has faced various
problems in executing this ambitious project. Although some of these were not within its
control, namely the ambiguous wording of the Agreement and the political context on which
its success depended, other factors were.

Ambiguous wording of the Agreement
Several problems faced by the Commission can be attributed to the wording of the
Agreement. Under paragraph 4 of the Human Rights Section of the Belfast/Good Friday
Agreement the NIHRC:

72 Interview with civil servant, Irish Secretariat, 14 October 2002.
'will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland. Among these issues for consideration by the Commission will be:

- The formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and
- A clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors’.

Subsequently section 69(7) of the Northern Ireland Act required the Secretary of State for Northern Ireland to request the NIHRC to provide advice of the kind referred to in the above paragraph.

There has been considerable criticism directed at the Commission that it exceeded its mandate and the debate has centred around the meaning of the phrase ‘to consult and advise’. On the one hand there are those who favoured a broader and dynamic approach whereby the NIHRC should produce a comprehensive and strong Bill of Rights. This is exactly how the NIHRC has interpreted its own mandate. The NIHRC has chosen ‘not to confine itself to advising on the scope for defining the requisite rights but to advise on the requisite rights themselves’. The NIHRC also argued that section 69(3)(b) of the Northern Ireland Act allows it to adopt this wider view, requiring it to make recommendations for the better protection of human rights in Northern Ireland: ‘we are of the firm view that these rights need to be protected in Northern Ireland - ideally through being guaranteed in a Bill of Rights…’. Coupled with language in the Agreement of a ‘fresh start’, the objective of the ‘protection and vindication of the human rights of all’ and the emphasis placed on the need to secure participation and dialogue, it was argued that to adopt a minimalist and limited interpretation of the NIHRC’s mandate would simply have been a non sequitur. It would have been impractical for the NIHRC to undertake consultation on the ‘scope for defining rights’ in a Bill of Rights and simply be restricted to setting out options for a Bill of Rights for Northern Ireland.

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74 The requirement to ‘consult’ was not included in the first available draft of the Agreement, the Mitchell Draft Paper and only after representations from NGOs and signatories to the Agreement was the statutory duty included. The Mitchell Draft Paper was circulated to the participants in the multi-party negotiations on 7 April 1998 and was the origin of the Agreement, see http://www.nuzhound.com/articles/mitdraft.htm. For an analysis on the differences between the Mitchell Draft Paper and the Agreement regarding the human rights provisions see P Mageean and M O’Brien, ‘From the Margins to the Mainstream: Human Rights and the Good Friday Agreement’, 22 Fordham International Law Journal (1999) 1499-1538. The requirement to consult is not statutory.

75 See Northern Ireland Human Rights Commission, Summary of Submissions on a Bill of Rights, July 2003, at 19.


78 ‘Declaration of Support’, para 2.

On the other hand many felt that the Agreement simply required the Commission to advise only on the ‘scope for defining rights’, rather than to produce an actual Bill of Rights itself. This led them to view the drafts issued by the Commission as ‘fundamentally flawed’. The Commission’s legitimacy in undertaking, what it stated was one of its key, projects was thus questionable in the eyes of some from the start.

The second difficulty with the wording of the Agreement centered around the phrase ‘particular circumstances of Northern Ireland’. This phrase has been used by many to question the Commission’s legitimacy not only in respect of its role in the Bill of Rights but more generally. As one political representative involved in the Talks stated ‘…when the Bill of Rights was discussed at the Talks the feeling was that the Irish Government and British Government didn’t want a Bill of Rights because they were afraid of people in the mainland UK, that people in the South will then say “well we want a Bill of Rights like Northern Ireland”’.82

However, what these ‘particular circumstances’ are is not specified. The most likely interpretation is related to the position of Northern Ireland emerging from violent conflict. Accordingly the rights should reflect the needs and experiences of people related to the conflict. However this in itself raises problems. Although there is extensive debate and literature on the Northern Ireland conflict, there is no consensus on its causes and consequences. Further, as noted elsewhere in this research, the perception of who has responsibility for respecting human rights in Northern Ireland (namely the state alone or non-state actors as well) is politically contentious. It was therefore going to be no easy task for the Commission to determine ‘the particular circumstances of Northern Ireland’. Even the UUP, which claims credit for introducing the term, did not have a clear idea of its meaning: ‘we saw it as their job to come up with something… We didn’t make a submission on that. These are the experts supposedly’. However, many unionists and others held the view that the Commission should have adopted a narrow interpretation to the phrase. In contrast, many felt that the Commission should use this opportunity to be holistic and draft a document that included a wide range of rights, both civil and political as well as economic and social rights, and which focused on state responsibility. These divergent views were reflected in a debate in the Northern Ireland Assembly in September 2001 where Esmond Birnie of the UUP moved the motion ‘that this Assembly believes, in this context of the development of a Bill of Rights, that the Northern Ireland Human Rights Commission has failed to discharge its remit, as given to it by the Belfast Agreement, in its various contributions to the debate on developing human rights in Northern Ireland’. The view from the main Unionist parties was that ‘the particular circumstances of Northern Ireland’ required the NIHRC to look into deaths resulting from non-state actors and, conversely, that socio-economic rights did not specifically relate to the particular circumstances of Northern Ireland.

80 See NIHRC, Summary of Submissions on a Bill of Rights, at p.19.
84 Interview with Steven King, UUP, 27 February 2003.
85 Including the DUP, UUP, the Cadogan Group, Ulster Human Rights Watch, Ulster Protestant Movement for Justice, faith groups such as Evangelical Alliance, CARE, ECONI and churches or religiously affiliated organisations such as the Methodists Church’s Council on Social Responsibility and the Irish Council of Churches, see Northern Ireland Assembly, Official Report, 2001-2002, 25 September 2001.
86 For example, NGOs and community and voluntary groups such as CAJ, Amnesty International, CoSo, NICVA, trade unions, political parties such as NIWC, SDLP, Sinn Féin and Alliance Party.
**Political context**

Although many in Northern Ireland were attracted by the South African experience, where there was a broad consultation process and civil society played a major role, the South African Bill of Rights remained a document produced through the all party negotiations of the Conference for a Democratic South Africa (CODESA). Hence South Africa’s politicians were committed to uphold it. In Northern Ireland, however, the Agreement left this significant constitutional task of dealing with the Bill of Rights to the Human Rights Commission. Given the enormity of the project, it is questionable whether the Commission was the appropriate body to be doing this, especially given the many other tasks it was allocated. The ambiguous text of the Agreement and the difficulties in engaging political support for the project, especially when this would form part of on-going negotiations on wider issues, meant that the Commission’s problems were exacerbated. It was clear that a Bill of Rights was unlikely to become a reality unless it gained party political acceptance. The Commission faced a number of difficulties in this regard.

Firstly, it was unclear to what extent there was significant enthusiasm during the negotiations of the Agreement among the two governments and the Northern Irish political parties for a Bill of Rights, certainly the content of such a Bill was not explored in any great depth in the Agreement itself. As one civil servant observed the decision to give the task to the Commission was done in a ‘fairly cursory manner, it wasn’t that people spent hours on it’. In addition the British government did not make it clear what sort of advice it wanted from the Commission. Its initial funding suggested fairly narrow and technical advice but then the Secretary of State appointed to the NIHRC people who were always likely to conceive their mandate in a broad way and the NIO did not oppose the idea of a broad consultation exercise, though it was rather tardy in agreeing to fund it. The Bill of Rights was therefore launched in difficult circumstances.

Secondly, the Commission struggled to gain support from some political parties for the project, in particular unionists and those opposed to the Agreement. Given the task of dealing with the Bill of Rights was given to the Commission by the Agreement, those who opposed the Agreement in principle therefore felt alienated from the Bill of Rights process from the start. Further, as noted elsewhere, the Commission found it difficult to obtain support from, in particular, many in the unionist community, for its work in general. In addition, although nationalist parties were traditionally supportive of the Commission’s work, they became increasingly disillusioned with its inability to deliver on the Bill of Rights, as deadlines were extended and advice postponed. Whilst one should not underestimate the difficulties the Commission faced in this political environment, it is also debatable whether the Commission dealt with these problems in the best way, certainly, it did not appear initially to see how crucial political engagement was going to be for the success of the project. As the Chief Commissioner acknowledged there was initially a reluctance to allow politicians to be too closely involved and some felt that they could draft and present a Bill of Rights without much reference to politicians. This appeared to have been due to a concern that closer involvement would jeopardise the independence of the Commission:

‘it has dawned upon us that the political reality is that we need consensus here. So I have to say that there are some Commissioners who ended up being worried that we were being politically divisive, they were the very ones who when we started the whole process said: “Don’t pay any attention to what politicians think because we mustn’t follow their lead, we

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89 Interview with civil servant from the Irish Secretariat, 14 October 2002.

90 Interview with Brice Dickson, Chief Commissioner, 4 April 2003.
must do what we think is right in human rights terms”. I think we’ve become a bit more real’.

Although the Commission clearly needed to maintain its independence from political influence in this project it was essential that it engage closely with these political parties to gain acceptance for the project as a whole. Yet the Commission seemed to lack the confidence to do so. It has also not been clear on the relationship between its own views and how to deal with those of the political parties. In this respect it is particularly important that the Commission is clear on what its role should be and the minimum standards it wishes to see in any Bill of Rights. This is a difficult balance to achieve. As one Commissioner said to us:

‘I think there’s a slight dichotomy in the Commission between the need to lead and the desire to keep political parties on board and to have their support for what it is doing. I think the Commission probably realise that they can produce all the advice they want but at the end of the day if it doesn’t have political consensus it won’t carry’.

It became increasingly clear, therefore, that a new initiative was needed to encourage more input from the political parties. A new structure for greater political involvement in the Bill of Rights process was proposed, based on a Round Table forum of the main political parties, alongside the Commission and civic society with an independent chairperson. Taking cognisance of this, the NIHRC held a consultative meeting on 2 December 2002 to report on progress with the consultation to date and to discuss this initiative. The NIHRC also suggested a number of seminars on ‘capacity building’ on the most important issues arising from the submissions. The Joint Declaration of 30 April 2003 by the British and Irish Governments, indicated that the British government would work with the parties to facilitate the response to the proposal for a Round Table forum and that it would be adequately supported and resourced. Yet, the Round Table has still to be established and it has always been, and remains, unclear what the NIHRC’s role will be within it.

The JCHR have recommended the NIHRC is kept at ‘arms-length’ from the Round Table discussions. Their reasoning is that if the NIHRC is to be seen to be acting independently when submitting its advice to the Secretary of State, it should not be involved. The NIHRC, however, is opposed to such a move, ‘we want to be effectively involved’, and as the Chief Commissioner stated to us:

‘I’m absolutely against any such proposal, the Commission as a whole is against it certainly, and the Government is against it. We were given the duty both by the Agreement and by the Northern Ireland Act to advise the Secretary of State and we must fulfil that duty. We’ve always said that we wanted the political parties to be involved in a Bill of Rights process, but we didn’t want them to dictate the process and we didn’t want the whole process to be reduced to the lowest common denominator that could be found between the parties. That danger still remains, I must say, which is why even this initiative to create a round table, we have insisted upon the right to reject any advice that that round table gives us if we think it’s not good enough. We will submit our own advice to Government’.

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91 Ibid.
92 Interview with former commissioner. See further Chapter 5.
93 Interview with Christine Eames, Commissioner, 1 April 2003.
94 Joint Committee on Human Rights, Fourteenth Report. Work of the Northern Ireland Human Rights Commission, at 34.
95 Ibid, at 83.
96 NIHRC, Response to the JCHR, at para 24.
97 Interview with Brice Dickson, Chief Commissioner, 4 April 2003.
These different approaches illustrate the tension between, on the one hand the risk that a Bill of Rights drafted solely by political parties would fall below internationally accepted standards on human rights, and on the other that political acceptance of the content of such a document is essential to its success. The Agreement requires that it is the Commission who will provide advice to the Secretary of State. Given its role as the expert body on human rights within the jurisdiction, it is reasonable to expect that the Commission should verify that any negotiated draft produced by political parties meets international standards.

In recent months it would appear that the government has obtained the support of four political parties, SDLP, Sinn Féin, Alliance and now the DUP, to agree to meet to discuss the idea of a Round Table. Although the Commission is likely to still want to play a not insignificant part in advising the Round Table, it has recently been suggested that the Commission will simply attach its comments to any conclusions the Round Table is likely to reach and submit both to the Secretary of State. The Chief Commissioner has also suggested that, depending on the nature of the conclusions reached by the Round Table, the Commission may also still continue to draft its own document and submit this with that of the political parties to the Secretary of State.

It is essential now that the Commission consider carefully its own vision for a Bill of Rights and how to feed this into the Round Table process.

**Consultation process**

Beyond the difficulties the Commission has faced with respect to the wording of the Agreement and the lack of political engagement, the manner in which it has carried out the project has not been without concern. The Commission decided that drafting the Bill of Rights should involve consultation that should be broad and inclusive. The Commission first began to consider the issue in the autumn of 1999 and launched its consultation on the Bill of Rights on 1 March 2000. Public meetings illustrated the dynamism that such a project could engender. As Christine Bell noted in respect of the official launch of the project, 'This was just a textbook performance of everything a Bill of Rights debate should be. There was a cross section of most political and civic society groups. There were people cutting across party political debates, there was the internationalisation of the debate, the room was packed with people who had had no engagement with human rights at all.'

The Commission established nine working groups to look at a number of sub-issues. The Commission called for comments on a Bill of Rights to be submitted by February 2001, although this was later extended. The Commission then issued in September 2001 a consultation document, ‘Making a Bill of Rights for Northern Ireland’, saying it was taking on board the submissions and working group reports. This draft document was a lengthy one containing 164 proposed clauses, 127 of which are supplementary to the ECHR. The NIHRC gave 1 December 2001 as a deadline for responses to their proposals. The NIHRC acknowledged that three months was quite a limited period but as the Chief Commissioner stated at the launch of the draft document ‘we hope that the time pressure will help to concentrate the mind and that enough time will then be left to allow the current Commissioners to produce their final advice to the Secretary of State before their term of...

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98 Interview with Christine Bell, former Commissioner, 16 May 2003.
99 These areas are children’s and young people’s rights; criminal justice; culture and identity; education; equality; implementation rights; language; social and economic rights; and victims’ rights.
100 The NIHRC received over 130 written responses by the end of February 2001 and a further 80 submissions received between March and July of the same year were also considered.
101 NIHRC, *Making a Bill of Rights for Northern Ireland*. This was launched at an event in the Waterfront Hall, Belfast, 4 September 2001 attended by over 300 people and widely disseminated in various formats.
office expires at the end of February next year. However, the deadline was then extended informally to the summer of 2002 and even in 2003 the NIHRC was still receiving submissions. By the summer of 2003 the Commission had received 340 submissions on the Commission’s draft proposal from organisations and individuals. The responses were then summarised in an extensive document.

In April 2004 the NIHRC produced its progress report on the Bill of Rights which it said was intended to 'act as a bridge between the consultation document and the Commission’s final advice to the government'. Progressing a Bill of Rights for Northern Ireland: An Update is an extensive document running to nearly 150 pages. It deals with the major criticisms to the first document, before going on to set out various sections of the Bill of Rights, proposing clauses and giving comments on why they were drafted. It called for further comments on specific issues to be submitted by 1 August 2004. The NIHRC stated that it planned to give its final advice to the government in 2004 and would work thereafter to have its advice implemented as soon as possible. As noted, above, however, the Chief Commissioner has recently stated that advice is not likely to be given until the newly appointed Commissioners have had a chance to participate, in reality no earlier than spring 2005. The Commission has suggested that a ‘handover’ document will be produced outlining what the Commission has done so far in the process. It is likely that this document will contain a third draft Bill taking into account comments that have so far been received on the April 2004 document.

During this entire process the Commission carried out a large number of activities including publishing Bill of Rights Discussion Pamphlets; produced a training video and trainers’ manual, a small booklet; placed advertisements in a number of newspaper and on billboards; and ran a series of ‘Training for Trainers’ programmes which allowed community leaders and facilitators to consult within their own networks and communities.

102 Speech delivered by Professor Brice Dickson, Chief Commissioner of the NIHRC, Waterfront Hall, Belfast, 4 September 2001.
103 For a list of those who submitted see NIHRC, Summary of Submissions on a Bill of Rights, at 120-133. From the 340 submissions, 40 were made confidentially or anonymously.
104 Ibid.
112 400 facilitators were trained. Northern Ireland Human Rights Commission, Annual Report 2001, 2001, at 29. The NIHRC employed a temporary Bill of Rights Education Worker to help with the training events.
Further activities included developing a website on the Bill of Rights,114 producing a newsletter explaining how the process of consultation was developing and what provisional conclusions had emerged,115 holding numerous events and meetings with organisations, individuals and some political representatives;116 and hosting a conference to consider other countries’ experiences.117 The NIHRC also encouraged organisations and groups, especially those with networks for disseminating information, to host meetings consulting their own members, which Commissioners and staff attended.118 A Human Rights Consortium, created in 2000 by NGOs, helped to encourage widespread community participation in the consultation process with its membership of over 100 organisations and groups.119 There was a concrete effort to involve children in the consultation process with the publication of a specially designed version of the draft document for children and a number of events were held in which the young participated.120

Overall, many of those we spoke to were very positive about the Commission’s broad consultation exercise, in the words of one NGO, it was ‘as inclusive as possible and we’ve had a lot of advertisements about it and they really have tried to reach as many people as possible. I mean they have been very supportive’.121

In encouraging such a broad consultation the Commission drew upon experience in other countries, notably South Africa and Canada, which suggested that if the public feel that they have ownership and have participated in helping to draft a Bill of Rights, then it is likely to increase its legitimacy.122 A Bill of Rights can be used to unite a divided society, if the ‘drafting process has been inclusive and legitimate’.123 However, like South Africa,124 some in Northern Ireland expressed concern that the consultation had not been particularly effective in reaching beyond the community and voluntary sector, most of whom were already aware of the Bill of Rights:

‘...the process has been I would say generally good, consultation has been pretty widespread, reasonably deep, as far as the organised community and voluntary sector has gone. Where I think they failed badly is in engaging with the public at large. The public at

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114 http://www.nihrc.org
115 Rights - Insight, Newsletter of the Northern Ireland Human Rights Commission. It was intended that this would be a regular publication but only one issue was produced.
118 Grants from the Community Foundation for Northern Ireland permitted groups to hold seminars and meetings, provide training or produce publications. The views expressed were then submitted to the NIHRC. The Community Foundation for Northern Ireland (formerly Northern Ireland Voluntary Trust), The Bill of Rights for Northern Ireland. Having Your Say. Guidelines for applicants. The CAJ produced a Bill of Rights Information Pack.
119 http://www.billofrightsni.org/
121 Interview with Geraldine Campbell, HIV Support Centre, 1 October 2002.
122 An evaluation conducted by an NGO, CASE, in South Africa showed that the public participation strategy pursued by the Constitutional Assembly resulted in an increased awareness of the Constitution and people felt that they were a part of the constitution-making process, S Gloppen, South Africa: The Battle Over the Constitution Ashgaye, 1997 at 266.
large, despite its advertising campaign, still isn’t really aware I don’t think of a Bill of Rights at all’. 125

Three surveys also substantiate these views. 126 Over the two and a half years between the first two surveys there was an increase of only 1 per cent of the knowledge of the NIHRC’s existence. 127 As noted below, there was no real improvement by 2004. As noted elsewhere, the importance of the Commission gaining, in particular, unionist support for its work, was crucial to its success not only in this project, but also its legitimacy more generally. Yet the Commission failed to gain the backing of many in the unionist community for the Bill of Rights. 128

Given the widespread nature of the consultation and the extent of what is a significant constitutional task, one would have imagined that the process would take some time to complete. However, the Commission originally stated that it aimed to deliver its final advice to the Secretary of State by March 2001, 129 only one year after its official launch. Many organisations and individuals used this opportunity and worked hard to submit their views in the three month deadline initially given by the Commission to submit comments on its first draft, only then to find that the deadline was extended several times. In addition the lack of feedback produced on the submissions undermined the consultation process for many. This then made the Commission the focus of negative attention. Consequently there was a real sense of frustration among those who had made initial submissions:

‘I think that if they had been much more realistic right from the start, that the initial deadline was rubbish, perhaps they should have done something about that, because that has been very frustrating. Community groups who had little resources trying to mobilise people quickly because they had very tight deadlines and then they find that actually if you are a political party you actually have another 12 months, or because you didn’t respond the first time that they are really going to beat a path to your door, so that left a feeling that the community/voluntary sector being a wee bit marginalised and not quite so important in recent times’. 130

Although the delay and extension of deadlines to some extent must be attributed to the breakdown of the political process and the resulting ongoing negotiations in that regard, the Commission still retains some degree of control over the management of the process. Unfortunately, any impetus and enthusiasm for the project which was there initially when the Bill of Rights was launched may well have been lost:

‘I mean when you look at all the amount of money promoting it and both in terms of the Human Rights Commission but all of the sectors that were working alongside them and all of the resources, the time resources that we put into it. I’m sure I spent about 22 hours at least doing the consultations and doing the responses and in the training, maybe that, I

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127 ‘This would seem to indicate that in that process it has tended to reach those who are already aware of the Commission’, Hosking, The Northern Ireland Human Rights Commission.
129 Commission Minutes, 12th meeting, December 13, 1999.
don’t even know if that counted the two days’ training, probably didn’t. And yet it just seemed to fizzle out, it was very, very soul destroying.131

The Commission must now be clear on how it is going to proceed, especially with the involvement of new Commissioners and a new Chief Commissioner, and be careful not to set further deadlines that are unrealistic.

**Lack of agreement on content of Bill of Rights**

Not only can wide participation in the drafting of a document such as a Bill of Rights ensure ownership over its contents, it can also increase the likelihood that it will be a better Bill of Rights.132 As noted above, the NIHRC clearly attempted to involve the wider society in its Bill of Rights project. Yet this consultation needed to be balanced against an agreed view from the Commissions themselves and some clear consensus as to what the document would actually contain. Submissions and consultation from the stakeholders and the public are likely to produce a wide range of opinions and beliefs, and the Commission needed to find some way of not only consolidating those but, more importantly, coming to their own conclusions and own vision, based on their expertise, as to the best document as a result.

The first difficulty in this regard was how to deal with the advice of the Working Groups.133 These Working Groups were asked within a period of three to four months to produce a report of no more than 3000 words on what should be contained in the NIHRC’s advice to the Secretary of State concerning the nine identified areas. Each group was composed of around 20 experts and they attempted to produce their reports by consensus. The role of these groups, however, was not clear. Their composition suggested they were required to provide expert advice on certain themes.134 Although each Working Group was told that their ‘report should consist of a first section which gives the recommended wording of the provisions envisaged and a second section which explains the thinking behind the choice of wording for each provision’, many felt there was a lack of guidance as to what form the report should take. Should it be idealistic or pragmatic? Should it produce explicit drafts of a Bill of Rights, or merely a collection of views? As has been stated elsewhere, the ‘former would presume some legal drafting…the latter would suggest that some public consultation by the groups were required’.135 However, given most of the Working Groups were not lawyers, each group had a limited budget of £2,000, and members were acting voluntarily, collecting views and opinions from others was not practical. According to the Chair of one of the Working Groups, when she sought guidance on this issue from the NIHRC the advice was conflicting.136

Further confusion arose over what should happen to the reports after they were submitted and how influential they should be in the draft consultation document. While the Commission is clearly an independent body and entitled to do with the submissions from the Working

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131 Interview with Marian Culley, former member of Disability Action, 27 January 2003.
133 Almost 200 members made up the Working Groups. For the list of names and Chairs of the different Working Groups see the NIHRC, *Annual Report 2001*, at 46.
134 The Chair, with the exception of the Implementation Issues group, was drawn from outside of the Commission. The membership, as stipulated in the Guidelines drawn up by the NIHRC, was intended to ‘broadly reflect the gender and community balances within Northern Ireland’. Northern Ireland Human Rights Commission, *Bill of Rights Consultation, Guidelines for Working Groups*, 16 August 2000. However like the NIHRC’s own composition, a number of organisations were critical of the method of appointment and the membership: ‘I think we would express a little bit of disappointment not to have been included in some of the working groups that were established, particularly those that focused on social and economic rights issues’, interview with Bob Stronge, AIAC, 8 October 2002.
136 Interview with the Chair of a Working Group, 12 November 2002.
Groups as it saw fit, after the reports had been submitted to it no meetings were held for any discussion, and some felt that their recommendations ‘went out the window’. Out of the nine Working Groups, three in particular were disappointed that the NIHRC’s draft proposals did not wholly reflect their advice. One member of the Language Group felt ‘cheated… and was left with a strong feeling that my time and that of my colleagues on the working group had been wasted’. The Chair of the Economic, Social and Cultural Rights Group described the NIHRC’s approach to its advice as ‘disingenuous’: ‘The Commission should have been explicit, they should have either have said we accept this recommendation and we endorse it or we don’t accept it.’

This lack of clear direction in how to deal with the views of the Working Groups was repeated in respect of the over 300 submissions received from the consultation process. As a result the Commission’s first draft Bill of Rights, Making a Bill of Rights for Northern Ireland in September 2001 came under considerable criticism for its lack of an overall vision, its uncertain relationship to existing domestic and international human rights provisions, a lack of internal coherence, excessive length and a lack of clarity as regards its enforcement within the context of the United Kingdom legal system. While the second draft issued in April 2004 mentions expressly many of the concerns raised with the initial proposals, it fails to deal with them adequately in its proposed amended provisions. Many questions are still raised and left undecided by the Commission. With the recognition now that political party acceptance and involvement is crucial to the Bill of Rights project, a further set of views will also need to be taken into account. How to balance the need to reflect views from others in the Bill of Rights against the Commission’s own vision never appears to have been clarified. It is therefore essential that the Commissioners themselves now agree on what they want the Bill of Rights to contain. This will then give them a framework against which to assess the numerous submissions that the Commission has received.

In this regard, it is particularly essential that the Commission be clear on two key issues, firstly, the relationship between the Bill of Rights and the Agreement on the one hand, and secondly, with international standards on the other. A debate around the issue of identity perhaps best illustrates the difficulties the Commission appears to have faced.

137 As one member of a Working Group commented ‘perhaps the Commission should have met the working group subsequent to the production of the group’s draft and discussed it more fully’, L. Reynolds and C O’ Murchadha, ‘A Bill of Rights for Northern Ireland - Language Issues in Context’, 52 Northern Ireland Legal Quarterly (2001) 309-315 at 315. The Equality Working Group report specifically recommended that such meetings should be held.

138 Interview with former member of the NIHRC, 16 May 2003.

139 These were the Cultural and Identity Working Group, Economic, Social and Cultural Rights Working Group and the Language Rights Working Group.


142 The authors of this study have already indicated some of their views on it in a special edition of the Northern Ireland Legal Quarterly which was produced as a result of a conference at Queens University Belfast in December 2001, Special Double Issue on the Proposed Bill of Rights for Northern Ireland 52 Northern Ireland Legal Quarterly, 2001; Murray, ‘The Importance of a Bill of Rights in Northern Ireland as a Process’; S Livingstone, ‘The Need for a Bill of Rights in Northern Ireland’, 52 Northern Ireland Legal Quarterly, (2001) 269-285.

The draft Bill of Rights of September 2001 contained provisions on ‘rights concerning identity and community’.144 These are the Commission’s primary response to the specific provisions in the Agreement regarding the need for a Bill of Rights to formulate an obligation on government and public bodies to ‘respect, on the basis of equality and treatment, the identity and ethos of both communities in Northern Ireland’. The September 2001 draft Bill of Rights acknowledged the Commission’s disagreements on this and included optional approaches.145 That of the majority included the key provisions that

‘2. Everyone belonging to a national, ethnic, religious or linguistic community shall have the right in common with other members of that community to enjoy his or her own culture, to profess and practise his or her own religion and to enjoy his or her own language

‘4. Everyone has the right freely to choose to be treated or not to be treated as a member of what might otherwise be perceived to be their national, ethnic, religious or linguistic community and no disadvantage shall result from this choice or from the exercise of rights connected to this choice.’

The Commission indicated that these proposals drew heavily on the 1995 European Framework Convention for National Minorities but it replaced the word ‘minorities’ with the word ‘communities’. This was done allegedly because the NIHRC felt that to draft a provision focusing on ‘the two communities’ in Northern Ireland was too narrow and excluded the concerns of other groups such as those of Chinese origin. Secondly, it was also felt that including a ‘minority’ rights provision would lead to constant debates over whether Protestants or Catholics were a ‘minority’ and entitled to its protections alone, better instead to give all communities equal rights.146

There were two issues of concern with this approach, however. Firstly, ethnic minority groups indicated that they were not totally in favour of replacing ‘minority’ with ‘community’ as this may lead to their cultural concerns being undervalued and to ignoring the disadvantaged position of minority groups.147 Secondly, a number of people have argued that clause 4 above, taken from Article 3(1) of the Framework Convention, may undermine the voting provisions established for the Northern Ireland Assembly and monitoring regulations under fair employment law.148 As a result they suggest that such provisions, if enacted, would undermine the Agreement rather than build on it. This is despite language in the disputed section stating that ‘nothing in this section shall be used to negate equality commitments, including positive action provisions, in this Bill of Rights or in legislation’. From within the Commission Inez McCormack referred to concerns about this provision in her resignation statement. Patrick Yu was even more emphatic in his resignation letter of 7 July where he raised concerns about the implications of the provisions, which continued to be discussed within the NIHRC, and the Commissions reliance on OSCE rather than Council of Europe advice for its decisions.149 While it does not seem inappropriate to us for a national human rights commission to seek advice from a variety of international sources, it was claimed by

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144 NIHRC, Making a Bill of Rights for Northern Ireland, at Chapter 3.
145 Section 3 of the draft Bill of Rights.
146 While Catholics would be a minority in Northern Ireland as a whole this would not be true in certain parts of the jurisdiction.
147 Interview with Tansy Hutchinson, NICEM, 1 November 2002.
148 The voting provisions provide that Assembly members must designate themselves as ‘nationalist’, ‘unionist’ or ‘other’. The monitoring regulations require employers to make a return to the Equality Commission indicating how many employees they have from a Protestant or Catholic community background. They must ascertain a community background for those who do not complete a monitoring return or indicate that they are neither.
149 The Making a Bill of Rights document refers to advice from the High Commissioner for Minorities at the OSCE on the desirability of replacing minority with community. As the Framework Convention is a Council of Europe treaty Yu argued that it was more appropriate to seek advice from the Council of Europe. In its action plan of October 15 the NIHRC indicated that it was its intention to do this and such advice has subsequently been sought.
some we spoke to that the Commission chose to approach the OSCE rather than the Council of Europe as the former were more likely to provide it with the advice it preferred. This was despite the fact that the Council of Europe is seen as the authority on the Framework Convention. The Commission, it is alleged, did not in fact wish to approach a variety of international sources. Yu’s concerns were picked up by nationalist politicians in Northern Ireland and by the then Irish Foreign Minister Brian Cowen and even two senior US investment officials.\textsuperscript{150}

The Commission pointed out that these proposals remain in draft and that they were open to discussion on them. In its Progress Report of April 2004, however, it amended its position, referring now to ‘everyone belonging to a national, ethnic, religious, linguistic or cultural minority or community’. Secondly, although it removes express mention of the right to choose whether to be treated or not to be treated as a member of a community, it states that ‘it remains of the view that this right should be protected’ and because it is enshrined in the Framework Convention for the Protection of National Minorities Article 3(1), ‘the whole of which is to be applied in Northern Ireland by virtue of section 3(4) of the proposed Bill of Rights, there is no need for it to be given a separate mention in the Bill’.\textsuperscript{151}

We would suggest that these inconsistencies and concerns reflect broader confusion within the Commission as to the nature and objectives of the Bill of Rights. Although the Commission stated in its Action Plan of 15 October 2003 that its ‘prime motivation’ is to build on existing human rights and equality provisions ‘including those in the Agreement’ and recognised concerns in its April 2004 document that the draft was not consistent with the Agreement, there remains a suspicion that this view is not consistently held. Certainly one Commissioner observed to us

‘I think there are strong individual human rights principles which would justify the Commission in saying “those bits of the Agreement are actually not compliant with international standards and also they are not a good thing in terms of the future of Northern Ireland”. So I am quite happy with that, saying there are some bits of the Agreement which are not ideal’.\textsuperscript{152}

Yet this is an important issue, as a previous Minister of State for Northern Ireland has stated, the ‘key test which the government will need to apply in considering proposals from the Commission for a Bill of Rights is the contribution they will make towards the peace process’.\textsuperscript{153} ‘The Commission needs to think carefully about how it sees the role of the Bill of Rights in respect of the wider peace process and how it wishes to link its proposals with the provisions of the Agreement.

\textsuperscript{150} They wrote to both the British and Irish governments indicating that ‘the draft Bill of Rights produced by the Commission jeopardizes important legal protections for the Catholic minority community and greatly endangers years of progress that have been made in this area... Allowing the Commission to languish will only threaten existing human rights and equality protections and further undermine confidence in the promise of the Good Friday Agreement’, Letter from W.C. Thompson and A.G. Havesi to the British and Irish government, September 2003. The Commission’s several attempts to contact them were not initially successful and they admitted later to the Commission that they had not read the equality clause in the proposed Bill of Rights before making their statement. The Commission is planning to meet with Mr Havesi, see Minutes of 59th meeting of the Commission, para 4.3.2.

\textsuperscript{151} NIHRC, \textit{Progressing a Bill of Rights}, p.33. However, it omits the section present in its initial draft which expressly states that ‘Nothing in this section shall be used to negate equality commitments, including positive action provisions in the Bill of Rights or in legislation’, s.3(b)(1), September 2001 draft.

\textsuperscript{152} Interview with a Commissioner, 30 April 2003.

\textsuperscript{153} Letter from the then Parliamentary Under Secretary of State for Northern Ireland, Des Browne to the NIHRC, 22 November 2001.
Secondly the basis of the Commission’s arguments as to why such provisions are included remains unclear. At times, as the comment above indicates, it is based on a claim that international human rights provisions require such measures (which is where the controversy regarding the international advice becomes especially pertinent), at others that such measures are desirable to get away from entrenched sectarianism in Northern Ireland. The initial draft’s insistence on a right to opt out from being treated as a member of a community has been praised by some as a defence of individual against group rights yet the initial proposed section as a whole gives groups (especially powerful groups) much greater legal protection than has hitherto been the case in Northern Ireland.\(^{154}\) The April 2004 draft confuses the issue. Overall it is likely that many of the public remain unclear as to what exactly the dispute is about while the support of some key politicians otherwise sympathetic to the Bill of Rights project has been endangered.

The issue of identity was not the only example upon which Commissioners were unable to agree among themselves, also failing to achieve consensus on the meaning of the term ‘the particular circumstances of Northern Ireland’ and how to proceed: ‘I wouldn’t say there is agreement on it, we’re still discussing it and it’s one of the issues that is part of the, for want of a better word, road shows that we’ve been doing, it is one of those particular things that we are looking at as well under the Bill of Rights. I think we all have different understandings or conceptions of what that is about’.\(^{155}\) As a result, instead of initially expressing an agreed approach, as one Commissioner said ‘“the particular circumstances of Northern Ireland” sometimes require a bit of a fudge about some of the issues’.\(^{156}\) However, rather than place the Commission in a more neutral position, ‘fudging’ this issue probably gave the impression that the Commission was adopting a broad interpretation and that it was legitimate to include a wide range of proposed human rights for inclusion in the Bill. This the Commission then affirmed in its Report, Progressing a Bill of Rights, in April 2004, stating that its consultation had ‘indicated that the preferred approach of the vast majority of those who have taken an interest in the matter is to adopt a Bill of Rights that covers not only rights of particular concern to the two main communities but also those of other disadvantaged communities and individuals’.\(^{157}\) The lack of clarity and divisive debate around the issue, however, has been used to undermine the legitimacy of the Commission not only in carrying out this task but more generally.

Even on an issue where the Commission recognised widespread appeal of such rights to many within Northern Ireland as evidenced by opinion polls\(^{158}\) and research that suggested comparative disadvantage in Northern Ireland in terms of housing, health and employment than in the rest of the UK, the Commission was unable to suggest a clear approach to the treatment of economic and social rights in the Bill of Rights. This has been a contentious issue. Those who favoured a broad expansive approach to the Bill of Rights advocated for their inclusion, supported in turn by the ability of the Bill of Rights to reach across the community divide by the inclusion of rights which were often seen as more relevant to many than traditional civil and political rights. As a representative from Help the Aged stated to us, ‘particularly the older person sector is focussing on things like socio-economic rights and would feel very strongly that to make the Bill of Rights relevant, and indeed the Commission relevant that particular in the older person sector, it needs something like that in’.\(^{159}\)

\(^{155}\) Interview with a Commissioner, 2 April 2003.
\(^{156}\) Interview with Christine Eames, Commissioner, 1 April 2003.
\(^{157}\) NIHRC, Progressing a Bill of Rights for Northern Ireland, at pp.9-10.
\(^{158}\) Northern Ireland Omnibus Survey, RES, July 1999.
\(^{159}\) Interview with Avril Craig, Help the Aged, 6 December 2002.
Others, however, disagree and have questioned the inconsistency of entrenching such rights in Northern Ireland and not the rest of the UK. In its initial consultation draft the Commission recognised that civil and political rights and economic, social and cultural rights were interdependent, although they were usually enforced in a different way.\textsuperscript{160} It then set out general principles whereby ‘Poverty and social exclusion represent a fundamental denial of human dignity’, legal remedies were necessary but insufficient alone, such rights should be protected equally and without discrimination, and public bodies should develop programmatic responses to the underlying causes of violations of such rights. It then required that all public bodies should take ‘legislative and/or other measures to develop and enforce programmatic responses to the social and economic rights’. In so doing, they should allocate resources in a ‘proportionate and non-discriminatory manner’. The economic and social rights then listed by the Commission were: as the peaceful enjoyment of possessions, the right to the highest attainable standard of physical and mental health and well-being, an adequate standard of living, the right to adequate housing, right to contribute to the economic and social life of society, including the right of access to work and the right to choose and practise a trade or profession, and the right to a healthy, safe and sustainable environment. The right to education was not included under this section, but dealt with separately elsewhere in the document.

The Commission acknowledged in its April 2004 draft that, despite widespread support for the inclusion of such rights, the provisions it had produced had prompted considerable criticism. Although acknowledging these concerns the Commission was no clearer in its Progressing a Bill of Rights paper in April 2004. Despite saying that it wished there to be ‘no doubt over how the social, economic and environmental rights’ should be enforced and protected, it did not present one view but three alternatives, calling for further discussion on each. Given the widespread consensus for the inclusion of such rights, the delay in the provision of the advice, and the call from international bodies that NHRI s have an important role to play in this regard,\textsuperscript{161} many have expressed disappointment that the Commission was not more forthright in this respect.

Conclusion

The Commission has illustrated, through its industry in some of its work, particularly its investigations and research, the value of a NHRI in Northern Ireland. Although it was not provided with the resources specifically to oversee implementation of the Human Rights Act, it is arguable that given the importance of this legislation to its work its potential could have been much more exploited. Perhaps the mistake of the Commission was to prioritise the Bill of Rights project, an ambitious constitutional task, with a vague remit, that relied on a supportive political environment.

Because the Commission placed the Bill of Rights project at the centre of its work, it was always going to be judged on what it delivered. Its eagerness to move quickly, without

\textsuperscript{160} NIHRC, \textit{A Bill of Rights for Northern Ireland}, September 2001, at pp.78-9.

\textsuperscript{161} See the General Comment No.10 on the \textit{Role of National Human Rights Institutions on the Protection of Economic, Social and Cultural Rights}, adopted by the Committee on Economic Social and Cultural Rights, E/C.12/1998/25, of 14 December 1998. This stressed the important potential role of such bodies in this regard, but which had so far not been really pursued and that such bodies should give full attention to such rights through education, scrutinising laws and policy, giving advice, indicating benchmarks, conducting research, monitoring compliance with the ICESCR, examining complaints. It said that such institutions ‘have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. Unfortunately this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions’, para 3.
recognising the importance of political support, and its lack of clarity on its own vision for the Bill of Rights meant that dealing with submissions from others has been problematic. After some reticence the Commission appears now to have accepted that to go ahead with providing advice to the Secretary of State at this stage, with the imminent appointment of a number of new Commissioners and Chief Commissioner, and with the Round Table process pending, would be premature.162 While the NIHRC is under an obligation to produce advice on a Bill of Rights which best protects the rights of all in Northern Ireland, rather than one which simply satisfies politicians’ wishes, it needs to be clear about when and why it is challenging their positions if it hopes to prevail. It cannot do this if there is no vision among the Commissioners on what a Bill of Rights can achieve.

162 A view echoed by political parties: ‘Not a great deal of negativity has been evident although both the SDLP and Sinn Féin felt that the publication was premature and should not have preceded the establishment of a political forum’, Minutes of the 64th meeting of the Commission, para 8.2. See also, ‘Lewsley: Let’s Move on Rights Ahead of Leeds Castle’, 2 September 2004, www.sdlp.ie/prlewsleysmoveonrightsbeforeleedstalks.shtml. ‘The SDLP is disappointed that he Commission have not focused on getting everyone around the one table and instead is pressing ahead with its own proposals. The reality is without wider political and public ownership their proposals risk being binned by the NIO’, ‘SDLP Bill of Rights Proposals’, 6 April 2004, http://www.sdlp.ie/prlewsleybillofrightsproposals.shtml
CHAPTER FIVE

ISSUES OF LEGITIMACY

As noted in Chapter 1, how a Commission is perceived in the eyes of the various stakeholders in society is key to its effectiveness. In order to be able to exert influence in the promotion and protection of human rights, a commission must enjoy widespread respect, not only from official bodies including government and the legislature, but also from political players and civil society as a whole. How it promotes its work, through the media and its communication strategy and at the international level, will undoubtedly influence how it is perceived by others. In addition, in order to establish itself as an authority on human rights within its jurisdiction, it is important that it carve out a role for itself among other constitutional and statutory bodies that are likely to exist and with whom there may be some overlap in functions. This Chapter will explore the Commission’s relationship with various actors.

The importance of a relationship with government and political players

It is apparent that many tensions over a NHRI’s relationship with other bodies, including the government itself and NGOs, result from a lack of clarity as to its position in respect of them. As one staff member stated in relation to the South African Human Rights Commission: ‘the Commission is still like a square peg in a round hole, it still hasn’t found where it fits in’.1 It would seem that a human rights commission is often perceived as sitting between NGOs and the government and acting as a link between these, what are seen sometimes as, opposing forces. Further, there does appear to be a perception from those outside a NHRI that if the government agrees with the Commission or praises it for its work, then the latter is not doing its job correctly, ‘You know when presidents and governments congratulate the Human Rights Commission you start to worry’.2 Given the background of some of the Commissioners, how the Commission is funded and appointed, and the need for independence, this causes difficulties.

One of the underlying themes of the Paris Principles is the need for a commission to be independent from government: an institution should be able to ‘perform its functions without any interference or obstruction from any branch of government or any public or private entity’.3 On the other hand, however, there is also a need however to be able to influence government and have a close relationship with it and be taken seriously by it. In short, it has to be ‘friend and foe’.4

Due to the political context of Northern Ireland, the relationship that the NIHRC must form with government has had to take into account not only the UK and Irish governments, but also any devolved authority. The Commission thus has had to develop an independent yet influential relationship with the NIO, the Northern Ireland Executive, and to a certain extent the Irish government.

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1 Interview with staff member of the Commission, 7 August 2002.
2 Interview with Rhoda Khadalie, former Commissioner, 5 August 2002.
Independence not only relates to who allocates the budget of the Commission but also the need to ‘be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of the government’.\(^5\) The South African Constitutional Court has held that financial and administrative independence are necessary to ensure the independence of a constitutional or statutory body.\(^6\) As noted in previous chapters, however, it is the Secretary of State for Northern Ireland who appoints Commissioners to the NIHRC,\(^7\) and allocates funding to the Commission out of money voted by Parliament to the NIO.\(^8\) The manner in which Commissioners were appointed, in secrecy and subject to considerable criticism in terms of whether they were ‘representative of the community in Northern Ireland’, undermined the legitimacy of the Commission in the eyes of many from the start.\(^9\) The government did little forcefully counteract such criticism.\(^10\) Furthermore, the funding it initially provided to the Commission was woefully inadequate and additional funds were subject to its authorisation.\(^11\)

Yet the responsibility of the government goes beyond non-interference. It is also clear that in order to function effectively ‘the executive must provide the assistance that the Commission requires to ensure its independence, impartiality, dignity and effectiveness’.\(^12\) The government must therefore be more proactive in supporting the work of the Commission. Although at times the relationship with the NIO has been described as ‘good’, unfortunately, as one political party representative told us, ‘I think they don’t actually curtail it or they don’t actually restrict it but I am not absolutely sure that they…support it’.\(^13\) Many we interviewed suggested that the NIO showed ‘contempt’ for the NIHRC, treated it with ‘disdain’,\(^14\) that ‘the senior civil servants within the NIO have craftily manipulated the situation in terms of giving the human rights commission the least amount of powers’,\(^15\) or that the government did


\(^{7}\) S. 68(2) of the Northern Ireland Act 1998.

\(^{8}\) Para 6 Sched 7, of the Northern Ireland Act 1998.

\(^{9}\) ‘A large number of people in Northern Ireland, myself included, think that that commission has no credibility in view of the discriminatory process by which it was formed and of quite a few of the persons on it’, David Trimble, House of Commons, 29 November 2000.

\(^{10}\) As the Chief Commissioner himself stated to us: ‘They haven’t done enough certainly…when we’ve been criticised publicly, the Government has not stood up in the way they ought to have done and said in Parliament or elsewhere that they’re happy with the composition of the Commission, they’re happy with the fact that it’s doing its work independently and so forth. I don’t expect the government to endorse everything we say but I expect them to endorse the way in which we are working’, Interview with Brice Dickson, Chief Commissioner, 4 April 2003.

\(^{11}\) See Chapter 2.


\(^{13}\) Interview with Eileen Bell, Alliance Party, 6 December 2002. Further, ‘there is a difference between allowing a body to be independent and essentially abandoning and undermining it as every turn which is what the government is doing… I mean the Secretary of State’s line, the more they are independent you can’t be nannying them. When the human rights commission is attacked in parliament you would expect to hear something more than they are all on a steep learning curve’, Interview with NGO, 12 November 2002. Those within the Commission have felt that it ‘has not been given the status that it deserves by the NIO officials’, Interview with Brice Dickson, Chief Commissioner, 4 April 2003. A Peer Review of the NIO also recognised inconsistent treatment of NIO agencies and NDPBs, Northern Ireland Office, Peer Review, November 2001, para 5.3.

\(^{14}\) Interview with an NGO, 10 January 2003.

\(^{15}\) Interview with community group, 9 December 2002. In addition, ‘if you don’t want an effective human rights body you don’t give it enough powers and you appoint a commission that is sure not to
nothing to counter the ‘campaign of vilification aimed at undermining the Human Rights Commission since its inception’. These hardly indicate the necessary support from the government to enable the Commission to do its work. This has not necessarily been the case with all the statutory bodies. Yet in respect of the NIHRC despite receiving advice from the NIHRC on laws and policy, the government consistently failed to take its views seriously and some ministers have openly criticised the Commission and its members.

Despite some support for the Commission in its pursuit of the case to the House of Lords, of particular concern has been the government’s failure to provide anything more than a (very delayed) draft response to the Commission’s review of powers, rejecting most of its recommendations. Although the Commission has adopted Memoranda of Understanding with government departments, and, after a protracted process, with the NIO in October 2003, there appears to have been little real improvement in the relationship.

work and thirdly when there is resistance to it and attacks to it you spend your time negatively defending it’, interview with former Commissioner, 15 May 2003.


18 The Former Junior Minister for Human Rights and later the Minister for the Environment stated, ‘From an Administration point of view there was lesser contact than there was with the Equality Commission because the Equality Commission is... funded by OFMDFM, its corporate plan and business plan has to be agreed by OFMDFM and therefore during my time there we had an interesting relationship with the Commission. We do not have the same relationship with the NIHRC because there was not the same legal basis between the NIHRC and the Administration’, Interview with Dermot Nesbitt, 4 December 2002.

19 S.69(3) of the Northern Ireland Act 1998.

20 With respect to David Trimble it was noted ‘David, he really took serious umbrage at the appointments. I think it was his kind of view to have just one meeting...is not Brice’s (Dickson) fault’, Interview with Steven King, UUP, 27 February 2003. He called for the resignation of the Chief Commissioner when the latter stated that the then RUC should not use plastic bullets as riot control weapons, see http://news.bbc.co.uk/1/hi/northern_ireland/1445397.stm. The Commission was relying on a UN Committee Against Torture recommendation.

21 See Chapter 2.

22 In March 2003.

23 The delay, according to the NIO, was due to the fact that it was ‘tied up with the review of powers’ and the ‘need to be sensitive to concerns around Whitewall if there is going to have a wide UK Human Rights Commission’, Interview with the NIO, 29 October 2002. The NIHRC, however, has taken a more cynical view: ‘you’re never sure whether the Government really care whether we work or not. I’m not sure that there was a great deal of enthusiasm to make it work’, interview with Paddy Sloan, Chief Executive, 4 April 2003.

24 In light of these difficulties, the Commission has recommended that the regulation of their relationship through a Memorandum of Understanding should be expressly laid out in the Northern Ireland Act: The Commission recommends the insertion of a new section 68(3C) reading: ‘The independence of the Northern Ireland Human Rights Commission from the Government is guaranteed and the relationship between the Commission and the Government shall be regulated by a Memorandum of Understanding, including a Financial Memorandum, which shall be annually reviewed’, NIHRC, The Commission’s Powers – A Supplementary Review, 21 April 2004, para 11.
Any support from the Irish government was also going to be important. The Commission could have exploited this to build political backing for its work. This has diminished, however, after the resignations from the Commission, with the Irish government expressing its ‘serious concern’ with respect to that of Patrick Yu and ‘stated grounds of resignation which appear to give troubling implications for specific equality and rights aspects of the Good Friday Agreement’.25

Beyond government, a commission’s legitimacy will also be determined by its interaction with political parties. In countries where the desire to create a human rights commission emerged from a supportive political environment and a vibrant human rights community, the legitimacy of the commission has not been questioned. Further, ‘public acceptance for national human rights institutions is greatest within the transitional context, as the institutions are perceived as part of a new constitutional order’.26 Thus, with respect to South Africa, an examination of submissions to the Constitutional Assembly during the drafting of the Interim and Final Constitutions indicate a willingness to have a human rights commission from both the ANC, the government and other parties,27 although views varied on the role that such a body should play, the functions it should have and its membership.28 As a result, whereas national human rights institutions in other jurisdictions found it difficult to gain general public and political acceptance, which in turn will hampered their ability to be effective, the South African Human Rights Commission did not appear to suffer from the same fate.

In Northern Ireland, in contrast, the establishment of the human rights commission did not take place in this supportive political environment and human rights was seen as a divisive issue. Although human rights themselves may have been seen as a key ingredient in the Good Friday Agreement, the creation of the Commission was not a ‘first division issue’ for some of the political parties.29 Despite support from some parties, in particular Alliance and SDLP, for a human rights commission in principle, because the NIHRC was not championed by any party or government, this appears to have had an impact on the degree of support it was therefore likely to receive when it came into being.

Political support was clearly going to be key, however, to the NIHRC’s success. As noted elsewhere in this report, the language of human rights in Northern Ireland has not been traditionally seen as a neutral issue, with many in the unionist community seeing human

29 ‘Some of the Unionist parties did not promote or pursue issues of rights and issues of structures like the Human Rights Commission, they concentrated elsewhere… It was inevitable that people had emotional issues and therefore they majored on that. Sinn Féin and the PUP had prisoners and the Irish language’, interview with politician, 16 December 2002.
rights as being in the ownership of nationalists. The Commission’s relationship with political parties was, therefore, to a certain extent, defined from its inception. The task of the Commission was how it would engage with those most hostile to its work. While it was clear that the Commission did make attempts to meet with all sides of the political spectrum, support from unionists in particular was crucial to its legitimacy. This was going to be a difficult task for a Commission and the response of unionists to the work of the Commission was not wholly negative and it certainly managed to work with individuals. Yet it failed to use the necessary tactics to obtain collective support, ‘…some of it was just people not really having the confidence to do that sort of work’, with only a small number of Commissioners apparently being comfortable with attending meetings with political parties, and it was perhaps naïve in its approach to maintaining its independence. This sent out signals to some that engaging with a political party was ‘dangerous’ and by keeping ‘these dreaded political trends’ at arm’s length, the NIHRC would be insulated from any political influence.

Equally, the Commission needed to tap into and exploit those who would traditionally have been more supportive of what it was trying to achieve, particularly Sinn Féin and SDLP. However, these parties became disillusioned with the Commission, through its handling of the Holy Cross situation and its Bill of Rights project. These concerns were exacerbated by the resignations of Inez McCormack and Christine Bell, and later Patrick Yu. As a result, political support for the Commission was undermined, leading to a crisis of confidence in the institution as a whole. Despite meetings with the Commission, political representatives still felt the need to make statements calling for the resignation of the Chief Commissioner, and for restructuring of the Commission as a whole. Several political parties will be looking closely at the choice of new members of the Commission and have called for an independent appointment process and an increase in the Commission’s powers. Whether these are provided by government, and how the new members of the Commission engage with political parties will determine whether confidence can be re-established.

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30 As the Northern Ireland Unionist Party responded when asked for an interview by us, ‘I feel a meeting with myself would be unnecessary as part of your project given that my views on the NIHRC can be very simply articulated. My considered position is that the NIHRC should be abolished’, Correspondence via email from Patrick Roche, Northern Ireland Unionist Party, 5 November 2002.

31 ‘From day one the majority of the Unionist community viewed the deliberations of the Commission with a fair degree of suspicion’, Interview with unionist politician, 19 September 2002. Further, ‘I mean it is a creature of the Agreement and where do we go from there?’ ‘It hasn’t engaged the support of the Unionist community and therefore there is a key problem in that over half the community in Northern Ireland feel alienated from the Human Rights Commission’, interview with Edwin Poots, DUP, 27 January 2003.

32 Interview with Christine Bell, former Commissioner, 16 May 2003. See also Chapter 4 in relation to the Bill of Rights.

33 Interview with a politician, 26 June 2003.


Accountability of a national human rights commission is often ensured through the requirement that it report to the legislature. In the context of Northern Ireland, accountability to the legislature includes not only Westminster Parliament, but also arguably the Northern Ireland Assembly. Although the NIHRC is required to submit an annual report to the Secretary of State who is under a statutory duty to lay it before Parliament, it is not directly answerable to the Assembly. Any oversight that has been carried out, therefore, has been done by Westminster, in particular its Joint Committee on Human Rights, not by the locally elected legislature. In this sense, the NIHRC was always one step removed from those who were more likely to be interested in its work. This has led some to suggest that if the NIHRC were a devolved body, as the soon to be established Scottish Human Rights Commission will be, the local MLAs may then take more interest in the NIHRC and, in turn this would, ‘loosen the grip of the NIO’. There are, however, certain disadvantages to putting too much emphasis on the responsibilities of the Assembly in this regard. Given previous hostile debates that have occurred in the Assembly on the role of the NIHRC, there is always the risk that the NIHRC would become a political football and used by MLAs for their own particular agenda. In addition, there is no guarantee, as the experience of the South African Human Rights Commission indicates, that the Assembly would read the NIHRC’s annual reports: ‘Parliamentarians don’t read, nobody ever interrogates the report… Parliament has often not highlighted issues raised in the Human Rights Commission reports’.

A national human rights commission itself can also be seen as an oversight body over acts of government and provide information to Parliament to enable it to undertake the same function. As the Report on Parliamentary Oversight and Accountability found with regard to Chapter 9 institutions in the South African Constitution:

'in relation to Parliament they have two roles. Firstly they should be seen as complementary to Parliament’s oversight function: together with Parliament they act as watch-dog bodies over the government and organs of state. Secondly, they support and aid Parliament in its oversight function by providing it with information that is not derived from the executive. As pointed out above, one of the constitutional functions of Parliament is to be an oversight body to provide a check on the arbitrary use of power by the executive…Thus Parliament’s oversight function can be enhanced by ensuring the effective functioning of state institutions supporting constitutional democracy'.

In this regard, the NIHRC in its review of legislation has interacted well with Assembly committees and as Brice Dickson noted, these offered ‘a rare opportunity for the
Commission to engage with unionist political representatives.\(^{46}\) It is therefore particularly unfortunate that suspension of devolution in October 2002 prevented further development of relationships in this regard.

Beyond the committee structure, however, some MLAs commented to us that the relationship with the Commission was ‘limited’,\(^{47}\) ‘wasn’t particularly close’,\(^{48}\) ‘minimal’,\(^{49}\) ‘vulnerable’,\(^{50}\) and ‘less than I expected’.\(^{51}\) Consequently, it is not surprising that the level of knowledge of the NIHRC and its other workings has been described as ‘poor’\(^{52}\), ‘patchy’\(^{53}\) and ‘very low’.\(^{54}\) Even when the resignations from the Commission took place, although individual political parties expressed concerns and Sinn Féin raised it at one level in a debate in the Assembly, one former MLA stated ‘it didn’t kind of shake the rafters here at all which to me said something about how it hadn’t quite had the impact I would have liked to seen it have’.\(^{55}\)

It would appear that few MLAs know Commissioners\(^{56}\) and certainly the Commission does not seem to be a body that they would immediately think of contacting on human rights issues. As one member of the Assembly stated: ‘it just hasn’t proved necessary at this stage, it is useful to have it there and it may be if we got contentious legislative issues… Most of the concerns people would have on human rights issues, I think would be less to do with legislation and more to do with administration and practice’.\(^{57}\)

Debates about the NIHRC in the Northern Ireland Assembly, similarly when they have occurred, have not been particularly positive,\(^{58}\) often reflecting the traditional political difficulties with human rights in Northern Ireland.\(^{59}\) It is unfortunate that these discussions have focused more on whether the NIHRC has exceeded its remit or acted appropriately than on the substance of the Bill of Rights or human rights in general.

At Westminster, similarly, there are a limited number of MPs with in-depth knowledge of the Commission, and beyond these few individuals ‘nobody else has taken a particular interest in

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\(^{46}\) ‘I think also the Commission, for its part, has concentrated more on building up relations with the Assembly in terms of the Committee stages’, Interview with Brian Barrington, former Advisor for Deputy First Minister, OFMDFM, 16 December 2002. Although the establishment of a Standing Committee on Human Rights and Equality in the Assembly has been suggested, and at one time was supported by the Commission, the Commission has since altered its position preferring more regular liaisons with various committees than a single committee.

\(^{47}\) Interview with a former MLA, 15 October 2002. In the course of the research we sent a questionnaire to all MLAs regarding the NIHRC but this, including a follow up letter, elicited only 8 responses.

\(^{48}\) Interview with Edwin Poots, MLA, 27 January 2003.

\(^{49}\) Interview with MLA, 16 December 2002.

\(^{50}\) Interview with Eileen Bell, Alliance Party, 6 December 2002.

\(^{51}\) Interview with former MLA, 15 October 2002.

\(^{52}\) Interview with a former MLA, 15 October 2002.

\(^{53}\) Interview with Eileen Bell, Alliance Party, 6 December 2002.

\(^{54}\) Interview with Steven King, 27 February 2003.

\(^{55}\) Interview with a former MLA, 15 October 2002.

\(^{56}\) See interview with member of the Northern Ireland Assembly, 15 October 2002. As another MLA commented with regard to MLA’s knowledge of the Commission, ‘I think it is poor, I think it is limited but that is not the fault of the Human Rights Commission, that is the fault of MLAs’, interview with MLA, 7 December 2002.

\(^{57}\) Interview with member of the Northern Ireland Assembly, 15 October 2002.


\(^{59}\) See debate on 25 September 2001 with respect to Bill of Rights, above Chapter 4.
As we noted in Chapter 4, the Commission’s opportunity to influence Westminster legislation has been hampered by a lack of adequate consultation by government. In the House of Lords the NIHRC has a higher profile due to the many parliamentary questions asked by Lord Laird. Unfortunately he has consistently over the years attacked a perceived nationalist bias in the membership of the Commission, using this to undermine its work, which in turn has placed an increasing burden on the Commission to respond to such criticisms.

It is clear that the Commission could have done more in engaging with the legislature, and in particular with the Assembly members, on a more informal basis. It would appear that the Commission tended to wait for the Assembly to send it draft legislation, rather than, say, engaging more proactively with members. This may have been due, in part, to a greater focus by the Commission on developing its relationship with the executive:

‘I am not quite sure whether the Commission saw the main line of its focus as being trying to influence the executive as distinct from trying to influence the legislature and I have a feeling that they focused most, this may be wrong, but my sense was that they must be focusing most of their attention on the Executive because the interaction with ourselves was largely a response to me sending Bills.’

The lack of awareness of the Commission’s work stems in part from a more general problem with the low level of knowledge of human rights among MLAs and MPs more generally. While some initiative could have been taken by the Commission to remedy this, it is equally apparent that it must also be the responsibility of members of the legislature themselves, both the Northern Ireland Assembly and Westminster, to engage with the Commission, and to increase their awareness of human rights more generally.

With NGOs and Civil Society

A commission’s legitimacy can also be measured through its relationship with civil society. It has been found elsewhere in the world ‘utilization of and reliance on each other’s work

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60 Interview with David Feldman, former Legal Advisor to JCHR, 7 November 2002. As one MP said to us ‘I think other than the Joint Human Rights Committee very few people are aware of it’, interview with member of the JCHR, 7 November 2002.
61 For example, ‘Whether they consider that the claim of the Northern Ireland Human Rights Commission to “be independent from every organisation” in its annual report for 2002 is consistent with the number of members who are also members of the Committee for the Administration of Justice appointed to the Commission in 1995’, 13 January 2003, WA4. ‘When and why they decided that the Northern Ireland Human Rights Commission needed members with community and grass-roots involvement or with political astuteness and awareness or an international perspective; and which members embody these requirements’, followed up with the question ‘Who appointed Ms Inez McCormack and Professor Christine Bell to the Northern Ireland Human Rights Commission’, 7 November 2002, Col.WA165-166.
62 For example, ‘the problem is that the commission itself does not reflect society; rather, it has a perceived republican bias and slant, and thus is part of the cold house for Unionists to which the Secretary of State for Northern Ireland has referred’, 3 May 2002, Col.958. Further, ‘my concern relates to the republican cabal that proceeded to consider the Commission as its vehicle into power and to operate as it wished’, 18 March 2002, Col.1174. Further, ‘that commission has been one of the major disappointments over the past three years. With its rather one-sided agenda, it is perceived by the Unionist community as part of the problem, and certainly not part of the solution’, 23 October 2001, Col.957.
63 CAJ, Submission from the Committee on Administration of Justice (CAJ) to the Government’s Response, at p.2.
64 Interview with a former MLA, 15 October 2002.
should provide an important way of meeting the resource deficit and reaming effective’.\(^{65}\) As Human Rights Watch observed in its study of NHRIs in Africa those ‘that valued and sought to create partnerships with the NGO communities in their countries were inevitably the commissions with the strongest records’.\(^{66}\) The Paris Principles also emphasise the need to develop an active working relationship with NGOs.\(^{67}\) However, like its relationship with government, a Commission needs to maintain its independence from NGOs and needs to be careful that its agenda is not determined by them. It is crucial that human rights commissions define their space and manage the relationship in a positive way. If a NHRI manages its space effectively, however, it ‘can be a constructive interlocutor between government and civil society on human rights issues, and provide an umbrella of protection and support to the NGO movement’.\(^{68}\) Defining this space, however, may be particularly difficult where, as in many countries, a number of Commissioners are drawn from the human rights community.\(^{69}\) Conversely, it may be more difficult to define if there are no links to NGOs.

In practice, human rights commissions often have both formal and informal links with the NGO community\(^{70}\) and most individuals and civil society organisations we interviewed recognised the need to establish a good working relationship with the NIHRC.\(^{71}\) It is clear from our research, both in Northern Ireland and South Africa, that NGOs wanted to see the Commission as a partner, as well as an institution which could call on them for assistance and which should not duplicate what is already being done. There is a sense, however, despite a willingness to collaborate, that a Commission may be a disappointment to NGOs. As has been mentioned in relation to the South African Human Rights Commission: ‘it also keeps a fair distance from NGOs, either they view NGOs as a threat or they want to be seen apart of NGOs just because parliament once criticised them and told them stop behaving like an NGO. And it goes down to every time accountability and this is why this issue needs to be sorted out. Because as a Commission we must be critical of government, we must be close to NGOs, you know that really should be a performance in your daily work. Because our mandates are so large and because we are so limited, we need to have partnerships in order to be able to make an impact, to be seen as credible, and I think we have ostracised ourselves a lot from civil society campaigns that are being run’.\(^{72}\)


\(^{67}\) ‘In view of the fundamental role played by non-governmental organisations in expanding the work of national institutions, national institutions shall develop relations with non-governmental organisations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialised areas’, Section C (7) of the Paris Principles.

\(^{68}\) Human Rights Watch, Protectors or Pretenders?, at 25.

\(^{69}\) For example, the National Human Rights Commission of Togo set up in 1987 included an elected representative of the Togolese Red Cross, elected representatives of women, youth, workers and traditional chiefs and two lawyers elected by the Bar Association. In Benin, Morocco and Senegal, representatives from the NGO community are mandated members of the human rights commissions.


\(^{71}\) Though in one instance, it was more by necessity rather than by choice: ‘In actual fact the only reason that we are now in it (involved with the NIHRC in terms of the Bill of Rights process) is because there was a feeling that our community was not being represented and we had to do something about it. We are not there, I think by choice, we are actually involved now doing what we actually believe political parties are set up for and other groups rather than the Orange institution’, Interview with the Orange Order, 18 February 2003.

\(^{72}\) Interview with staff member of the Commission, 8 August 2002.
This is also evident in the Northern Ireland context. Although some NGOs and civil society organisations with whom the NIHRC has cooperated have expressed no problem with their relationship, 73 others have had more concerns. Some mentioned a certain ‘distrust’ with the Commission and a ‘prickliness’ in the relationship with it: ‘…because we have exercised our right to be critical and to ask critical questions at times of their [NIHRC] performance and their activities, I think that they have been very sensitive’. 74 Some of these concerns have been exacerbated by the manner in which the Commission carried out the Bill of Rights project, the Holy Cross dispute and how it handled the resignations. 75

There are difficulties for a human rights commission in accepting such a horizontal and close relationship with NGOs. On the one hand, although NGOs are not representative and they are not appointed by the people or parliament, there is a perception that involvement of NGOs more in the appointment of Commissioners, for example, may enhance a commission’s legitimacy. 76 On the other hand, while it is essential that the Commission work closely with NGOs, it is also important that it maintain its independence. Sometimes this balance can be difficult to achieve and this appears to have been the case for the NIHRC. Certainly in Northern Ireland there has been a perception among some NGOs that the Commission wished to distance itself from them, for example, claiming that the NIHRC’s rejection of proposals were more to do with the Commissioners not wishing to ‘taint themselves’. 77 Further, another NGO stated:

‘..we never wanted a privileged relationship with the Commission but we certainly weren’t prepared to settle for a second-rate relationship with the Commission, we weren’t prepared to be punished, if you like, for the fact that there were some members of their Commission who were or had been members of our organisation. So I think there was, and I imagine there still is, a certain amount of, it feels like distrust and hostility in fact that we are always up to something and that they need to guard against having a close relationship with us.’ 78

It is essential in Northern Ireland that the Commission has more confidence in itself as an independent, official body, but at the same time exploits its contacts with the NGO community. This is important if it is to re-establish confidence in its operations from civil society.

73 Organisations such as Help the Aged, Coalition on Sexual Orientation (CoSo), the Law Centre and Disability Action, see, e.g. Enhancing the Rights of Older People in Northern Ireland, NIHRC, November 2001; Enhancing the rights of Lesbian, Gay and Bisexual People in Northern Ireland, NIHRC, August 2001.
74 Interview with NGO, 23 October 2002.
75 Letter from British Irish Rights Watch, see Minutes of NIHRC’s meeting, 28 July 2003 and 11 August 2003; Memorandum from NICEM, written evidence to the JCHR inquiry on the NIHRC, http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/132/132we16.htm. The Relatives For Justice was unhappy with the outcome of the first report on plastic baton rounds ‘I was so dissatisfied with this final product...there was room in it for prevarication from the British in terms of continued use of plastic bullets’, Interview with Relatives for Justice. ‘A letter was received from Amnesty International, British Irish Rights Watch, the CAJ and Human Rights First, outlining their concerns about the operation of the NIHRC’, Minutes of 62th meeting of the Commission, March 2004, para 3.3.1. This letter has not been put in the public domain.
76 ‘The Commission is accountable to Parliament but as I told you Parliament doesn’t read reports never highlights recommendations of the Commission or issues the Commission raises. …I think this would improve but it should have substantial NGO input. It is the NGOs that hold government accountable in this country’, interview with Rhoda Khadalie, former Commissioner, 5 August 2002.
77 Interview with NGO, 23 October 2002.
78 Interview with an NGO, 12 November 2002.
The importance of a human rights commission having a clear understanding of its role is essential when there are other constitutional bodies that potentially overlap with its jurisdiction. These may include equality commissions, electoral commissions, prisons and police inspectorates, among others. It is especially important in this regard for a NHRI to be able to define a space for itself and to set out the exact boundaries of its relationships with others. In Northern Ireland the Commission needed to establish itself between a variety of bodies including the Equality Commission, a number of policing bodies (such as the Police Service of Northern Ireland, the Police Ombudsman and the Policing Board), the Legal Aid Department, Assembly Ombudsman, Parades Commission and Mental Health Commission, Criminal Cases Review Commission, and the new Commissioner for Children and Young People, among others. The primary means it has employed in doing so is through agreeing a Memorandum of Understanding with each body. These agreements, and practice, have proved successful in avoiding duplication and ensuring a good working relationship between the Commission and the various bodies. The Commission has managed to work with them, even on sensitive issues, and defined its own view in collaboration with others. The Commission thus meets regularly with the variety of statutory bodies, has worked with them on the provision of training and research projects, and in referral of complaints. The only apparent difficulty has been some tension with the police, with the police on the one hand noting lack of attendance of Commissioners at meetings, Commission in turn noting lack of consultation on some issues, refusal of access to documents, and the reticence of the bodies.

With other statutory and constitutional bodies

79 One of the authors of this report, Professor Stephen Livingstone, was a member of the Equality Commission.
80 The NIHRC has signed Memoranda of Understanding with: the Police Service of Northern Ireland, 16 January 2003; the Police Ombudsman, 2 November 2001; the Equality Commission, 23 October 2000; Northern Ireland Departments, 26 March 2003; the Legal Aid Department of the Law Society, 5 September 2002; the Northern Ireland Office, October 2003; the Northern Ireland Court Service, 6 December 2002; the Assembly Ombudsman, December 2003. A Memorandum of Understanding with the DPP has recently been concluded, 11 June 2004. Although there is no Memorandum of Understanding with other bodies such as the Parades Commission and the Mental Health Act Commission, the relationship with those bodies has been described as ‘fairly good’, interview with Commissioner, 4 April 2003.
81 See, for example, interview with Joan Harbison, Chief Commissioner of the Equality Commission, 18 December 2002. The Police Ombudsman has said it has had a ‘fairly wholesome sound relationship’ with the NIHRC, Interview with Sam Pollock, Chief Executive, Police Ombudsman, 28 October 2002. Despite a critical report on its training, the PSNI’s reaction was positive and as a result this has ‘fostered a very good relationship’, Interview with the PSNI, 2 December 2002. See Northern Ireland Human Rights Commission, An Evaluation of Human Rights Training for Student Police Officers in the Police Service of Northern Ireland, November 2002; Human Rights in Police Training. Report Three: Probationer Constables and Student Officers, March 2004; Human Rights in Police Training. Report Four: Course for All, April 2004.
82 Thus, in respect of the policy on the 50/50 police recruitment, the NIHRC worked closely with the Equality Commission so as not to undermine each other’s work, even though the two organisations took slightly different stances at the end.
84 It was reported to us that there was a feeling that the Police Ombudsman wanted ‘to defend their own patch … you stick to your field and we’ll plough our own’, Interview with a former Commissioner, 3 April 2003.
85 ‘It would be helpful for him (Brice Dickson) and us to have probably more involvement at our actual meetings with the other Commissioners. But I don’t know if it is difficult to judge what the other commitments are, but even if it was on a rotation basis that would be constructive’, Interview with Andrea Hopkins, PSNI, 2 December 2002.
86 The Commission has claimed that it was not consulted on a number of issues, for example on recruitment policy. The PSNI stated in response ‘that there was an independent consultant on that case’, interview with Phil Shepherd, PSNI, 2 December 2002. Further, see Northern Ireland Human Rights Commission, An Evaluation of Human Rights Training for Student Police Officers in the Police Service of Northern Ireland, November 2002.
87 The Commission has claimed that it was not consulted on a number of issues, for example on recruitment policy. The PSNI stated in response ‘that there was an independent consultant on that case’, interview with Phil Shepherd, PSNI, 2 December 2002. Further, see Northern Ireland Human Rights Commission, An Evaluation of Human Rights Training for Student Police Officers in the Police Service of Northern Ireland, November 2002.
Policing Board in agreeing a Memorandum of Understanding with it.\textsuperscript{87} Some historic difficulties with the Legal Aid Department appear to have been ironed out.\textsuperscript{88} In this respect the Commission appears to have found its niche well.

**Need for a Commission to be Accessible**

How a Commission is perceived by those who could and who do make use of its services is an important element in its legitimacy. This includes the extent to which a Commission is open, its ability to provide its users with results and its proactive engagement with all sectors of society, particularly those most vulnerable and those most hostile to its work.\textsuperscript{89} In this respect, many among the legal profession, for example, who have approached the Commission for assistance in various cases found it to have been helpful, even when support was not granted. For example:

‘They were very helpful, it was mostly in the field of employment, broadly speaking, that we would have thought of approaching them and they were fairly quick about responding and usually of their own volition sent the papers to counsel and gave a very detailed opinion and usually why they weren’t going to fund us in the circumstances. I found them quick and efficient and knowledgeable and interested in what point we were trying to put across to them’.\textsuperscript{90}

Many cited the support of the staff in particular and most stressed that the Commission kept them regularly informed and said they would have been happy to refer individuals and cases to the Commission in future.

Unfortunately, there were other sectors of society who did not always see the relevance of the Commission’s work to them. Thus, while various representatives of churches suggested ‘a good ongoing working relationship’ with the NIHRC\textsuperscript{91} and ‘as commissions go, it has been as good as any relationship I can think of’,\textsuperscript{92} it failed to imprint itself on the conscience of Rights Commission, *The Recording of the Use of Plastic Bullets in Northern Ireland*, May 2002. Brice Dickson called for Ronnie Flanagan to follow the example of his counterparts in England who had resisted the use of plastic bullets during disturbances. Sir Ronnie Flanagan angrily reacted to Brice Dickson’s appeal: ‘I was surprised at the timing of his statement and disappointed at its lack of rigour’, [http://news.bbc.co.uk/1/hi/uk/northern_ireland/14445397.stm](http://news.bbc.co.uk/1/hi/uk/northern_ireland/14445397.stm).

\textsuperscript{87} The Chief Commissioner commented that ‘we just don’t think the Board initially took seriously enough the human rights dimension to policing; they haven’t given us the place that we deserve in that debate’, interview with Brice Dickson, 4 April 2003. Brice Dickson has also suggested to us some political members of the board are ‘apparently opposed to the idea’ of a Memorandum of Understanding.

\textsuperscript{88} See Chapter 4.


\textsuperscript{90} Interview with a solicitor, 13 April 2003.

\textsuperscript{91} Interview with member of the Council on Social Responsibility, Methodist Church, 3 December 2002.

\textsuperscript{92} Representative from the Church of Ireland, 31 January 2003. Faith organisations such as ECONI, CARE and Evangelical Alliance have submitted a number of responses to the Bill of Rights project: Draft Strategic Plan 2002-2006, Comments by the Most Reverend Dr R.H.A. Eames Church of Ireland Archbishop of Armagh, Primate of All Ireland, August 2002; The Presbyterian Church in Ireland Church and Government Committee Response to the Northern Ireland Human Rights Commission’s Document ‘Making a Bill of Rights for Northern Ireland’, November 2001, Evangelical Alliance Making a Bill of Rights for Northern Ireland November 2001; CARE Making a Bill of Rights for Northern Ireland A Consultation Response from CARE November 2001; A Response from Evangelical Alliance to the Consultation by the Northern Ireland Human Rights Commission on Making a Bill of Rights for Northern Ireland, December 2001.
many. Surveys conducted in 2001 and 2004 indicated a decrease in the number of those who were aware of the NIHRC but a slight increase in the level of satisfaction with the Commission.

Further, there needs to be a perception that a NHRI can provide the user with real benefits. Many often presume that a national human rights commission will be a body that is more powerful, both in terms of its political influence and its resources. With the NIHRC, however, some individuals we spoke to felt that this was not necessarily the case: the ‘noises coming out of the commission’s office is that we don’t have the resources, we don’t have the people’. As a result, some organisations who themselves had limited resources have taken strategic decisions not to engage fully with the NIHRC who in their view ‘isn’t going to return product’.

In addition, how well known an institution is will impact on the extent to which it is used and whether it is perceived as legitimate. The Commission has consistently stressed that it intends to operate in a fair, open and transparent manner and its website provides most of the Commission’s main documents, minutes and information on how to contact it. In terms of its location, the Commission’s office is based in Belfast city centre but it has been questioned whether there should be more offices or a site across the rest of Northern Ireland, or at least a presence, if only on a regular but non-permanent basis. Certainly this appears to have helped other NHRI be seen as more accessible. Using the Bill of Rights as its vehicle, the Commission has attempted to reach out to many across the jurisdiction, indeed of those we interviewed the Bill of Rights was often the main point of contact between them and the Commission. The Chief Commissioner, in particular, is well known and has been willing to travel across Northern Ireland and elsewhere to talk to anyone who requests it.

As the Evangelical Alliance Northern Ireland stated:
‘the Commission could not be faulted on their willingness to engage with groups seeking to influence their decisions. From the Chief Commissioner to the intern researchers, they were accessible, open and happy to forward documents, research resources and the like. This aspect of their work is to be praised’.

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93 See interview with the Pat Finucane Centre, 23 January 2003: ‘As a matter of course we simply do not recommend that they (people who approach the PFC) go the human rights commission ever. It is not an avenue that we think is useful’. Relatives for Justice and the PFC have expressed some disappointment with the NIHRC and suggested that its work has become ‘irrelevant’ to them, Interview with Relatives for Justice, 9 December 2002. ‘they have proved that they’re a pretty toothless sort of animal, it’s not effective on the ground, its not courageous, it’s not sticking its neck out, it’s not going to die for human rights’, Interview with Father Denis Faul, 9 January 2003.

94 43% had heard of the Commission in 2004, compared to 59% in 2001.

95 Two thirds were satisfied or quite satisfied, compared to 43% in 2001. The number who were very dissatisfied fell from 7% in 2001 to 2% in 2004, see Northern Ireland Human Rights Commission, Views on the Northern Ireland Human Rights Commission and its Work. Summary of Opinion Survey 2004, at pp.4-5.

96 As one NGO said to us, it expected that the Commission ‘would give us a strong voice if you like, on the inside or certainly more inside than organisations … would be, who would generally be seen as critics from the outside’, interview with NGO, 23 October 2002.

97 Interview with the Pat Finucane Centre, 23 January 2003.

98 Interview with Relatives for Justice, 9 December 2002.


100 Interview with Pat Finucane Centre, 23 January 2003.

101 The Ghanaian Commission on Human Rights and Administrative Justice has offices across the country which have helped to improve its accessibility.

102 Indeed, the Chief Commissioner’s willingness to provide information and comments in respect of this research reflect his openness.

103 Memorandum from Evangelical Alliance Northern Ireland, written evidence to the JCHR inquiry on the NIHRC, http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/132/132we11.htm
In doing so, organisations, apart from one exception,\textsuperscript{104} found the NIHRC very accessible and willing to meet and participate in events:

‘The Chief Commissioner would have been very accessible and I think that is an experience common to the voluntary and NGO sector... And in terms of staff members again on quite a lot of occasions have we had some level of involvement with them. It has been reasonably rare that we haven’t been able to have a meeting or got turned down’.\textsuperscript{105}

Unfortunately, while the Chief Commissioner and staff have been visible, some organisations were unaware of the other Commissioners: ‘It is very difficult to actually know who all the commissioners are and find out how you actually lobby them. I mean you can’t lobby somebody if you don’t know who they are’.\textsuperscript{106} As noted elsewhere in this report, there is a danger with a sole full time Commissioner that the institution will be equated with that particular individual. This does not assist in the development of the concept of a corporate body. Visibility of the other members of the Commission may also assist in enhancing the perception of its accessibility. It is essential that the new Commissioners build upon the work that the outgoing Chief Commissioner has achieved and increase their own profiles accordingly.

The legitimacy of NHRI will also be tested by its attention to the most vulnerable members of society.\textsuperscript{107} The NIHRC’s attention to gay and lesbian people in Northern Ireland, persons with disabilities and older people must be applauded and has been welcomed by organisations working in this area.\textsuperscript{108} Unfortunately its attention to particularly marginalised groups has meant that it has received criticism from some quarters. As one civil servant noted ‘they need to be doing more in terms of pursuing an agenda, which is relevant to the ordinary man and woman in the street. ...They need to find a way into it I think, some of the bread and butter issues that affect ordinary people, now that takes you down the route of social economic rights which I know is very difficult territory indeed’.\textsuperscript{109} Yet this is not sufficient reason for the Commission not to continue working in these areas. The Commission has clearly gone beyond the Paris Principles in this regard and demonstrated the value of a NHRI in Northern Ireland.

The Commission, as noted above, has found it difficult to reach those most hostile to its work. One area which could have been used to appeal to these and others is through economic and social rights. As noted in Chapter 4, these rights on housing, education and health, unlike civil and political rights, are seen as relevant to many including those who may have felt that they had no ownership over human rights. Indeed, this was one issue on which there appears to have been cross-community support. Yet the Commission has been faced with the difficulty of how to exploit such rights while bearing in mind the broader constitutional issues and the impact on UK government responsibility outside of Northern Ireland. Given the overwhelming consensus for such rights, however, it is surprising that the Commission was not even able to provide a text in the Bill of Rights drafts to exploit this unanimity and develop public endorsement.

\textsuperscript{104} One organisation told us it had asked either the Chief Executive or one of the Commissioners to speak at its conference but ‘we got fobbed off with a project officer’, interview held 5 December 2002.

\textsuperscript{105} Interview with an NGO, 23 October 2002.

\textsuperscript{106} Interview with a voluntary group, 3 February 2003. In addition, ‘I am someone who has had reasonable level of involvement with the Commission over its four years, who has had very little contact with Commissioners apart from Brice Dickson. I’ve seen them occasionally at collective meetings or at conferences but really next to no contact with individual Commissioners’, interview with Patrick Corrigan, Amnesty International, 11 November 2002.

\textsuperscript{107} Okafor and Agbakwa, ‘On Legalism’, at 686.

\textsuperscript{108} See, for example, interview with James Knox, CoSo, 3 February 2002.

\textsuperscript{109} Interview with civil servant, 20 November 2002.
Conclusion

While the Commission has made clear attempts and has not been unsuccessful in establishing sound relationships with some stakeholders, those who mattered most, political parties and government, and more recently civil society, have not been developed positively. The Commission has struggled to obtain the necessary support from government and been subject to constant criticism from unionist community in particular. Although there is some evidence of the Commission attempting to engage with these sections of society, it is apparent that it has not done enough. More worryingly, however, has been the recent disillusionment among its supporters, both in civil society and political parties. Without the ability exploit those who would traditionally have been behind its work, the Commission’s legitimacy was seriously in doubt. Faced with this, it is not surprising (although not necessarily appropriate) that the government wished to delay the appointments to enable an almost entirely new Commission to be created. Yet this crisis in its status in the eyes of supporters and others is not solely the fault of the Commission. It is clear that many actors were not sufficiently proactive in working with the Commission, government, legislature, legal profession and churches alike. Without their willingness to accept some responsibility for its failings and future success, and to do something about this, whatever the Commission may attempt to do, it is unlikely to succeed.

Some of these difficulties may be overcome if the Commission had managed to control its public profile. Indeed, a NHRI needs to occupy a high public profile to be influential. Yet the experiences of other human rights commissions illustrate the value of managing relations with the media and having a clear communication strategy. A good relationship with the media can help to compensate for a commission’s lack of powers and resources. Developing a positive relationship with the media where they work to promote the image of the commission has proved essential, but also difficult, for other NHRI. As the former Chair of the South African Commission, Barney Pityana, commented ‘our greatest and most unhappy challenge has been to work with an unresponsive media’, a difficult relationship which was exacerbated with the decision of the SAHRC to investigate racism in the media.

As noted in Chapter Three the Commission has been slow to develop a media and communication strategy and its attempts to manage its profile have been criticised as ‘amateurish’ and ‘if they want to have a media profile they’re not succeeding well’. Yet the Commission has not been out of the limelight. The failure to develop a coherent strategy, however, resulted in it being less able to control its public image, so journalists observed that they were much more aware of the NIHRC in respect of stories about it, notably with respect to resignations and internal divisions, than in stories it wished to promote: ‘so anything that they see in the media recently has been people sort of leaving last year, like Inez and stuff going and that’s been very negative stuff in the media, so it hasn’t been an altogether sort of positive light it’s really shone in, the last while anyway’. There is some evidence of an improvement in this regard, with respect to the media response to the publication of its report

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110 The UN Handbook advises that ‘a national institution should develop a strategy for identifying the areas of its promotional programme which would benefit from media involvement’, United Nations, National Human Rights Institutions. A Handbook, at para 158.
111 Pityana ‘National Institutions at Work, at 638. Pityana’s main concern appears to be that the media condemned it as financially wasteful.
112 Interview with a journalist, 27 February 2003.
113 Interview with Susan McKay, Sunday Tribune, 26 March 2003. Malachi O’Doherty of Fortnight magazine commented that the Commission had a lower profile than the Parades Commission, Federation of Small Businesses or the CAJ.
114 Interview with journalist, 14 March 2003. ‘The more detached assessment would say we seem to hear more about them when they’re under criticism or in trouble’, interview with journalist, 11 March 2003.
into women prisoners. This attracted considerable media attention much of which praised the Commission for its work. If the Commission is able to build upon this in the development of a media and communication strategy it will be better able to manipulate its profile and therefore potentially enhance its legitimacy.

On a different level, the international arena can be influential in providing an alternative means for a NHRI to increase its profile and therefore influence government. While there is a temptation to use the international fora as a self-promotional tool, exploited properly a NHRI can use such platforms to bring more pressure to bear on government and highlight any concerns with the human rights situation of the jurisdiction. The NIHRC has certainly been very active and has made its presence felt on the international scene, through the preparation of international treaties, urging the UK government to ratify various Conventions and Protocols, making submissions to international human rights monitoring bodies and attending the hearings of the various treaty monitoring bodies. The NIHRC has also hosted international conferences and the Chief Commissioner, Commissioners and staff have attended and addressed meetings with other NHRI. International experts commented that the NIHRC ‘has perhaps got one of the most active roles of any Commission, even though it is one of the smallest, in monitoring government reports to the treaty bodies’. Even those who have been critical of the NIHRC’s other activities, has applauded it on the ‘sophisticated way’ it has acted on the international scene suggesting that the ‘international reputation of the Commission is probably much higher than the domestic reputation of the Commission’. However, in order to be effective it is essential that it use these fora strategically and in this respect the success of the Commission is less apparent. As one NGO representative stated to us: ‘I mean there’s obviously an amount, a piece of work about strengthening national institutions worldwide which is probably quite an important thing to do but I am not sure that it all fits into that and I am not sure, given the lack of resources which you have, that you can justify it. I think there’s a huge amount of time spent on that’. Thus, when the NIHRC was

115 P Scraton and L Moore, Report of the Transfer of Women from the Mourne House Unit, Maghaberry Prison to Hydebank Wood Young Offenders Unit, June 2004.
117 For example, the NIHRC was represented at the meeting of the Ad Hoc group on New York on disability in June 2003 and is liaising with Charlotte McClain of the SAHRC. It has also worked in respect of Protocols 4, 7 and 12 to the European Convention on Human Rights, the Revised European Social Charter and the UN Convention on Migrant Workers and their Families. The NIHRC urged the UK government to accept the right of individual petition to the UN Conventions on Torture and Racial Discrimination.
118 In its Annual Report 2002 the NIHRC complained of the UK government’s failure to send it copies of the relevant UK reports when they were first issued, see NIHRC Annual Report 2002 at 55. Although the situation has slightly improved it is still an issue which the NIHRC has raised with the various Whitehall departments, see Minutes of Commission meeting of 10 February 2003. Of the three UN treaties under which the UK was to report in 2003-04, the NIHRC had received drafts of two UK reports. The NIHRC submitted comments to government on the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention Against Torture.
119 For example, the UN Human Rights Committee, the UN Committee on Economic, Social and Cultural Rights and the UN Committee on the Rights of the Child. See B Dickson, ‘The Contribution of Human Rights Commissions to the Protection of Human Rights’, Public Law [2003] 272-285 at 274-278.
120 Interview with an international expert, 27 November 2002.
121 Interview with an academic, 7 November 2002.
122 Interview with an academic, 7 November 2002.
123 Interview with NGO representative, 12 November 2002.
criticised by two senior US investment officials from the New York regarding the Bill of Rights debate, some felt that if the NIHRC had travelled to the US and met influential politicians it might have been insulated against some of the attacks.

This situation may be partly explained by the lack of clarity over the role of a NHRI on the international plane. Whether a commission should be an ambassador for its country or campaigning for change does not appear to have been settled by many institutions, which often seem to adopt the former approach. The difficulty in finding their niche at this level, often situated between government and NGOs, is compounded by their ambiguous status at some of the international fora. Again, this illustrates the importance of a NHRI, and the NIHRC is no exception, defining its space but using its influence with both government and NGOs to advance the protection of human rights in its jurisdiction.

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125 Recently the Commission planned a meeting with one of them, see Minutes of the Commission’s 59th Meeting, para 4.3.2. In addition, the Chief Commissioner was personally invited to give evidence at Congressional hearings on ‘Human Rights and Police Reform’ in March 2004 but could not go. The Commission claimed that they were only given short notice of the hearing, had other commitments in Northern Ireland at the time and ‘the topic was one on which the Commission had not yet reached a definitive position and could not therefore say much’, Brice Dickson. The NIHRC plans to visit the USA in the near future to raise awareness of its work, thus it was suggested at the 63rd meeting of the Commission in April 2004 that the Chief Commissioner travel with Tom Donnelly, see Minutes of 63rd meeting, para 12.3.5.1.
CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

Overall Assessment

The NIHRC has only been established for five years. This is a relatively brief time for any new institution to make an impact and too early, some might suggest, to offer any evaluation of it. Most NHRIs around the world take some time to get going. While we would acknowledge that it is still early days for the NIHRC we also note that already significant public controversy has developed around its appointments and operations, highlighted by the resignation of a number of its members and criticism from politicians on both sides of Northern Ireland’s political divide. There is currently a crisis regarding the Commission’s future. In such circumstances we feel it is especially valuable to produce an independent study on its work to date. This study looks at both the work of the Commission itself and the environment in which it has operated. It has examined the extent to which the NIHRC has achieved what people hoped it would achieve and to the extent that it has not considered whether the problem lay within the context the Commission operated in or the actions of the Commission itself.

Overall our conclusion is that the work the NIHRC has done has demonstrated the value of a human rights commission in Northern Ireland. However, it has not proved as effective as many hoped it would and is struggling to make a significant impact on the promotion and, in particular, the protection of human rights in Northern Ireland. It is an organisation which has demonstrated significant industry and can claim some successes. However these are overshadowed by its problems. Many of these problems spring from the context in which it has operated, notably the limited powers and resources it was given plus the very difficult and highly politicised context in which it must operate. Any Human Rights Commission in Northern Ireland would have faced significant problems in these circumstances. However the NIHRC has not responded well to these challenges. Its failure to develop a clear strategy and a unified Commission has undermined its ability to act effectively as regards the promotion and protection of human rights for all. Nothing demonstrates the combination of external and internal problems more clearly than the Bill of Rights process. Arguably this was too big a project to give to a Commission which already had a number of other difficult tasks and the NIHRC was certainly inadequately resourced for the type of Bill of Rights process that many envisaged. However the prospect of drafting a Bill of Rights was clearly something that attracted a number of people to serve on the Commission and it made the development of its advice on the Bill of Rights one of its central projects. This unity of interest did not, though, produce a unity of purpose. The NIHRC has had great difficulty agreeing on either the substance of a Bill of Rights or the process by which it should be achieved. Such difficulties have been referred to by three of those who have resigned from the Commission as central to their concerns. Yet those remaining on the Commission have still to produce a draft Bill, let alone marshall support for its acceptance. Many of those outside the NIHRC who were initially very supportive of the Bill of Rights project and the Commission’s role in it are now confused and deflated.

The vast majority of those we spoke to in our research, however, clearly felt it was important that there should be a human rights commission in Northern Ireland. It was especially important, therefore, to come to some conclusions on its work and make recommendations with respect to its future. In our study we have highlighted three issues to consider as regards assessing the effectiveness of any NHRI, namely capacity, performance and legitimacy. To offer our brief conclusions on each we would say that as regards
• Capacity – The NIHRC was reasonably well placed as regards powers compared with commissions in many other parts of the world. In most respects its powers complied with the Paris Principles, the appointment process ensured a Commission that was independent of government and it was permitted to recruit its own staff. However there was a very significant omission as regards its investigation powers and while the appointments process did contain more transparency than has been evident in many NHRIs it was not sufficiently transparent to counter criticisms that its composition was not fully representative of the community. The government then failed to defend the subsequent appointments. Most seriously the government also initially failed to provide the NIHRC with sufficient resources to execute the very broad mandate it had been given. While the resources were never so limited as to make it impossible for the NIHRC to function, and indeed were later increased, they did make it difficult for it to exercise the full range of its powers and intensified internal conflicts over priorities. Context is also an aspect of capacity and the NIHRC faced a very difficult context with the issue of human rights having become quite a politicised one in a divided society. Moreover some of the areas on which a greater consensus existed, such as disability or children, already came under the jurisdiction of other bodies or were about to. The NIHRC thus had to operate on issues which were very contentious and where it would always find it difficult to achieve widespread support.

• Performance – The NIHRC clearly has achieved a number of significant things in a very short time. It is seen as accessible at a local level but also enjoys a high reputation at the international level. It has displayed significant industry in responding to official reports and legislative proposals. Aspects of its litigation and investigation work have produced change that advances the protection of human rights. However there have also been significant failings. The Commission was slow to put in place adequate organisational structures and is still in the process of developing these. It has struggled to develop a clear strategy and vision that, in particular, works out the relationship between promotion and protection activities. Internal divisions have grown worse rather than diminishing. The impact of its work, especially as regards producing change through litigation or advice has been limited, and it has yet to achieve its major task of providing final advice on a Bill of Rights for Northern Ireland.

• Legitimacy – It is a matter of particular concern for the NIHRC that its legitimacy does not appear to have grown in the eyes of some while it has clearly diminished in the eyes of others. Legitimacy as regards government institutions is always a difficult issue for any NHRI. If a government is too friendly towards such an institution then it may be a sign that it is not doing its job, as government institutions will often be those most likely to breach the human rights that a NHRI seeks to protect. Some degree of tension between government and a human rights commission is therefore essential if such a commission is to play even an effective advisory role as regards the protection of human rights, much more so if its powers go beyond this. However if an NHRI is to play an effective role it needs to have some sort of a constructive relationship with government. If an NHRI is to be more than a government funded human rights NGO then it must have some level of influence with government. Government must show it respect to the extent of maintaining its funding, seeking its advice and taking its recommendations seriously even where it disagrees with them. Although government has frequently professed its support for the NIHRC its actions do not always live up to these commitments. In particular it has failed to fund it adequately, to seek its advice early enough, to affirm the choices it made as regards Commissioners or to respond adequately to the Commission’s recommendations, notably as regards the review of powers. While the primary responsibility for this must lie with government itself it has been suggested to us by a number of people that the NIHRC has not always helped itself to earn this respect. On some occasions, such as its financial planning or draft Bill of Rights advice, the quality of its work has not
been as strong as it might have been. On others, such as the review of powers or failure to be consulted over draft legislation, it has not made its dissatisfaction known as forcefully as it might have done or marshalled the support of others. One group from which it might have sought support is politicians, although it is important to bear in mind in Northern Ireland where politics are divisive and to be seen to be supporting the Commission may not have been in a party’s interest. While Alliance and the Women’s Coalition remain strong supporters of the NIHRC it has major legitimacy problems with all the main unionist and nationalist parties. Unionists were initially wary if not hostile to the Commission. It is far from clear that their impression of it has improved, at best hostility has been replaced by indifference. It was notable that even when the NIHRC came under attack by nationalist politicians, where the logic of Northern Ireland’s political geometry suggested it might then be supported by unionists, that support was not forthcoming.1 Nationalist politicians were originally supportive of the Commission but, in the wake of Holy Cross and the resignations crises, have become its fiercest critics. In most parts of the world indifference or hostility towards a NHRI by government or political parties might be compensated for by strong support from civil society groups. Indeed, they might be seen by such groups as an indication that an NHRI was doing its job too well. However this has not been the case in Northern Ireland. While one might acknowledge civil society in Northern Ireland itself is significantly divided along political lines and that the views of such groups may largely echo those of political parties, what is especially concerning for the NIHRC is that a number of groups which have earned a more impartial reputation have also expressed reservations as to whether the NIHRC is proving effective. Another significant sector is the media. Here also the Commission faces significant legitimacy concerns, with most of the journalists we interviewed for this project suggesting that it enjoys a very low public profile. It appears likely that stories about divisions within the Commission are more likely to be covered than the stories the Commission itself wants to advance.

It is noticeable that many of those who indicated dissatisfaction with the Commission’s effectiveness to us also indicated sympathy with the difficulties it had faced and a desire to see a strong and effective Commission. Admittedly some were opposed to the idea of an NIHRC from the start and had not changed that view. However it did not appear to us that any of those who were initially favourable but who were disappointed with its operation to date had now come round to the idea that it was a bad idea in the first place. We would also endorse the view that there is a need for a Human Rights Commission in Northern Ireland and that it can play an important role. After examining our conclusions about its first four years in a little more detail we consider what steps might be taken to improve its effectiveness.

A. Capacity

1. Legal Status and political support in its creation
One of the initial factors in the effectiveness of a commission is political support in its creation and throughout. While on the one hand its creation was the result of the peace negotiations leading to the Agreement which involved the major political parties, the British and Irish governments and was approved by referendums on both sides of the border, the place given to the Commission within this process was more low key. Despite human rights and equality provisions being seen as integral to the Agreement,2 it would not seem to be the case that detailed attention was given to the mandate, composition and functions of the

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1 ‘DUP slams body’s critics but fails to buck it’, Irish News 1 August 2003.
Commission at this stage of the process. As Alex Attwood of the SDLP noted in respect of unionist parties:

‘I think that in the negotiations, a bit like Patten, subsequently, parties who might have had, who might have thought substantive objections to a human rights commission…in the negotiations for the Good Friday Agreement they concentrated on a narrow front and let pass a lot that they might have taken issue with in different circumstances. …And during the negotiations the Human Rights Commission wasn’t one of that narrow range of issues that they spent time negotiating’.3

The lack of attention to the detail of a human rights commission during the negotiations may have been a good thing in ensuring that the body was actually brought into being, yet many of the decisions that were taken then, and the wording introduced into the Agreement about the powers and remit of the Commission, would come back to haunt it and prove particularly contentious in its future. This appeared to be the case with the Bill of Rights:

‘the Bill of Rights issue was always a sort of a second or third tier issue in the negotiations and it wasn’t sufficiently important in the negotiations for anyone to make it their first and primary issue and therefore it was never really brought forward as a deal maker or deal breaker. Given the exhaustions of the negotiations, the sense I get from talking to people is that it was then thrown in, yeah there should be discussions about Bill of Rights, no, we’re not going to deal with it now, who do we get to deal with it, oh we look to the Human Rights Commission to do that. So my impression was that it was not a particularly well thought out idea and that the language that was used was, as with much else in the Agreement, intentionally ambiguous as to what really was going on because you just didn’t want to get into a situation where it was going to be yet another problem in the negotiations. And nobody made it sufficiently important to push it to the line’.4

Much of the provisions and specific remit of the Commission was thus left to legislation, which found its way, as did other aspects of the Agreement, into the Northern Ireland Act which came into force on 1 March 1999. Debates in Westminster on the drafting of the Act on issues about the mandate of the Commission and its remit indicate clearly that many issues were already settled before their debate in Parliament. Indeed, as Mageean and O’Brien note, ‘the legislative process of the Northern Ireland Bill clearly showed that there was considerable opposition from elements of the state to changes envisaged in the Agreement’. …there has been a concerted attempt on the Human Rights Commission, on equality of opportunity, and on policing to dilute the effectiveness of what was promised in the Agreement’, suggesting the obstacles were put in place by civil servants in the NIO ‘who were hostile to change or wanted to derail the whole process’.5 When the Northern Ireland Bill was debated in Westminster, a few, but important, changes were made to the provisions as a result of lobbying by Kevin McNamara,6 including the addition of express requirements for review of its powers in s.69(2), the power of the Commission to bring proceedings relating to human rights, the ability to conduct investigations and the power to publish its outcomes and findings.7 It is apparent that the decision as to what powers and resources should be allocated to the new Commission was influenced in part by its predecessor SACHR.8

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3 Interview with Alex Attwood and Brian Barrington, 16 December 2002.
4 Interview with academic, 7 November 2002.
5 Mageean and O’Brien, ‘From the Margins to the Mainstream’, at 1538.
7 Northern Ireland Act 1998, ss.69(5(b), 69(8) and 69(9) respectively.
8 It has been suggested, for example, by Des Browne in evidence to the JCHR that the budget of the Commission fixed at £750,000 in the first instance was simply three times the £250,000 given to SACHR, Minutes of Evidence, Mr Desmond Browne and Ms Kirsten McFarlane, 2 December 2002, para 75, http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/132/2120203.htm

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This was not a particularly auspicious start, for what seems from reading the Agreement, to be the principal human rights institution for Northern Ireland. Any serious political support there may have been at the time for the Commission from a number of the political parties including the Sinn Féin, SDLP, PUP, Women’s Coalition and UDP, clearly needed to be capitalised in its future operations.

2. Protecting independence: appointments

One of the major criticisms directed at the Commission from its very inception has been its composition, to the extent of personal criticism and continued parliamentary questions. The appointment process being carried out by the executive, albeit with public nominations, in a climate of secrecy without legislative or adequate independent involvement, must mean that it is the government which has to bear primary responsibility for any criticisms that are thus directed at the current membership. As we note in Chapters 2 and 5 the manner in which the members are appointed is central to the legitimacy of the Commission and in this the government failed to instill confidence in the members it appointed. The appointment process has been criticised by numerous organisations, including the Commission itself, and individuals, as well as the JCHR which concluded in its report that ‘in preparing its final response to the NIHRC’s review of its functions and powers, the NIO give consideration to a role for an independent Commission in the appointment of Commissioners’. The government has so far refused to accept that changes are necessary and believed that the existing procedure is adequate to ensure independence. The more secret the process and the more it is in the hands of the executive, the greater the responsibility on the government to defend its decisions as being appropriately made.

3. Political context in which established: need for other independent and democratic state institutions

As Chapter 1 noted, a human rights commission is unlikely to be effective in its mandate if it operates alone without the support and existence of other institutions of democracy such as a free press, an independent judiciary and a professional police service. The police have undergone significant reform during the period under review, having been criticised for a failure to protect human rights in the past. While the media and judiciary have generally been seen as independent neither have been without their critics as to whether they could have done more to protect human rights. Interestingly the NIHRC has had its most productive engagement with the new policing service, producing valuable work on its training programmes. Its relationship with the courts has been less satisfactory, with the litigation on the scope of its powers displaying some judicial resistance to the Commission having an influence, though this appears to have diminished once the House of Lords clarified matters. As we saw in Chapter 5 it has not enjoyed a good relationship with the press, whose greatest interest in the Commission has been to cover stories critical of it.

The NIHRC was established in difficult political circumstances, after a period of conflict and violence. Human rights have not been seen by all sections of the population of Northern Ireland as being of equal concern to them and Northern Ireland was, and continues to be, a society emerging from conflict. Many of the past abuses that occurred are still seen by some

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9 ‘Having decided on appointments to the NIHRC, the NIO must stand by these choices and make clear its support for, and confidence in the impartiality of, the Commissioners it has appointed. … We recommend that the NIO be more robust in support of the Commission, its work, its impartiality and its independence’, Joint Committee on Human Rights, Fourteenth Report: Work of the Northern Ireland Human Rights Commission, 15 July 2003, HL 132, HC 142, at para 30.
as having not been acknowledged, let alone dealt with. The NIHR C has thus faced an uphill
task to encourage all sections of the population and, in particular, all political parties, that
Human rights are a matter of equal concern to them. The stop/start nature of devolution has
not helped this as it has deprived the Commission of the opportunity of engaging particularly
with the political parties, civil service and government bodies on a regular and normalised
basis. As the Joint Committee on Human Rights noted in its report on the NIHRC,
‘Difficulty in building consensus has been compounded by the lack of political progress.
…Clearly, the Commission’s considerable potential to enhance democracy in Northern
Ireland has been hampered by the difficulties of engagement with the political parties’.13

4. Adequate powers and resources
Since its inception, and culminating in the Review of Powers, the Commission has, until very
recently, to no avail, criticised the failure of the government to provide it with the adequate
powers and resources to fulfill its mandate. Its concerns have been supported by many others.
Of particular concern has been the lack of investigative powers, resulting in an inability to
compel individuals to talk to the Commission or provide it with documents during its
investigations into particular matters.14 Taking the Paris Principles as the basis on which
powers of a national commission are usually assessed, the NIHRC was not given ‘as broad a
mandate as possible’,15 among other things and in the Review of Powers the government
refused to take on board most of the Commission’s recommendations.16 This did not bode
well in terms of convincing the Commission and others that the government was taking its
work seriously. It is to be welcomed, therefore, that the government has recently announced
that it intends to increase the Commission’s powers to access places of detention and compel
witnesses and documents.

Ironically one of the problems for the Commission may have resulted from it having too
broad a mandate in some areas. As we noted in Chapter 4 there must be some doubt as to
whether it was wise to give the NIHRC the task of advising the Secretary of State on a Bill of
Rights for Northern Ireland, especially when it was given such a broad range of other tasks.
This difficulty was compounded by the lack of resources available to conduct the type of
consultation exercise to which all the Commissioners were committed and the Commission’s
failure to mobilize NGOs and civil society.

5. Personnel issues
One of the earliest and what has proved to be one of the sustained criticisms of the
Commission has been its membership. Unionists in particular argued that the initial
composition of the NIHRC was not ‘representative of the community’ in that it did not
include sufficient members who could be clearly identified with unionism. As we discuss in
Chapter 2 this view may have proceeded from a misunderstanding as to the meaning of that
term. Moreover there does not appear to be consensus on how Commission members should
have been chosen. What does appear to be widely accepted though is that the initial
membership did contain a number of people with knowledge and experience of human rights,
a vital requirement for any Commission hoping to prove successful in the promotion and
protection of human rights. In particular its Chief Commissioner was a respected expert on
human rights. In addition it did have the freedom to appoint its own staff, though financial
considerations constrained how it could exercise this. What is less clear is that sufficient
thought was given to the full range of skills that a Human Rights Commission would require

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12 See interview with Gerry Loughran, Former Head of the Northern Ireland Civil Service, 24 January
2003.
13 Joint Committee on Human Rights, Fourteenth Report: Work of the Northern Ireland Human Rights
14 See Chapter 5.
16 See Chapter 5.
or to the issue of how many Commissioners should be full as opposed to part time. The latest round of appointments has not improved the situation with confusion over the status of human rights experience as a criterion.

**B. Performance**

1. **Must have strategic plan and vision**

One key factor in a Commission’s effectiveness, by which a body with limited resources and powers can still ensure impact, is through defining a clear and coherent strategy for its work. This can be a particularly difficult task for a commission, as the experience in South Africa also illustrated. While the South African Human Rights Commission had a broad mandate and extensive powers and it is possible to identify a number of themes that run across all aspects of its work, it has failed to project a clear overall strategy for its work. As a result it has been criticised, often on the more high profile issues in which it chooses, or not, to become involved. For example, despite having paid some attention in its work to HIV/AIDS, when it came to a case before the Constitutional Court which received international attention challenging the refusal by the government to provide drugs to pregnant women to prevent transmission of HIV, the Commission was noted for its absence amid allegations of government pressure.

Similar issues have arisen for the Northern Irish Commission. Certainly, the first Strategic Plan for 2000-2002, produced in October 1999, was more a list of priorities and was very broad. Its second Strategic Plan was more focused and defined benchmarks and indicators and there was a sense, from talking among those working for the Commission, that it has now become clearer on developing its strategy, furthered in part by the resignations of Christine Bell and Inez McCormack and the reviews that the Commission has undergone. Unfortunately, this strategy does not yet appear to have been translated to those on the outside, and, as the 2003 Action Plan suggests, the Commission does not appear to be any more focused in the breadth of work that it intends to carry out.

The Holy Cross dispute, in addition, had the result of exposing publicly the lack of consensus among the Commissioners themselves on fundamental issues, of illustrating that the Commission could not act together and was unable to come to an agreement on how publicly to deal with such crises. Although there is considerable disagreement over what the Commission should have done in this instance,

‘Nearly everyone, however, agreed that the outcome was disastrous for the Commission – that it had ended up with much negative publicity and being attacked by both sides when neither of these outcomes was inevitable. There was a broad view that this had occurred because the Commission lacks a media strategy or a proactive approach to marketing its human rights message. Both require a clarity of purpose and a level of agreement among Commissioners about the Commission’s human rights message that it has sometimes lacked in its public utterances’.19

2. **Make full use of powers and resources available to it**

The Commission has so far been unsuccessful in persuading the government to increase the powers available to it, and although it has had some success in gaining an increase in resources, these still do not match those of comparable institutions such as the Equality

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Commission. However, one of the reasons it has been suggested why the Commission failed to gain this support is because it has not yet used what it already possesses to its fullest extent.

With respect to reviewing law, the Commission has carried out a rather impressive and broad range of work in this regard. Certainly in its relationship with the Assembly, and in particular, with its various committees, the Commission’s views have been taken seriously in debates. In contrast, however, despite high quality submissions on draft legislation at Westminster, the government has not been receptive. On the other hand, however, there has been less evidence of follow up by the Commission and its visibility in the Assembly and particularly in Westminster has been low. There may be other ways the Commission can influence the legislature and government, even if it is not successfully immediately in influencing the content of the legislation. The Commission needs to be more confident in its independence by engaging more with government departments and parliament in lobbying its recommendations.

The Commission’s extensive work in the area of promotion and education has been generally well received and it has sought to develop valuable partnerships with organisations and schools. Commissioners and, in particular, the Chief Commissioner, have travelled widely and spoken to many organisations and individuals. A large proportion of this work has been centred around the Bill of Rights which, while useful for obtaining views, has meant that the Commission has not been seen to set a clear baseline or minimum standard on human rights itself. There has been less attention to the Human Rights Act as a vehicle for human rights promotion and while the Commission has been involved in training in schools and the police, it has paid less attention to other professional bodies.

The Commission was not given a specific power of investigation and thus powers to compel individuals to give evidence or documents to be produced. The government has still failed to give a final response to the Review of Powers, although a recent statement at last suggests that increased powers to visit places of detention and compel evidence and witnesses will now be provided.20 Despite these limitations, the Commission has established criteria for undertaking investigations and has attempted to pursue this function in other ways, achieving some excellent results on some occasions. In combining its investigative and research mandates, the Commission has also produced a number of other reports which have been well received. However, there have been some difficulties with the Commission using outside experts to produce the report and then Commissioners having some difficulties in agreeing on their recommendations.21 Some of the reports have lacked focus. The Commission’s follow up in relation to its Juvenile Justice investigation needs to be matched with respect to its other reports to ensure that they have practical effect. It is hoped that its recent work on women prisoners, which has been welcomed by many, signals its future direction in this regard.

It is perhaps in the Bill of Rights work where the Commission is most known, and also where it is most criticised. The role of the Commission with regard to the Bill of Rights does not appear to have been thoroughly thought out in the context of the Agreement negotiations. In addition, it is arguably that many of the issues that have disrupted the Commission’s work and undermined its legitimacy in this project are due to the ambiguous wording of the Agreement and confusion over what exactly the NIHRC’s task was with regard to the Bill of Rights. The Commission clearly saw the Bill of Rights project initially as a way of taking a holistic approach to its work: ‘The consultation process on the Bill of Rights to date has been extremely valuable in itself. The Human Rights Commission wants the Bill of Rights to emerge from a process, not to be imposed from on high. We want the people of Northern

21 Although outside experts may be used, staff of the Commission work closely with the researchers.
Ireland to feel that, having helped to mould the Bill of Rights, they own it and that it is a
document which could be a basic foundation stone for a stable future’.22

A draft Bill of Rights was produced in September 2001 as a consultation document. Since
then the Commission has engaged in a number of activities, outlined in Chapter 4 of this
report, which are designed to take forward this project. Although it has now produced a
Progress Report, it has still to produce its final advice to the Secretary of State. While the
delays may be partly due to political difficulties in the Northern Ireland peace process as a
whole, and therefore beyond the control of the Commission, the period since 2001 has been
marked by increasing division within the Commission both as to what should be in a Bill of
Rights and what the role of the Commission should be in its production. This division has fed
directly into a number of resignations and political party criticism of the Commission’s work.
As we noted in Chapter 5 many of those in civil society who were the greatest supporters of
the Bill of Rights are now confused and unhappy as to where the process is going. As a result,
three years later it has been unable to maintain and enrich an ongoing debate.

The NIHRC has not been able to rise to these challenges. Its first problem is that it set
unrealistic deadlines, possibly because the initial Commissioners were anxious to finish the
project before their term of office ended, which it had constantly to extend. Secondly it lacked
a clear strategy as to how it would conduct the consultation. As we discussed in Chapter 4 the
relationship between the broad social consultation, the Working Groups and the Commission
itself was never clear. Having encouraged a wide range of views the Commission did not
seem clear as to what it was going to do with them once it received them. Thirdly it did not
put in place adequate internal organisational structures to deal with the Bill of Rights. Though
this was a massive task it has been unclear which Commissioners and staff have primary
responsibility for it. In practice it often appears to be thrown in with all the other duties of the
Chief Commissioner and Chief Executive. This is one area where having another full time
Commissioner or even a Deputy Chief Commissioner to take responsibility for this area
would have been very valuable. Fourthly Commissioners appear to have been unable to agree
upon or even fully debate some key issues for the overall vision of the Bill of Rights. These
include its relationships to the Human Rights Act, to international human rights provisions
more broadly and to the Agreement. Finally the whole relationship between the Commission
and the political realm as regards the Bill of Rights has been problematic.

Since then the alternative idea of giving the Bill of Rights to a roundtable of political parties
has arisen and has been pursued vigorously by some both within and without the
Commission. While it is far from clear that this roundtable is any more likely to come up with
an acceptable Bill of Rights than the NIHRC the issue of what relationship should exist
between it and the Commission has yet to be clarified.

In respect of the Commission’s casework, the role of a national commission in litigation is
potentially powerful, enabling it to bring test cases and using these to highlight issues of
particular concern. The Northern Ireland Commission’s case work has been dealt with in
three ways: through providing assistance to individuals, intervening as amicus and taking
cases in its own name. As was noted in Chapter 4 the Commissions limited resources have
had a particular impact on this aspect of its powers. As a number of Commissioners observed
in their evidence to the JCHR and as that committee itself endorsed, the NIHRC cannot be a
legal aid body. It must take a strategic approach to litigation. In accordance with this the
Commission has devised criteria in addition to its statutory provisions for deciding when it
will support a case and has generally refused to support some types of claim.

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22 Northern Ireland Human Rights Commission, Making a Bill of Rights for Northern Ireland. A
However, as we discussed in Chapter 4, it is not always clear where the cases the Commission has supported fit into a strategy. Moreover it is unable to point to many successes, either in the courts or through settlements, flowing from its litigation. The Holy Cross litigation demonstrated a degree of confusion both as to the NIHRC’s objectives in using litigation and the procedures by which it decided to support applications.23

As we noted one area where the NIHRC has shown innovation in its litigation has been the use of the power to intervene in litigation as opposed to taking cases itself or supporting others to do so. Though this activity was interrupted by decisions of the Northern Irish courts suggesting that the Commission did not have the power to do this the position has now been clarified by the House of Lords decision and the NIHRC is again playing a useful role in human rights litigation through this mechanism.

Finally, the Commission has acted at the international level, using international treaty bodies, for example, attending conferences and participating in networks of national human rights institutions. In doing so, it is clear that it has gained a good reputation and many are aware of its work. However, it is not clear whether it has been strategic in its approach at this level and whether it has used this position to its full advantage.

3. Organisational issues

As we discussed in Chapter 3 the Commission did not pay as much attention to organisation and staffing issues initially as it might have done. The delay in appointing a Chief Executive, for example, is now accepted to have been a mistake by all Commissioners. Its limited resources have not always been deployed as effectively as they might have been, yet it also initially lacked independence in being able to allocate the resources as it saw fit. We have seen how its extensive committee system has led to a degree of confusion as to the different roles of Commissioners and staff as well as making very significant demands on part time Commissioners. Perhaps as a result several of those to whom we have spoken have stressed the accessibility of the Commission but have been less positive about the efficiency with which it responds to queries or organises events. The NIHRC has been proactive in reviewing its organisational structure and has indicated that it will act on the recommendations made by Hosking and more especially Courtney.24 However the extent of change to date has been slow and appears to have been adversely affected by the decline in the number of Commissioners produced by resignations and withdrawals.

A more fundamental issue appears to be that the Commission has yet to function as a ‘body corporate’. Commissioners do not seem to be able to come to agreement on fundamental human rights issues, divisions that have then been displayed to the outside through incidents such as the Holy Cross dispute. The Commission seems to be operating through the separate identities of its members and has yet to find some mechanism of discussing differences but emerging with a common position. As one person we spoke to stated:

‘we still need to see more of the Commission as a body corporate expressing corporate views. Now part of that will be because of the degree of the division and the disagreement there is on key issues within the Commission and I think everyone is aware of that. …and I do frankly think that it should get its act together and put that act on show, for the people of Northern Ireland’.25

As we have discussed in Chapter 3 this is a responsibility of all culty of human rights coming to be identified with one individual. On another the Chief Commissioner is to act as the chief human rights advocate in Northern Ireland, with a greater stress being placed on his leadership of the Commission and on being the public face of

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23 The Commission has amended its procedures in response.
24 A working group was set up by the Commission to oversee implementation of Courtney’s report.
25 Interview with civil servant, 20 November 2002.
human rights in Northern Ireland. On this view the other Commissioners act more in support of the Chief Commissioner who may have the final say in decision-making. It seems likely that the role of Chief Commissioner, especially where there is only one full time Commissioner, will involve elements of both of these roles. However it does not appear that there is agreement within the Commission as to where this balance should be struck. We would only comment that, especially in the difficult context in which the NIHRC operates, it is especially important to ensure a unified Commission.

4. The ability to be influential and act as a catalyst for change

It is always difficult, especially in such a short time, to assess the impact which an institution such as the NIHRC has had. Governments and other public institutions will often be reluctant to acknowledge that changes in legislation or policy have been brought about by the NIHRC. Often, especially where change is achieved, it will only have been one of a number of bodies involved. However one indication comes from the Commission’s appendix one to its 2003-6 Strategic Plan, where it provides information on what it has done in its first four years. This details significant activity in terms of producing reports and papers but is thin on detail on what impact all this has had. For example the Commission states that ‘we sought to influence the way in which the police and government departments in Northern Ireland prepared for the commencement of the Human Rights Act’ but does not offer any indication as to whether the Commission, which one would imagine would be the primary point of reference for such institutions as regards their Human Rights Act obligations, actually had any impact on the way these institutions went about their business. The only litigation ‘success’ the appendix can point to is the House of Lords decision on its own powers and in other annual reports the Commission has frequently complained as to the lack of influence it has had on legislation, especially at Westminster.

In some other areas the NIHRC can claim a greater impact. As we note in Chapter 4 its education and research work has generally been well received, even if the latter has not always been followed up. The one investigation it has been able to conduct did contribute to pressures to close Lisnevin Juvenile Justice Centre. At the international level the Commission has had significant success in being well known. Its participation in treaty body mechanisms, intervention in submission of cases, and networking among NHRI fora has resulted in the Commission being a body that is well respected and known outside of the UK. But the impact of its international work on the ground is less evident.

As stated before all this is early days and it may take some time for some of the work the Commission has undertaken to bear fruit. However already at this stage there is some concern that the NIHRC does not appear to have carved out a role for itself nor established itself as the authoritative and primary voice on human rights in the jurisdiction. Despite a wish that it should be, it does not appear to be the first port of call for those within or outside government to obtain advice on human rights matters.26 As one civil servant noted, ‘it needs to be taken by the scruff of the neck, it needs to take itself by the scruff of the neck, establish its credibility, establish its profile, establish its role and establish its relationships, that’s a very tall order indeed and they are going to have to work very very hard, I think it can be done and must be done’.27 This was perhaps indicated particularly clearly by the Holy Cross issues. Although the Chief Commissioner stated that the aim of the Commission at the time of its becoming involved was to inform the parties of their rights and responsibilities in exercising those rights, he did admit that in terms of the impact the Commission had: ‘the reality was that we were too small and too unimportant an organisation to achieve very much’.28 The Commission did not see its potential to influence others. Similarly in respect of the media a

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26 See for example, interview with Gerry Loughran, Former Head of the Northern Ireland Civil Service, 24 January 2003.
27 Interview with civil servant, 20 November 2002.
28 Interview with Brice Dickson, Chief Commissioner, 4 April 2003.
number of journalists observed to us that it was too ‘low key’ a body and that it really only got coverage when stories focused on problems in the Commission itself.

5. Dealing with crises and reflecting on problems
There has been some attempt of the Commission to monitor its own effectiveness. The resignations of various of its members, which received considerable media attention, and the review of its powers, along with the inquiries carried out by Hosking and Courtney have meant that the Commission has felt itself under scrutiny and has gone through some period of reflection on its operations and how it is perceived by others. However, as the withdrawal of two Commissioners from active service and the later resignation of one of them illustrated, there were substantial internal divisions among the Commission and disagreement about how effective it has been and how best to take this forward. As a result, what monitoring there has been does not yet appear to have been followed up by any concrete action.

As we noted in Chapter 3 the Commission has struggled to respond positively to crises, especially those resulting from Holy Cross and from the resignations. In particular, as will be discussed in our section on legitimacy, it has struggled to convince others that it has found an appropriate way forward.

C. Issues of Legitimacy

While the Commission has had no real problems defining the space between itself and other statutory bodies, it has faced greater difficulties in its relationship with government and with NGOs. NHRIs always have a difficult relationship with government institutions. On one hand they need to be independent and to be seen to be independent of government. Nothing is more likely to undermine a NHRI than to be seen to be in the pocket of government or to be reluctant to criticise it. On the other hand if a Human Rights Commission is to be influential it is important that it develop a relationship with government and in this regard must be respected and taken seriously by it. As we observed in Chapter 5 it is far from clear that such a relationship has developed between the NIHRC and government institutions, especially as regards the main government department with which it interacts, the NIO.

One symptom of this has been the delay in concluding a Memorandum of Understanding with the NIO. This took several years to realise, despite it being seen as an important document by both. However, even with the Memorandum of Understanding in place the Commission is still not accorded the position one would expect. Beyond the issue of the Memorandum of Understanding we have noted government’s failure to fund the NIHRC adequately, its omissions as regards consulting the Commission or accepting its recommendations and, most notably, the delays in responding to the Commission’s review of powers document.

Just as there is likely to be some tension between governments and NHRIs so also it is likely and, indeed often appropriate, that NHRIs and human rights NGOs will take different positions. The latter are always likely to be more forthright in their advocacy of certain positions and are less likely to feel constrained by the need to represent the whole of the society. However a strong NHRI will more often find itself in agreement with reputable human rights NGOs than not. This is especially true where, as in both Northern Ireland and South Africa, it is they rather than government who have most strongly advocated its creation and wish to see it succeed. To quote Human Rights Watch again ‘In particular, a constructive relationship with human rights NGOs speaks highly to the gravity with which a human rights
commission views its responsibilities’. In light of this it must be a matter of some concern that an element of tension appears to exist between the NIHRC and human rights NGOs.

The Commission’s relationship with other stakeholders, while not necessarily negative, has not been particularly inspiring. With the legislature the Commission should be accountable to Parliament and to the public which it serves. Operating within a particular constitutional context, it was essential that the NIHRC be accountable not only to Westminster but also, in particular, to the Northern Ireland Assembly. The latter was clearly fundamental for its legitimacy. Yet, the Commission has been deprived of the opportunity to develop its relationship further with the Assembly given its suspension and dissolution. This could have been the main way for the Commission to interact with the politicians. There is no sense of normalcy in this regard. Unfortunately, however, a lot of the engagement with Parliament has been the Commission reacting to Parliamentary Questions criticising it, in particular led by a small number of individuals.

With the churches, the relationship has varied and the Commission has not really succeeded in engaging them in human rights matters. Those among the legal profession who have worked with the Commission found it to be helpful but requested more training to be provided on human rights legislation. With civil society and the public in general, those who have had contact with the Commission have expressed their satisfaction in general at the way in which their matters have been dealt with. But many, however, do not know of the Commission’s work and the surveys taken over the years do not indicate a significantly increased awareness of the Commission or human rights in general.

In its Action Plan of October 2003 the Commission indicated its intention to establish a Consultative Forum to communicate better its work to key stakeholders. It was intended that this would meet every six months to discuss the strategic direction of the Commission’s work. This does not have a static membership, but individuals are invited to attend to discuss particular issues. The first meeting took place at the end of July 2004 and discussed the general strategic direction of the Commission. The exact focus of these meetings, however, is not clear and the feedback from those who have attended the initial event has not been particularly positive.

It is perhaps the disillusionment among political parties with the Commission which is the most serious issue facing the Commission at present and upon which its future, and that of the Bill of Rights, rests. While the Commission has consistently come under attack from unionist parties from its inception, centred around its appointments and composition, more recently there has been increased dissatisfaction from among nationalist parties about the manner in which the Commission is functioning. The depth of the lack of confidence from across the political spectrum is clearly indicative of a crisis point in the history of the Commission.

RECOMMENDATIONS

As we noted in Chapter One NHRIIs come in a variety of shapes and sizes. Some are single member, some multi member. Some have a very broad range of powers, others a very narrow mandate. Some are made up largely of government officials and supporters, others include a broad range of civil society representatives. They are also established in a variety of contexts. Some by governments facing domestic and/or international criticism for their human rights records, others by constitutional assemblies in a period of constitutional change. Some face

30 See Chapter 5.
31 See minutes of the 63rd meeting of the Commission, April 2004, para 9.
governments hostile to every action of the NHRI, others enjoy a high level of government support and co-operation. Our discussion of the Northern Ireland Commission in Chapter Two showed that it began life with certain positive signs. These included a broad mandate, a membership which included individuals with extensive expertise and experience on human rights issues, the power to appoint its own staff and recent legal changes which strengthened the human rights protections available in domestic law. However it also faced a number of problems, notably limited resources and a difficult political environment where significant disagreement existed as to whose human rights had been infringed in the past and what human rights were most in need of protection in the future. While we have noted many similarities between the circumstances of the Northern Irish and South African Commissions, for example, this is obviously one major difference. In South Africa, as the existence of the Truth Commission and the Bill of Rights testify, there is a much broader level of agreement on the place of human rights in both the societies past and future than currently exists in Northern Ireland.

Our analysis in Chapters Three, Four and Five suggests that while the NIHRC can point to a number of achievements it has not advanced the promotion and protection of human rights as far as many hoped it would, including many who have served on the Commission. However it has also been clear to us that while a few people we spoke to felt the idea of a Human Rights Commission was a bad one from the start, that human rights were either a bad idea or were already sufficiently protected in other ways, there is still widespread support for a human rights commission in Northern Ireland. Even those most critical of the performance of the NIHRC still felt a human rights commission had an important role to play in Northern Ireland. That role included developing a broad societal awareness of human rights, monitoring public authorities to ensure their compliance with human rights, being an authoritative repository of information and advice on human rights and taking a range of actions to protect human rights when abuses came to light. Such ambitions are not greatly dissimilar from those the Commission has had for itself over the past five years. They are also similar to the ambitions for NHRIs in most parts of the world. So what should have happened to increase the chances of this occurring in Northern Ireland and what can be learned that is of advantage to the new Commissioners in the NIHRC and other NHRIs already existing or about to be established in other parts of the world.

Firstly that there are a number of things for which government, both its legislative and executive branches, bears a responsibility. Attending to these would increase the chances that the NIHRC would be effective. These include

- Ensuring adequate funding and independent decision-making. The NIHRC was clearly under-funded from the start, especially as regards staff, a legal budget and the Bill of Rights process. The lack of funding increased tensions within the Commission over priorities and contributed to public disappointment with its limited activity. There appears to have been little detailed thinking on how the Commission’s budget should be set and when it quickly became clear that it was inadequate the Commission was forced to spend a significant amount of time and energy arguing for an increase in its funding. This distracted it from other important issues at its inception and did little to protect its independence. As has been seen around the world there is little point in government establishing independent human rights commissions if it then deprives them of the resources needed to ensure their independence.

- Ensuring a transparent appointments process. Although the process for the NIHRC appointments did provide for the advertising of positions, a published set of criteria for appointments and the involvement of people other than government officials in the selection it still fell short of demonstrating sufficient transparency. In particular we have suggested that government might include a more independent element in the selection process. The Commission is supportive of outside input. This could draw
upon some of the models now being developed for judicial selection, which include a mixture of lawyers and lay people.\(^{32}\) Similarly a selection panel for NIHRC members might include a range of officials, politicians and lay people. It might make recommendations to the Secretary of State but would be entitled to an explanation if any of its recommendations were rejected. Government could also produce a more detailed set of criteria for appointment and clarify what it understands both as to the definition of ‘representative of the community’ and what the purpose of having this criteria for appointments is. A certain degree of confusion appears to exist regarding this which was not helpful for the Commission once it was established. However we would not endorse the view either that there should be direct political representation on the NIHRC or that people should be appointed primarily because of their political background, still less that there is a need to appoint people who are hostile to the whole idea of human rights. Nor did we feel that there was much support for direct political appointments among even those who were critical of the initial appointments to the Commission. Knowledge and experience of human rights plus a willingness to work for their promotion and protection should be the key criteria for appointment but this should not be defined narrowly to focus only on academic or NGO expertise, there are many other walks of life in which people can gain experience in human rights. Also where government is responsible for selecting the Commissioners it is important that it defend its choices. Early in its existence the NIHRC came under substantial criticism from some unionist politicians in particular less for what it had done, which is a matter for the Commission itself to deal with, but for who was on it. The government rather than the NIHRC was responsible for its composition but it seemed that it left the Commission to defend the choices government had made. It is important in this latest round of appointments that the government takes these previous criticisms into account and, furthermore, is prepared to stand by the decisions it makes.

- Ensuring the Commission has adequate powers. This has already been discussed at length in chapters two and four. In particular we have noted that the powers given in respect of investigations were inadequate and that this has already caused difficulties for the NIHRC in exercising its investigative function. Moreover the reasons given for not conferring adequate investigations powers were unconvincing. The failure to confer adequate investigation powers was especially disappointing given that litigation will probably always play a minor role for the NIHRC (especially given the limited funding and the possibility for individuals to pursue human rights claims through the use of private lawyers funded by legal aid) and investigations have an important potential to deal with issues where litigation is too slow or inappropriate. It is hopeful, given the government’s recent statement, that these powers will now be enhanced. However it is also important not to overburden a Commission with tasks it is not effectively equipped to do. As noted in Chapter Four we suggest that the power to advise on a Bill of Rights comes into this category, even though many both within and without the Commission welcomed this and have devoted considerable energy to it.

- Ensuring that there is effective engagement with the Commission. We noted in Chapters two and four the delays in producing memorandums of agreement with a number of government departments, notably the NIO and OFMDFM. Partially because of this the NIHRC has not been consulted as frequently and as early about policy development regarding human rights as it should have been. Ultimately it is for government to make decisions and it can reject the advice of the Commission if it chooses to. There remains the risk that its decisions will be challenged in the courts. Therefore we would endorse the suggestion that there government should be required to give due regard to the recommendations of the Commission. It would not be

inappropriate to require United Kingdom government ministers when making a
statement under Section 19 of the Human Rights Act 1998 as to a Bill’s compatibility
with that Act or Northern Irish ministers when indicating under Section 9 of the
Northern Ireland Act 1998 that proposed legislation is within the competence of the
Assembly, to acknowledge any contrary views they have had from the Human Rights
Commission. This would at least ensure that the Commission’s views were brought to
the attention to the legislature, and perhaps later to the courts, which might encourage
the executive to respond to them more fully before the stage of making such a
statement is ever reached.

These are important responsibilities for government. Although directed to government in
the United Kingdom we feel they may also have resonance for many parts of the world
where NHRIs are established. However as our and other studies have indicated there are
also responsibilities on those appointed to commissions to ensure their effectiveness, even
when they operate in a context of limited funding, powers and political support. As
Human Rights Watch has observed ‘What is clear is that even under constrained political
circumstances, human rights commissioners have scope to make important choices’. 33
Our study suggests that there are a number of things Commissioners can do to strengthen
the effectiveness of their institution. These include

- Developing a clear purpose and collective vision for the Commission. Especially
  where a Commission has a broad mandate it will face demands to take action on a
  very broad range of issues. It is important that Commissioners reflect on a common
  understanding on human rights, what they feel are the most important human rights
  issues for their society and that they develop an agreed policy on how to take this
  forward. It is essential that Commissioners work together to create a corporate body.
  Especially in a society with a history of division this may not be an easy task but it is
  vital that the Commissioners undertake such work if they are not to face difficulties in
  the future when criticism comes their way. We have argued, especially in Chapter
  Three, that such discussion did not take place initially in the NIHRC. Instead
  important differences were deferred or glossed over. Partially as a result the
  Commission fell into reactive mode and spread its resources too thinly. When
difficulties did arise it did not display a shared purpose and such disunity undermined
its legitimacy. In this respect further thought needs to be given to the possibility of a
Deputy Chief Commissioner who may relieve some of the burden from the only full-
time appointment, and enable the Chief Commissioner to advance his own arguments
during meetings if need be. The lack of a shared purpose has had a significant adverse
impact on things like the litigation strategy and the proposals for a Bill of Rights. If
the Commission is not to repeat these mistakes, it is essential that members, both new
and old, attempt to agree on a strategic vision for the future. Given that new members
of the Commission are likely to bring with them new ideas and suggestions, it is
important that their views are accommodated and the transition to a new corporate
body is managed smoothly.

- Fully understanding the idea of independence in this area and distinguishing it from
  isolation. Independence from government is often stressed but as noted in the
  observation above it is also important that a NHRI display independence from all
  those who urge it to act in various ways. Ultimately it is for a Commission itself to
decide what is the best way to promote and protect human rights, but maintaining
independence should not become isolation where it avoids engagement with others
for fear that they ‘taint’ its agenda. As we saw in Chapter Five, although this has been
denied by the Commission, a number of key NGOs in the human rights field have
expressed concern that the Commission has not worked as closely with them as they
expected and indeed has been concerned to keep them at arms length. It is essential,

33 Human Rights Watch, Protectors or Pretenders?, at p.26.
however, that a Commission develop strong alliances. It can and should act as non-partisan yet push government and NGOs to operate to their full potential. A number of those we spoke to, both within and without the Commission, have indicated that there has been a reluctance to become too closely involved with politicians, and vice-versa, whether in Belfast, London, Dublin or Washington. However if a NHRI is to prove influential in respect to matters which have a high political profile in most societies then it is important that it devote significant energy to its visibility and reputation in the political world. Such visibility should always be orientated towards the advancement of the promotion and protection of human rights rather than being an end in itself. However especially where an NHRI feels it lacks sufficient powers and resources it is important that it develop alliances and partnerships with those who may help it to achieve its aims.

*Building on what exists in the human rights field. Members of Commissions may feel that there is much that needs changed as regards law and policy if the protection of human rights is to be achieved. Making recommendations as to these tasks is one of their key functions. However they cannot always guarantee that such changes will take place, especially in a society characterised by significant division. It is important to make full use of whatever legal structures already exist, except where these are largely discredited from the perspective of protecting human rights and there is a danger of legitimating them. We have argued at a number of points that the NIHRC could have made more use of the Human Rights Act in its work. This was accepted as a legitimate provision by government, a broad spectrum of political opinion and civil society. It was a major innovation in the legal protection of human rights on which many were looking for advice and information. It could have formed the basis for a critical but constructive relationship with a number of government departments and given the NIHRC a more detailed grounding for its proposals as to where there was a need for a Bill of Rights to go further. However, as the Chief Commissioner acknowledged ‘We’ve done very little on the Human Rights Act, as it happens, a lot more on the Bill of Rights’. While the HRA has undoubtedly featured in the NIHRC’s work it has not been given the prominence that the South African Bill of Rights plays in the SAHRC’s work, for example.

*Paying sufficient attention to organisational issues, especially where one is building a new institution. As noted in Chapters Two and Three the NIHRC’s Commissioners, perhaps anxious to move onto the ‘real work’ of the Commission, did not pay as much attention to matters of staffing and organisation as they might have. The NIHRC has been hampered by such issues ever since, with two internal reviews over the past three years and more changes still to be made. The role of the Chief Commissioner should not necessarily be to act as the face of the Commission but to encourage and mobilise others to do the work. This requires a recognition of the need to develop a corporate body from among the members of the Commission as well. Organisational issues in the Commission have caused several problems as regards its effectiveness, most notably with regard to its relations with the media. This has the potential to be one of the most significant relations for the Commission, especially where it claims to be lacking in adequate powers and resources, but the Commission initially appeared to take media interest for granted rather than develop the organisational structures to ensure it was developed and sustained.

Most of these observations are long term in character and, we believe, have application to other NHRI s even if the NIHRC is our primary example. In respect of the Northern Ireland Commission some look back to what might have been done differently from the start, for example that on making more prominent use of the Human Rights Act or paying more initial attention to organisational issues, while others remain current issues. However the NIHRC currently faces a significant crisis of confidence, especially in the light of resignations, withdrawals and criticism of its performance by political parties. The Commission clearly needs some new appointments but it is unclear whether it will attract good applicants while
these doubts remain. In October 2003 it issued an Action Plan in response to this which stressed a number of matters such as a further report to government on powers, submitting a response to the JCHR report and implementation of a new communications strategy.34 To date this does not appear to not appear to have assuaged public concern and was somewhat overtaken by a further controversy concerning the involvement of the NIO in the drafting of this plan. A number of things promised in it have yet to appear.35 It would be remiss of us to conclude this report without making some comments on what things could be done in the short term if confidence is to be restored in the NIHRC.

Perhaps the main response required is for the current Commission, rather than clinging on to the Strategic Plan for 2003-6, to acknowledge that this plan will need to be revisited and that a review of this plan will take into account issues such as internal organisation, partnerships with others and media strategy. It is particularly important that the Commission consider carefully now how to integrate the newly appointed Commissioners into the institution and develop a unity of purpose among the Commission as a whole. Portraying itself as a corporate body with a united vision and purpose is key to its success in the future. As we indicate in Chapter Three the current plan does not provide an adequate framework for the Commission’s activities and a commitment to revisiting it might reassure any new members to the Commission that they will have an opportunity to fully influence how it will develop in the future. It would need to consider carefully the Commission’s approach to the Bill of Rights. The Action Plan leaves this somewhat ambiguous with on the one hand suggesting that the Commission will assist the roundtable proposed in the July 2003 Joint Declaration of the British and Irish governments but on the other indicating that the NIHRC will press ahead with its own discussions with political parties concerning equality provisions and group rights. Given that the NIHRC’s stewardship of the Bill of Rights process appears to have run into the sand it might be better to give the roundtable some time to see if it can produce something which enjoys more widespread political support. The Commission would still have an important role in providing advice to the roundtable, based on the submissions it has received, and reviewing anything it produces to see if it is likely to advance human rights protection in Northern Ireland. Because the NIHRC will retain the duty under the Agreement to give advice to the Secretary of State, it might want to fulfill this obligation with a greater understanding of what enjoys political support within Northern Ireland.

However, as this report has suggested throughout, developing confidence in the Commission is not the responsibility of the NIHRC alone. Government could also act in a number of ways that would indicate concrete rather than rhetorical support for an effective Human Rights Commission in Northern Ireland. The most important manifestation of this is a positive response to the Commission’s recommendations regarding its powers, notably its powers of investigation, and resources. Government might also revisit the structure of the Commission and review the idea of having a Deputy Chief Commissioner or perhaps two other full time Commissioners, to reduce the burden on the Chief Commissioner and facilitate more effective planning of the Commission’s tasks. The government needs, through the appointment process and review of powers, to inject confidence in the new Commissioners and Chief Commissioner and reduce the chances of it being subject to the same criticism and difficulties as previously. Although the new appointment of new members does not create a new

34 See http://www.nihrc.org/files/14oct.htm. Other commitments included detailed discussions on the Bill of Rights on the rights of minorities and communities, publication of recommendations of a review of the Commission (Courtney), public endorsement of the integrity of all Commissioners involved in decisions concerning the Holy Cross case, and establishment of a consultative forum.

35 In particular paragraph 11 of the Action Plan states ‘the Commission is happy to make available through its website the full set of recommendations contained in the Courtney review and the Commission’s progress to date in implementing those recommendations’. This is not yet available on its website. The Morrow Communications report on the communication strategy was produced in May 2004 the response to which is still being considered by the Commission.
Commission as such, ‘new blood’ is an opportunity for the Commission to take stock, learn from the past and look to the future. Taken together such actions by both the NIHRC and government might rekindle the hopes of many who were so encouraged by the creation of the Commission in 1999 and still hope to see it play a major role in the promotion and protection of human rights.
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Response to Diplock Review, 1 February 2000

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NIHRC Briefing Papers on the Immigration and Asylum Bill 1999 - For the Third Reading in the House of Commons ---Support Provisions, 1 June 1999

NIHRC Briefing Papers on the Immigration and Asylum Bill 1999 - For the Second Reading in the House of Lords ---Detention and Support, 1 June 1999

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NIHRC Submission to the United Nations' Committee on the Elimination of All Forms of Discrimination Against Women, 1 June 1999

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APPENDIX I

LIST OF ORGANISATIONS AND INDIVIDUALS INTERVIEWED

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<th>Organisation/Group</th>
<th>Individual</th>
<th>Role</th>
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<tr>
<td>Northern Ireland Human Rights Commission</td>
<td>Professor Brice Dickson</td>
<td>Chief Commissioner</td>
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<td>Margaret-Ann Dinsmore QC</td>
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<td>Tom Donnelly</td>
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<td>Dr Linda Moore</td>
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<td>Bertie Campbell</td>
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<td>Geraldine Campbell</td>
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<td>Les Allamby</td>
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<td>Sara Boyce</td>
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<td>Tara Caul</td>
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<td>Austen Morgan</td>
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<td>John Ferris</td>
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<tr>
<td>Professor Geraldine van Beuren</td>
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<td>Queen Mary, University of London</td>
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<td>Professor Colm Campbell</td>
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<td>Professor Sandra Fredman Senior Associate</td>
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<td>Professor Conor Gearty</td>
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<td>London School of Economics</td>
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Professor Brigid Hadfield University of Essex
Professor Colin Harvey University of Leeds
Francesca Klug Senior Research Fellow London School of Economics
Dr Barbara McCabe Ulster People’s College
Professor Christopher McCrudden Oxford University
Professor Alan Miller McGrigor University

**Politicians and Civil Servants**

Lord Alderdice Former Speaker NI Assembly
Alex Attwood SDLP
Brian Barrington Former Advisor to the Deputy First Minister OFMDFM
Ray Bassett BIIGC
Eileen Bell Alliance
Bairbre de Brún Sinn Féin
Richard Good Adviser to the Speaker NI Assembly
Dr Steven King Political Advisor UUP
Sir Gerry Loughran Former Head NI Civil Service
Alban Maginness SDLP
Laurine McAlpine NI Court Service
Robert Mcartney QC UKUP
Chrisilla McCauley Councillor Sinn Féin
Clare McGivern Head of Legal Services NI Assembly
Professor Monica McWilliams NIWC
Dermot Nesbitt UUP
Edwin Poots DUP
William Smith PUP
Chris Stewart Former Head of Community Relations, Human Rights & Victim Division OFMDFM

**SCOTLAND AND REPUBLIC OF IRELAND**

**Irish Human Rights Commission**

Dr Maurice Manning President IHRC
Dr Alpha Connolly Chief Executive IHRC
Professor William Binchy Commissioner IHRC
Michael Farrell Commissioner IHRC
Clodach McGrory Commissioner IHRC

**Irish Government and Civil Servants**

Frank Boughton Civil Servant Department of Justice, Equality And Law Reform
Alma Ni Choigligh First Secretary Department of Foreign Affairs
Anglo-Irish Division
Michael McDowell, T.D Minister for Justice, Equality And Law Reform

**NGOs**

Aisling Reidy Director ICCL
Donchna O’Connell National University of Ireland, Galway
### Media
- Susan McKay: Journalist, Sunday Tribune
- Carol Coulter: Journalist, Irish Times

### Scottish Government, Politicians and Civil Servants
- Robert Brown: MSP, Scottish Parliament
- Alison Colvine: Former member of Head of Human Rights & EU Co-ordination Unit, Scottish Executive
- Jacqueline Conlan: Former Head of Human Rights & EU, Scottish Executive Co-ordination Unit
- Donald Gorrie: MSP, Scottish Parliament

### NGOs
- Rosemary Burnett: Scottish Development Manager, Amnesty International
- Rosemarie McIlwan: Director, Scottish Human Rights Centre
- John Scott: Chair, Scottish Human Rights Centre

### Statutory Groups
- Ian McKay: Educational Institute of Scotland
- Jack Perry: Confederation of British Industry
- Muriel Robinson: Legal Officer, Equal Opportunities Commission

### British Government, Politicians, Civil Servants and Parliamentarians
- Frances Butler: Specialist Adviser, Joint Committee on Human Rights
- Prof. David Feldman: Legal Adviser, Joint Committee on Human Rights
- Lord Laird: House of Lords
- Kirsten McFarlane: Human Rights & Equality Unit, NIO
- Kevin McNamara: MP, Joint Committee on Human Rights
- Roisin Pillay: Joint Committee on Human Rights
- Mark de Pulford: Human Rights Division, Department of Constitutional Affairs
- Shaun Woodward: MP, Joint Committee on Human Rights

### NGOs
- Deborah Chay: Former member, Charter 88
- Tim Hancock: Amnesty International
- Roger Smith: Director, JUSTICE
- John Wadham: Director, Liberty
- Candy Whittome: Co-Director, British Institute of Human Rights
- Jane Winter: Director, British Irish Rights Watch
**Statutory Organisations**

Caroline Gooding  
Director of Legal Services  
Disability Rights Commission

Seamus Taylor  
Director of Strategy and Delivery  
Commission for Equal Opportunities Commission

Jenny Watson  
Deputy Chair  
Racial Equality

**International Experts**

Robert Archer  
Executive Director  
International Council on Human Rights Policy

Prof. Brian Burdekin  
Former Specialist Adviser  
UN High Commissioner for Human Rights, Office of the High Commissioner for Human Rights, UN

Elena Ippoliti  
Human Rights Officer  
Office of the High Commissioner for Human Rights, UN

Peter Hosking  
Former member  
New Zealand Human Rights Commission

Dr Mohammad-Mahmoud Ould Mohamedou  
Research Director  
International Council on Human Rights Policy

Orest Nowosad  
National Institutions Team  
Office of the High Commissioner for Human Rights, UN

Jean-Paul Riviere  
National Institutions Team  
Office of the High Commissioner for Human Rights, UN

**SOUTH AFRICA**

**Commissioners and Staff**

Dr Jody Kollapen  
Chairperson  
SAHRC

Judith Cohen  
Parliamentary Officer  
SAHRC

Prof Karthy Govender  
Commissioner  
SAHRC

Andre Keet  
Public Education Manager  
SAHRC

Rhoda Khadalie  
Former member  
SAHRC

Prof David McQuoid-Mason  
Commissioner  
SAHRC

Ann Routier  
Former member  
SAHRC

Victor Southwell  
Provincial Co-ordinator  
SAHRC

Helen Suzman  
Former member  
SAHRC

Tseliso Chipanyane  
Director of Research  
SAHRC

Faranaaz Veriava  
Former staff  
SAHRC

**NGOs**

Geoff Budlender  
Attorney  
Legal Resources Centre

Mary Burton  
Black Sash

Richard Calland  
Executive Chair  
IDASA

Isobel Frye  
National Advocacy Manager  
Black Sash

Dr Vinod Jaichand  
National Director  
Lawyers for Human Rights

Marcella Naidoo  
National Director  
Black Sash

Michelle O’Sullivan  
Women’s Centre
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<tr>
<td>Johnny de Lange</td>
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<td>Dene Smuts</td>
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<tr>
<td>Dennis Davis</td>
<td>Judge</td>
<td>Cape High Court</td>
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<td>Justice Kate O’Regan</td>
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<td>Janettee Traverso</td>
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