Lia O'Hegarty, Irish Human Rights Commission

ICJ Conference: A Human Rights Institution for Switzerland?

3 April 2008

The Irish Experience with the Human Rights Commission[1]

As outlined by foregoing speakers, in this day and age it is possible to identify what a national human rights institution (NHRI) is and to say that no institution should call itself a human rights commission unless it meets the Paris Principles. That, of course, does not mean that all of these human rights commissions are the same, or that 'one size fits all'. Far from it.

In Ireland, we are talking about a NRHI in an **established democracy**. We have a Constitution with strong human rights content, a judiciary with a good human rights record, a reasonably active parliament, a vigilant media, an ombudsman, a diversity of NGOs, and a range of statutory bodies with a mandate relevant to human rights (such as the Equality Authority). Clearly in a situation like ours, the role of a human rights institution will be very different to that, say, in a country in which democracy and respect for law are not deeply rooted.

How NHRIs go about protecting and promoting human rights is determined, first of all, by the **powers** they are given, second by the **circumstances** in which they find themselves, and third by the **resources** at their disposal. It is taken as a given that human rights commissions are, and must be, **independent** of government. Without that independence they are not in a position to speak with authority and would clearly lack the necessary credibility. But they must also be independent of other bodies. Independent especially of NGOs and pressure groups who may automatically assume human rights institutions are on their side, and by definition anti-government.

[1] These reflections derive from, and are based on, extended discussions with Dr. Maurice Manning, President, IHRC, whose extensive input no amount of thanks can adequately reflect. This paper is not to be copied, cited or further published without consent of the author.

Mandate of the IHRC

The IHRC was established by statute in 2000, very much in the context of the Northern Ireland peace process. One aspect of that peace agreement was the creation of two human rights commissions, one in Northern Ireland and one in Ireland. They have joint meetings quarterly. It is one of the cross-border bodies which is working and working effectively.

Our founding statute is called the *Human Rights Commission Act 2000*.[2] Our mandate is to promote and protect human rights. Those human rights for us are clearly set out in s.2 of the Act.

First, there is our own Constitution, articles 40-44 of which set out fundamental personal rights. These rights have been greatly elaborated upon in the case law of the Irish Courts.

Secondly, the range of international agreements to which Ireland is a party and which incorporate human rights is extensive. The best known international agreements to which Ireland is a party are:

- The International Covenant on Civil and Political Rights (1976);
- The International Covenant on Economic, Social and Cultural Rights (1976);
- The International Convention on the Elimination of all forms of Racial Discrimination (1969);
- The Convention on the Elimination of Discrimination Against Women (1981);
- The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1987); and
- The Convention on the Rights of the Child (1990).

It is hoped that Ireland will soon ratify the recently agreed UN Convention on the Rights of Persons with Disabilities (2006) which for the first time in such a treaty confers a specific role on national Human Rights Commissions in advancing the

[2] Amended by the *Irish Human Rights Commission (Amendment) Act 2001*

rights contained therein. Indeed we contributed to the drafting of this treaty; we played a key role in leading international human rights commissions in that exercise and will continue to take a lead role in mapping the way forward on the implementation of this convention.

At European level the best known international agreements are:

- European Convention on Human Rights (1950);
- The Revised European Social Charter (1996);
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987); and
- The Framework Convention for the Protection of National Minorities (1995).

Membership of the IHRC

The IHRC has 15 members (a full-time President and 14 part-time Commissioners). The range of members is in accordance with the Paris Principles.[3] Thus, for example, we have 5 academics, a practising lawyer, a psychiatrist with extensive human rights expertise, two representatives from NGOs (one representing homeless people and the other from the civil liberties field), a former politician, academic experts in education and legislation respectively who are not affiliated to a university. Our president is a former academic and former politician. The Commission is now into its 2nd 5-year term, with several new appointments (including myself).

The vexed question can be posed as to how **representative** our Commission is of society. In this regard, however, I do not believe it is constructive to assume that a Commission must be constituted by plucking each member from different factions in society. Such a Commission would be less than the sum of its parts. Voices can be brought to the table in different ways, indirectly as well as directly. Thus, for example, among our academics we have an international expert in immigration law and migration and another who has campaigned tirelessly on behalf of disabled persons. This is one way of ensuring that vulnerable groups are protected. Direct

[3] See Paris Principles, Part A, s.3(A)

representation from certain – but not all – minority groups is also possible. In the previous Commission, we had a member of the Travelling Community.
I believe that the 'part-time' but paid status of our Commissioners helps to ensure a quality Commission. Commissioners are heavily involved in the work, bringing their specialist expertise to specific areas and also bringing their good judgment to the overall work. Yet they are also free to continue with other work, which in fact enhances their contribution to the Commission. Furthermore, there is the important factor of networking (a very important factor in Irish society at least) which helps to make a Commission more representative even where it cannot contain direct links to the many groupings in society.[4]

Main Powers of the IHRC

And we come now to the powers of the Commission as laid down by the legislation. These main powers are:

1. To keep under review the **adequacy and effectiveness** of law and practice in the State relating to the protection of human rights;
2. [If requested by any Minister][5] to examine **any** legislative proposal and report its views to Government on any implications of such proposals for human rights;
3. To consult with such national or **international bodies** or agencies having a knowledge or expertise in the field of human rights, as it sees fit;
4. To make such **recommendations to the Government** as it deems appropriate in relation to the measures which should be taken to strengthen, protect and uphold human rights in the State;
5. To promote **understanding and awareness** of the importance of human rights in the State and for those purposes to undertake, sponsor or commission or provide financial or other assistance for **research and educational** activities;

[4] See further de Beco, 'National Human Rights Institutions in Europe', (2007) 7:2 Human Rights Law Review 331 at 346-347
[5] In practice this power is exercised with or without a ministerial request.

6. To prepare and **publish** in such a manner as it thinks fit reports on any research undertaken, sponsored, commissioned or assisted by it in relation to the foregoing;
7. To conduct **enquiries** in accordance with section 9 (I will return to this below);
8. To apply to the High Court or the Supreme Court for liberty to appear before the High or the Supreme Court ***amicus curiae*** in proceedings before the Court that involve, or are concerned with, the human rights of any person;
9. To establish and participate in a joint committee with the Northern Ireland Human Rights Commission;
10. To grant legal assistance or institute legal proceedings occasionally in accordance with sections 10 and 11 respectively.

These are the powers we have, and on paper at least, they appear strong. But what do they mean in practice? Right from the outset, the Commission had to recognise certain realities:

We were new. So are most other National Human Rights Institutions. So we were to a very real extent entering uncharted territory. There would be, and has been, a sharp learning curve. We were not going to have huge resources, that was made clear to us by the Government, and so we have to be realistic in what we do. We have 10-12 staff (but also a number of fellows recently recruited) and a budget of little over €2m.

We did not and do not want to duplicate human rights work being done elsewhere. If we started doing things already being done by say, the Courts, by statutory bodies or by some NGOs, then we would lose credibility. We have to be very clear that what we do is **focused**. Let me now explain how we use our powers and what we see as our **priorities**. I can probably best do this by outlining some of the work we do.

Scrutiny of Legislation

One of our main powers is to keep under review the **adequacy and effectiveness of law and practice** in the State relating to the protection of human rights. In practice, this means examining legislation, especially at pre-parliamentary and parliamentary stages, to see that it is human rights compliant. We carry out a detailed expert study

of the proposed legislation, judging it against human rights standards and international best practice and submit our views to the relevant Minister.

What this process means is that at the pre-enactment phase, both Government and Parliament have available a human rights based critique of the relevant proposals – not our views on the desirability of the proposed legislation, but our best analysis of how the legislation measures against our international obligations and the Constitution as far as human rights are concerned.

It does not always run smoothly. Ministers may resent the delay. Ministers may disagree. But the process is now settling down and a pattern is emerging. Ministers are beginning to realise the value of overcoming these hurdles at an early pre-legislative stage rather than facing later legal challenge. Ministers may even concede that our proposals actually enhance the legislation. Over the past few years we have examined more than twenty major Bills and currently we have five Bills under scrutiny:

The Immigration, Residency and Protection Bill 2006 – observations just published
The Defamation Bill 2006
The Privacy Bill 2006
The Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2006
The Passports Bill 2006

The process however involves more than just Ministers and Government. Our observations are made available to all members of the Oireachtas [parliament] and we regularly appear before Oireachtas Committees to explain what it is we are saying. In so doing, we add an extra dimension to parliamentary scrutiny at the pre-legislative stage. What we say is taken seriously, and subsequent debate shows that it does impact on the detailed examination of the legislation. This of course can only be effective if what we say is authoritative and is seen to be genuinely independent.

From our perspective there are short-comings in the **parliamentary process**. In particular, there is the way in which legislation is frequently rushed through Oireachtas without adequate scrutiny, often to the detriment of the finished product. This most frequently happens coming to the end of a parliamentary session, with

whole sections of bills "guillotined" i.e., legislation is rushed through with a curtailment of time allowed for parliamentary scrutiny.

Another unhelpful development is the tendency in recent times to introduce, what is in effect new legislation, in the form of multiple amendments at **Committee Stage**, the third stage of a Bill's passage through each House of Parliament. This means that too often, legislation has neither been discussed in general principle nor examined in detail. These are not necessarily new developments but they are a cause of concern. To some extent, we can turn this to our advantage by getting a 'second bite of the cherry', if asked by Oireachtas committees to appear before them to inform their deliberations. This week we are appearing before a parliamentary committee to explain our concerns about the immigration bill. The importance of networking again comes to mind. The Government knows that, even if it rejects our proposals, they are likely to come back to haunt them at committee stage.

From the perspective of the Human Rights Commission there is also the fact that very **few Ministers refer legislation** to us (apart from the former Minister for Justice Equality and Law Reform whose behaviour in this regard was is exemplary). This is undesirable given that human rights issues can be found in health, welfare, economic and employment issues and we hope that the example set by the Justice Minister is the one which will be followed. In any event, although the Act mentions referral of specific pieces of legislation by Ministers; in practice we comment on Bills as and when we choose. The peculiar advantage of specific ministerial referral is that it typically involves us at a very early stage, e.g. when there is merely a **Scheme of a Bill**, or 'Heads of Bill'.

Influencing Major Policy Issues

But the capacity of the Irish Human Rights Commission to influence public policy goes much wider than the intervention on the detail of legislation. We also have the right to comment on major policy matters where we feel that there are important human rights issues. Our intervention may originate from enquiries undertaken by us, or from requests made to us, or where we feel that there may well be issues to be addressed and where we feel the law may need to be changed.

In many ways I feel this is the most important of our powers, because it is free-standing and means we can take an **initiative** wherever appropriate, or indeed react to societal events/circumstances as appropriate. We can identify emerging issues and suggest new laws, new policies or new practices. In that way we are not tied to the Government's legislative agenda. Let me give a few examples.

In 2006 we wrote to the Minister of Justice Equality and Law Reform on the question of the determination of life **sentences**. We had been approached by a person who is serving an indeterminate sentence for murder. He has spent over twenty years in jail and his release or otherwise is a matter for the Minister for Justice. We commissioned research on the issue, which was published recently and we agreed with the conclusion in the research, that there is an incompatibility between the current regime governing the determination of life sentences in Ireland and the European Convention on Human Rights, principally on the grounds that the decision to release is entrusted to the executive rather than a "court or court-like body" as is envisaged by the Convention. As a consequence we urged the Government to change the law regarding the powers of our Parole Board.

Let me give another example. In December 2005 the Commission issued an observation on the issue of **extraordinary rendition** and the use of Shannon Airport by US aircraft. In that observation we expressed our concern about reports that US aircraft landing at Shannon Airport might be involved in the transport of persons to secret locations where they may be at risk of being subjected to torture, cruel or inhuman treatment. Our resolution to Government set out Ireland's international legal obligations in relation to the prevention of torture and called on the Government to seek agreement from the US authorities to inspect the aircraft in question. The Department of Foreign Affairs has vigorously contested our interpretation. The issue did not – and has not – gone away. So in December 2007 we published a detailed report on rendition.

To give just another example of policy. It would hardly be a surprise to say that the question of **policing** standards is of great concern to the Commission. We have watched the transformation of the Police Service in Northern Ireland (PSNI) to the

point where it is seen as a model in many respects world-wide, and especially in the way in which it has integrated human rights principles into all aspects of its work.

Our police, the Garda Síochána, is currently engaging in a process of human rights restructuring. Frankly we would be happier if, like the PSNI, it hired external human rights lawyers to help, advise and oversee the process. In the light of a variety of recent controversies, but also because it is right in itself, we aspire that our Garda Síochána should be fully human rights compliant. To help in that process we are undertaking major research to outline in detail what a fully human rights compliant Garda Síochána would look like and seek to provide bench marks against which a human rights compliant Garda Síochána can be judged. In doing this, we are seeking measurable standards against which any reforms can be judged.

N.B. Our involvement in the human rights aspect of Garda reform reflects our approach. Our job is to *promote* human rights - therefore we also work *with* the Garda Síochána (or with prison officers or with any other group in the country which is seeking to implement human rights changes into its way of working). Thus, in my capacity as Commissioner, I also participate on a human rights advisory group appointed by the head of police (and indeed on a consultative group appointed by the Garda Síochána Ombudsman Commission (GSOC)). But we will also *monitor* what they are doing, and we reserve the right to be critical and very publicly critical if we feel that standards or progress are not being met. In this way, we can help the organisation from inside within while retaining our critical and independent voice outside. It is a kind of 'creative tension'.

The scope of the Commission's activities is broad. In the short term since our establishment we have intervened publicly on issues ranging from **immigration, race, migrant workers, travellers** (an indigenous cultural group in Ireland), in all cases suggesting changes in law and practice. The Commission also engages actively with International treaty monitoring bodies, notably the UN Committee on the Elimination of Racial Discrimination and the UN Committee on the Elimination of Discrimination against Women.

Anticipating Emerging Issues

We also try to anticipate. The question of civil unions looms. To help further this debate we published a report on the rights of ***de facto*** **couples**. The report attempted a comprehensive account of the international human rights standards applicable to *de facto* couples and assessed the adequacy of Irish law in the light of that international legal framework. The report examined issues such as access to marriage, rights on relationship breakdown, property rights, succession rights, health and personal safety issues, duties in respect of children, employment rights consumer rights and privacy rights. Our objective was not to take sides but to provide the basis for an informed public debate on what will be for many people a difficult and sensitive issue. On a separate note, we are currently doing a small amount of scoping research on **same-sex couples**.

But perhaps the best example can be found in one of our earliest reports – the rights of **older people** in long stay care. The very first piece of research commissioned by us was a study *Older People in Long Stay Care (2003)*. It was a fine and a frightening piece of work which made most of the points which were subsequently effectively and dramatically made in a major documentary on our national television, revealing a series of serious alleged human rights breaches against elder citizens. When we published the report, not surprisingly there was little media reaction and the response from the Department of Health was perfunctory and dismissive, but very soon, with stories emerging in the media, the issue became a hot topic.

This brings me to the question of **economic, social and cultural rights**. This is an issue which raises hackles, which is frequently argued in a polemical rather than in a reasoned way, and can occasionally be a cover for a battle of different agendas. We are conscious of Ireland's existing international legal obligations with respect to such rights. We do not want to short-circuit our democratic process. We do not see the courts as an alternative to the political process. But we do see the need to demystify the nature of these rights and the nature of Ireland's international legal obligations. We see these rights as being particularly important for groups which have limited access or impact in the political process. To help us in all of this we have sought to explore in depth the nature of these rights and, conscious of the needs for clarity, we have sought to explain the issues involved in accurate and understandable language

through **seminars and research**. Currently, we are conducting a **mapping** of human rights education throughout all sectors in Ireland, because before we dedicate resources to particular educational projects, we feel we need to know more about the *status quo* in human rights awareness.

The need to anticipate new and emerging issues will, coupled with fear of limited resources, be the major challenge for us in the years ahead. Issues arising from **immigration,** ranging from education to religion to cultural rights, will be huge. (There are of course other new issues, e.g. threats to **privacy** from new technologies.) If we do not 'stay relevant', we may lose that authority I spoke of. We may have to find new and creative ways to do thinks on a sparser resource base, e.g. instead of commissioning research on migrants, highlighting research already done.

The Commission's *Amicus Curiae* Role

The Commission has four statutory functions which broadly speaking fall into the category of legal functions – three concern litigation and a fourth relates to the Commission's ability to conduct enquiries.

Of the three **litigation** functions, I would like to explore the Commission's *amicus curiae* function, noting that the Commission's other two litigation functions relate to granting legal advice, representation or other assistance to individuals and instituting proceedings in its own name, respectively [rarely if ever used to date].

Section 8(h) of the Human Rights Commission Act 2000 provides that the Commission may, subject to the leave of the Court, appear before the High Court or the Supreme Court, as *amicus curiae* (or friend of the court) in proceedings that involve or are concerned with the human rights of any person.

First, the Commission, under section 8(h) of the Human Rights Commission Act 2000, has **discretion** in deciding which cases it should seek to appear in. To date the Commission has applied for and been granted liberty to appear as *amicus curiae* on 4 occasions. It may surprise some to learn that the Commission has only rarely done so on foot of a request to it from a party to proceedings; indeed, it has refused many such

requests to it. The other cases in which the Commission was granted liberty to appear before the Superior Courts involved proposals made to it by its in-house solicitor. In two recent cases, the proposal was made further to an invitation from the Court itself. (Incidentally, we tend to get automatically notified of many ECHR cases before the domestic courts because s.6 of the *European Convention on Human Rights Act 2003*, which gave effect to the ECHR in our law, requires that the Commission is notified whenever a declaration of incompatibility of our laws is at issue.)

At the outset the Commission spent much time considering how it should approach its role. Two Commission committees considered the matter. It decided to adopt **guidelines**, to assist it consider *amicus curiae* requests or proposals. These are available on the website (www.ihrc.ie) and include such matters as the importance of the human rights issues raised, whether core questions of principle are raised, etc.

Secondly, any *amicus curiae* appearance is subject to the absolute **discretion of the Court**. Under Articles 34 and 35 of the Constitution, it is the Courts who are charged with adjudicating upon rights. The Superior Courts have inherent jurisdiction to permit the appearance of *amicus curiae* in cases involving both public and private law issues.

Thirdly, while the reference to the *amicus curiae* function in the Human Rights Commission Act 2000 is the *only* legislative reference in Irish law to this strange creature, it does not – nor should it – preclude other bodies from appearing before the Superior Courts in cases as *amicus curiae* and indeed other bodies have so appeared – the UN High Commissioner for Refugees, the Equality Authority and the Law Society of Ireland to name three such bodies.

We are currently involved as *amicus* in approximately 4 cases at present before the Irish courts, ranging from travellers' rights to refugees. We already did approximately 4. In a recent case, where the High Court invited the Commission to appear in a joined case stated and judicial review application involving the Housing Acts, the Commission was in a position to furnish the Court and parties with outline written submissions on the human rights issues raised at an early stage in proceedings.

One of our current cases involves an EU element and may well go as far as the ECJ; it is a case taken by an academic group styling themselves Digital Rights Ireland, disputing data retention laws. Furthermore, we may even become involved in a ECtHR case, where the European Group of NHRIs hope to make a group submission in *DD v. Lithuania* (a case re intellectual disability).

There appears to be some interest in the cases notified to the Commission. By October 2006, the Commission had received over 130 case notifications under either section 6 of the ECHR Act 2003 or otherwise.

Holding Enquiries

One major aspect of our work still at the incremental stage is that of Holding Enquiries. At present, and indeed on a continuing basis, we examine complaints made by people who feel that their human rights have in some way been violated.

Clearly, to hold such an enquiry is a major operation and we want to make sure given our limited resources that the holding of the enquiry is on a substantial matter which cannot be adequately dealt with elsewhere. As well as cost, there is the complication that in Ireland, any form of public fact-finding inquiry is bound by excessive complexities arising from a huge body of constitutional case-law. It is virtually impossible do so with a level of simplicity and informality. We have considerable **compellability** powers (although in reality these are hardly matched by adequate resources).

To guide our own discretion in choosing cases for enquiry, we have published a set of **guidelines** (see www.ihrc.ie). Therefore, typically we may choose a case because it appears to illustrate a **systemic** abuse, or where it cannot be better addressed in another more appropriate **forum** (which, in most cases, it can). Again, as with the *amicus curiae* role, we are looking for iconic cases here rather than to do justice between parties in every case as if we were the courts.

In my view a problem with the enquiry function is that, due to resource limitations as well as the complexities of conducting any public fact-finding enquiries in Ireland (-

we have a raft of case-law prescribing very detailed procedures for same -), we are inevitably going to inquire only into a small minority of cases notified to us. This in itself may cause dismay among victims or perceived victims of human rights abuses. To them, a No is a No. We have an Ombudsman which deals with complaints against public bodies generally, other than breaches of the law. But for us there remains the danger of alienating individuals or groups whose requests for enquiries we reasonably refuse, even though in our hearts we would like to help them.

In this way, the enquiry function can be something of a double-edged sword. We make the best of it, however, by using enquiry requests as a **source of information** to us on what kind of human rights abuses are occurring, or perceived to be occurring, in Ireland. For example, we recently dealt with a case where a woman suffering from depression was repeatedly denied council housing. She ultimately committed suicide. Although the woman's family may desperately need a fact-finding resolution, we may only be able to offer something far less, such as raising the council practice with a parliamentary committee, using this particular story as well as others to highlight a systemic problem in local government.

To sum up, if a NHRI has an enquiry function, it will need two things (other than resources, obviously): actual **flexibility**, and perceived flexibility.

Other Issues

NHRIs have a variety of roles to play in the international treaty process. These have been expertly explored in a publication of the German Institute for Human Rights. Time does not permit me to go into detail here, but an example in the Irish context is the 'shadow' report on the implementation of the ICCPR which we have submitted to the UN HRC alongside our Government's own periodic report. Currently, we are exploring the future implementation of OPCAT (Optional Protocol to the UN Convention against Torture). Our approach in this area is typical for us: we will hold a roundtable involving different stakeholders, with a view to exploring what form a national preventive mechanism (NPM) should take in Ireland. It may be that the IHRC will ultimately have a coordinating function here, or maybe not, but either way we will work closely with whatever body or bodies are involved.

Time does not permit me to explore the topic of international cooperation between NHRIs, as outlined by foregoing speakers.[6] Suffice it to say that we are deeply committed to this. We currently hold the Chair of the European Group of NHRIs (see www.nhri.net). We also strongly support the initiative of the Council of Europe Commissioner for Human Rights, in fostering a partnership with NHRIs. We look forward to contributing and benefiting from this partnership (see www.coe.int).

Conclusion

The Irish Human Rights Commission has been in effective existence now for just 6½ years. At the beginning of this Lecture I posed the question: can a Human Rights Commission make a real difference, add real value in a sophisticated polity such as our own? I think that the Irish experience suggests a Yes rather a No in answer to this question. But the 'Yes' will continue only if the Commission is truly **independent**. And only if it speaks with **authority**. By that is meant that its observation are firmly rooted in human rights instruments, national and international, and can stand up to the closest scrutiny. De Beco has suggested that, to deal with the problem that NHRIs cannot force the hands of a government, there might be introduced some kind of consultative procedure, whereby governments are obliged to consult them in certain cases and, where they disagree, to rationalise this.[7] Personally, I think such a procedure risks becoming illusory. Of far greater power is the ability to exercise political and moral pressure on the government, and this is best achieved, again, by the *quality* and *authority* – both real and perceived – of the statements emanating from NHRIs.

[6] See, e.g. Conclusions of the International Roundtable on the Role of NHRIs and Treaty Bodies (Berlin, 2006)
[7] De Beco, *op. cit.* at 363