

Article 24 of the Commissioner for Children and Young People (Northern Ireland) Order 2003 – the review of the office of the Commissioner

Compatibility with Paris Principles

Executive Summary/Recommendations

1. Introduction

In the Introduction, the brief for this project is outlined and the methodology set out.

2. Composition

It is now accepted that a single-person office can be a National Human Rights Institution (NHRI) and there is a developing approach of appointing corporations sole as Human Rights Institution for Children (HRICs) and Ombuds for Children in Nordic countries. Nevertheless it is advisable that the Commissioner should have strong networks supporting the Office and providing expertise to it.

In the light of consideration of issues of plurality and breadth of expertise within NICCY, and further considerations concerning issues of autonomy and resources outlined below, it is therefore recommended that at least two Assistant Commissioners be appointed to provide a stronger institutional basis for the protection of the Commissioner's independence.

As an alternative, consideration should be given to establishment of an Advisory Council, made up those with particular expertise in the fields of the law and policy concerning children and young people to provide that expertise for the benefit of the performance of the Commissioner's functions and to provide a forum for advice to the Commissioner.

It is also recommended that the Chief Executive Officer should hold the status of Deputy Commissioner in order that a range of administrative functions may be carried out in the Commissioner's name.

3. Breadth of mandate

It is recommended that the four HRICs and the wider network of equality and human rights agencies in the UK (without prejudice to the important role of Irish bodies) should consider how some of the advantages of an NHRI could be replicated through closer coordination among themselves in terms of national, European and international influence.



It is recommended that the mandate of NICCY should be extended to include private authorities, including a wide range of faith-based, community and voluntary and commercial organisations, subject (arguably) to the limitation that NICCY should not have the power to promote and protect children's rights within families or against parents.

It is recommended that the mandate of NICCY should be extended to include all public authorities, including UK-wide public authorities.

In the alternative, consideration should be given to a review of the remit of the four Children's Commissioners in the United Kingdom to ensure that there is an infrastructure of HRICs within the UK which enjoys powers which are compliant with the Paris Principles, as interpreted by European Network of Ombudsmen for Children (ENOC) and the United Nations Committee on the Rights of the Child (UNCRC). Whatever infrastructure is put in place, the NI Commissioner should act in conjunction with a UK or English Commissioner in matters pertaining to the rights and interests of children and young people in Northern Ireland.

4. Breadth of powers

It is clear that service review under Article 7(3) has been a major vehicle for the achievement of the Commissioner's objectives.

It is suggested that the NICCY Order should include a provision whereby courts and tribunals should be required to take the Convention on the Rights of the Child into account in determining any issue concerning the rights and interests of children and young people.

Given the relatively informal approach of the Commissioner's Office towards the use of its formal powers, and given the need to deal with the flow of particular complaints which are made to any HRI or equality agency, NICCY has begun to make formal use of its powers under Article 9, although reviews in individual cases under Article 10, investigation of complaints directly under Article 12, or the launching a formal investigation under Article 16 have yet to be undertaken. This is not to deny that the threat of the use of formal powers has brought about collaborative outcomes on a range of occasions.

It is recommended that all residuary clauses be removed from the NICCY Order and that NICCY be encouraged to enter into Memoranda of Understanding with other agencies responsible for investigations and complaint arrangements to avoid duplication of such arrangements.

It is recommended that the Commissioner's powers of formal investigation should apply across the full range of the Commissioner's investigatory and complaint assistance powers.



It is recommended that Schedule 1 Part II authorities should be subject to same powers of formal investigation as apply to other relevant authorities.

There is no justification for limiting the Commissioner's powers to issues which exclude questions of illegality, even if legal proceedings upon the issues in question have been initiated. Indeed, given the Commissioner's powers of legal assistance and initiation and intervention in legal proceedings, such a restriction would be illogical subject to an appropriate restriction on conflict of interest scenarios.

The Commissioner's powers should be directed towards the role of reporting upon issues within his remit rather than taking on an adjudicatory role on matters of illegality with corresponding enforcement powers. It is perfectly proper that the Commissioner should have extensive powers of evidence gathering, as he enjoys at present, but it would fundamentally alter his functions to give him an adjudicatory role on unlawful breaches of the rights of children and young people, including enforcement powers such as non-discrimination notices.

It may be useful to consider whether the option should be open to the Commissioner to enter into action plans with relevant authorities in lieu of making recommendations in a report or even in lieu of making a formal report. As well as maintaining a public register of recommendations as set out in Article 19(5), it would be valuable if copies of reports with recommendations should be submitted to the Assembly.

5. Autonomy, resources and parliamentary oversight

It is recommended that the appointment, re-appointment and removal of the Commissioner be removed from the remit of OFMDFM and be made the subject of an independent appointment and disciplinary process. It is also recommended that policy-focused aspects of the Management Statement should be removed as being incompatible with both the Paris Principles and the UNCRC General Comment No 2.

It is difficult to make precise recommendations on matters as sensitive as financial control. Given that OFMDFM has to give approval for the detail of the Commissioner's financial expenditure, its intrusion into the Commissioner's autonomy is substantial. It ought to be sufficient that the Commissioner negotiates an annual budget over every three year period, sets down broad parameters within which he proposes to spend it (particularly in terms of staff resources) and informs OFMDFM of his Corporate Plan and Business Plans. Greater control of the Commissioner's expenditure, however laudable in terms of public accountability, is inappropriate in relation to a human rights institution and particularly one whose functions are almost exclusively directed at public sector authorities.



While the Commissioner must be subject to public accountability in relation to finances and use of budget, the Commissioner's autonomy cannot be guaranteed if a government Department is his Sponsoring Department. In these circumstances, it would be desirable if the Commissioner, as a 'constitutional watchdog', was made answerable to a Committee of the Assembly rather than a Government Department (or, during periods of direct rule, to a parliamentary committee at Westminster).

If NICCY is to remain a Non-Departmental Public Body (NDPB), a declaration of independence should be included in the NICCY Order. A new category of 'Constitutional' NDPB should be considered to encompass HRIs such as the Children's Commissioner, the NIHRC and the ECNI.

6. Participation

It is clear that the Commissioner has fully fulfilled all responsibilities upon him to ensure the full participation of children and young people in his activities.

It is therefore suggested that serious consideration should be given to the establishment of an NGO Forum, to meet occasionally, and in which the Commissioner can engage in a constructive exchange of views with the NGO sector.

1. Introduction

In the Background to the brief for this project, the Office of the Commissioner for Children and Young People for Northern Ireland (NICCY) states:-

"In 2002, the Committee on the Rights of the Child¹ welcomed plans to establish an independent human rights institution for children in NI and recommended that the institution;

- have a broad mandate and appropriate powers and resources in accordance with the Paris Principles to monitor, protect and promote all the rights of the Convention and for all children;
- be easily accessible to children;
- be able to determine its own agenda;
- be empowered to investigate violations of children's rights in a child-sensitive manner and to ensure that children have an effective remedy for violations of their rights;
- have formal advisory functions with the relevant legislative bodies and establish formal links, including co-operation, with other similar bodies;
- have adequate resources and appropriate staff ;
- involve children and children's organisations effectively in their establishment and activities."²

¹ UNCRC, GC No 5: 8.

² The UNCRC, in its Concluding Observations on the United Kingdom's State Report of 2002 (CRC/C/15/Add.188), §§16-17.



These recommendations are based on General Comment No. 2 (2002) of the UN Committee on the Rights of the Child (UNCRC) on 'The role of independent national human rights institutions in the promotion and protection of the rights of the child',³ which in turn applies the Paris Principles on NHRIs to children's human rights institutions for children (HRIC).

In light of these recommendations, the brief drawn up for this review by NICCY was to consider:-

*"how the Order compares to the Paris Principles;
what steps could be taken to improve coherence and consistency with the Paris Principles as an independent human rights institution and if non-compliance is identified as an issue how might this restrict NICCY's effectiveness taking into account our objectives and legislation."*

The review which follows should be read in conjunction with the close analysis of the Paris Principles and the CCYP (NI) Order 2003 by Professor Brice Dickson of Queen's University Belfast, which is contained in an annex to the review.⁴ Both the review itself and the annex pay close attention to the recommendations contained in the UNCRC General Comment No.2. Whereas Dickson systematically examines the 2003 Order in the context of each provision of the Paris Principles, this review takes a thematic approach towards what appear to be the most pertinent issues in terms of 'Paris principles compliance' at the stage of a three year review⁵ and includes the outcome of empirical work and further research undertaken by Fitzpatrick.

The main issues considered in this review are those of composition, mandate and powers, reflected in the first, fourth and fifth recommendations of the UNCRC listed above; autonomy and resources, reflected in the third and sixth recommendations; and participation, reflected in the second and seventh recommendations. As part of the methodology of the project, a range of NICCY documentation has been considered and interviews have been conducted with the (Interim) Commissioner, Barney McNeaney and with senior staff of the Office who head up the three teams in the Office, Linda Kerr, (then) Head of Legal and Complaints, Teresa Devlin, Head of Research, Policy and Service Review and Marlene Kingham, Head of Communications and Participation. Some stakeholders have also been interviewed, including Pip Jaffa of the Parents Advice Centre, Siobhan Fitzpatrick of NIPPA – the Early Years Organisation and Paddy Kelly and Tara Caul of the Children's Law

³ CRC/GC/2002/2.

⁴ Referred to as 'Dickson'.

⁵ It is not intended to rehearse the entire range of issues outlined in submissions made at the time of the passage of the then 'NICCY Bill', for example those set out in fn 5 but this is not to detract from their importance either at that stage or at present.



Centre (CLC).⁶ An interview was also arranged with a senior officer of the Office of the First Minister and deputy First Minister (OFMDFM), NICCY's sponsoring Department, within which is situated the Children and Young People's Unit (CYPU), which has immediate responsibility for the activities of the Commissioner.

There is therefore an emphasis on the use of powers from both NICCY's and stakeholders' perspectives but in the wider context of satisfying the Paris Principles as interpreted by the UNCRC. An initial distinction, made from amongst the stakeholders, is between an 'Ombud' and a Human Rights Institution for Children (HRIC). In the CLC submissions, the comment is made that "the emphasis [in the NICCY Bill] is on the role of Ombudsman with the focus on reviewing safeguard mechanisms as opposed to addressing breaches of rights and failures to protect".⁷ The distinction adopted here is slightly different being that between an 'Ombud' body, such as the Local Ombudsman model in Northern Ireland, whereby individual complaints are investigated with a review to redressing grievances and improving practice and procedures and a HRIC model, whereby, while including aspects of the Ombud model, a more strategic approach towards its powers in the protection of the rights and interests of children and young people is employed. Some reference will be made to this distinction during the course of this review.

2. Composition

An initial issue concerns the 'requirement' of plurality at the highest level of an NHRI.⁸ Dickson comments,

"Strictly speaking, the institution should be a collectivity of persons, but everyone now accepts that organisations headed by individuals can qualify as Paris Principle compliant NHRIs provided that the plurality of society is somehow reflected in the work of the organisation."⁹

This is referred to as 'pluralistic representation in the General Comment No 2. Paragraph 12 states:-

"12. NHRIs should ensure that their composition includes pluralistic representation of the various elements of civil society involved in the promotion and protection of human rights. They should seek to involve, among others, the following: human rights, anti-discrimination

⁶ The CLC has made available to us, for the purposes of this review, a range of documentation including McCrudden C, 'International Principles on National Human Rights Institutions and the Commissioner for Children' and Young Person's Bill, Prepared for 'Putting Children First', 18 July 2002 ('McCrudden') (an extensive review of the NICCY Bill in light of the Paris principles) and the Written Submission by the Children's Law Centre & Save the Children to the Committee for the Centre in respect of the Commissioner for Children and Young People Bill, August 2002 ('CLC submissions')(a commentary upon the NICCY Bill with proposed amendments to it).

⁷ CLC submissions, p 3.

⁸ Paris Principle B.1.

⁹ Dickson, §6.



and children's rights non-governmental organizations (NGOs), including child- and youth-led organizations; trade unions; social and professional organizations (of doctors, lawyers, journalists, scientists, etc.); universities and experts, including children's rights experts. Government departments should be involved in an advisory capacity only. NHRIs should have appropriate and transparent appointment procedures, including an open and competitive selection process."

Issues of participation of the 'plurality' of society will be considered under the 'participation' theme of this report but there are wider issues of the effectiveness of a 'corporation sole'¹⁰ approach towards the protection of the rights of children and young people, and indeed human rights and equality issues more generally.

On the benefits side of the equation, there is great force in the argument that a single voice, championing the rights of vulnerable people, none more so than the voice of children and young people, represents an authoritative focus of public representation of the rights of such disadvantaged groups. Whatever 'corporate' internal and external discussions and consultations may occur, the single Commissioner can be a driving force in setting a dynamic and effective agenda within his¹¹ remit. The force of personality of the Commissioner can resolve controversies at a relatively early stage without recourse to formal powers and can speak with great authority on children's rights issues.

Nonetheless, there are costs to the 'corporation sole' approach. Most obviously, the position of the particular Commissioner can become personalised and his authority threatened by unsympathetic forces. There may be some benefit in the officers of the Office having to report to a Board four or five times a year, not just in the sense of plurality but because a Commissioner in day-to-day contact with officers may be so close to the strategy of the Office, and the outworkings of that strategy, that a certain lack of transparency in the Office's work may be apparent to stakeholders. So also, leaving aside issues of participation, a range of talents can be brought to bear, a range of responsibilities can be spread across even a limited number of people and a plurality of representation will make more likely challenges to orthodoxy. While not a major concern, there is a tradition in the UK of single officer bodies fitting an 'Ombud' model and plural bodies fitting a HRI model.

It is significant that the Commissioner can delegate any of his functions to staff of the Office.¹² The Commissioner has a Senior Management Team, including a Chief Executive, to whom certain functions can be delegated. For

¹⁰ Schedule 2, para 1(1), NICCY Order.

¹¹ Given the individual nature of the Commissioner's role, the term 'he' is, with some reluctance, used throughout to denote 'he' or 'she'.

¹² Schedule 2, para 6, NICCY Order.



example, in one case with which the Office dealt, the Commissioner had a conflict of interest.¹³ It has also been noted that Commissioner decisions which might be open to review or appeal, eg on decisions on legal assistance under article 15 of the Order, might involve the Commissioner absenting himself from first-instance decisions in case an independent voice is required to consider any review of or appeal from such a decision.

In section 5 of this report, 'Autonomy and resources', the degree of potential control exercised by Government over the activities of the Commissioner is outlined. A further argument in favour of some degree of plurality within the Commissioner's Office is that the Commissioner might find it easier to protect his autonomy if he was supported by at least a small number of office holders who would introduce some breadth into the decision-making processes of the Office. It is therefore suggested that at least two publicly appointed Assistant Commissioners could be appointed to perform this role.

An alternative model would involve a broadening of the extent of expertise available to the Commissioner but some weakening of the degree of support which could be provided to him. This would involve the establishment of an Advisory Council, made up of suitably qualified people with expertise in the law and policy concerning children and young people. The Advisory Council could provide that expertise for the benefit of the performance of the Commissioner's functions and to provide a forum for advice to the Commissioner. The Advisory Council should be seen as a supportive element of the corporate governance of the Commissioner's Office.

It is also suggested that, instead of a series of delegations by the Commissioner, the Chief Executive Officer should have the status of Deputy Commissioner so that a range of administrative functions could be performed by the CEO in the name of the Commissioner.

It is now accepted that a single-person office can be an NHRI and there is a developing approach of appointing corporations sole as HRICs and Ombuds in Nordic countries. Nevertheless it is advisable that the Commissioner should have strong networks supporting the Office and providing expertise to it.

In the light of consideration of issues of plurality and breadth of expertise within NICCY, and further considerations concerning issues of autonomy and resources outlined below, it is therefore recommended that at least two Assistant Commissioners be appointed to provide a stronger institutional basis for the protection of the Commissioner's independence.

¹³ Case No. 84.



As an alternative, consideration should be given to establishment of an Advisory Council, made up those with particular expertise in the fields of the law and policy concerning children and young people to provide that expertise for the benefit of the performance of the Commissioner's functions and to provide a forum for advice to the Commissioner.

It is also recommended that the Chief Executive Officer should hold the status of Deputy Commissioner in order that a range of administrative functions may be carried out in the Commissioner's name.

3. Mandate

3.1 NICCY as a regional, specialised human rights institution

Along with mandate and powers, this review is considering fundamental issues concerning the adequacy of a specialised regional human rights body as an NHRI.¹⁴ As Dickson states,

*"There is, of course, a degree of artificiality involved in comparing the 2003 Order with the Paris Principles (even as updated) because the Paris Principles were never intended to be used as a set of standards by which to measure institutions that have a remit which is less than 'national' or which deal with the human rights of only one section of the population."*¹⁵

It is understood that the Commission for Racial Equality (CRE) has been recognised as the lead organisation for NHRI purposes from the UK by the International Coordinating Committee of NHRIs, but that was prior to a formal accreditation system being introduced. The Northern Ireland Human Rights Commission (NIHRC) is the only body in the UK which has received such accreditation and is now the leading UK organisation in this context; of necessity it has category 'B' status, not 'A', because it is not and never can be a truly national HRI, but then neither could the CRE (or, arguably, the Commission for Equality and Human Rights (CEHR)) once it is fully established in 2007. Indeed the CEHR's powers in relation to human rights are heavily circumscribed and may well not satisfy the Paris Principles. The NIHRC has significantly more extensive powers and is treated as a regional HRI for many purposes.¹⁶ We are aware that NICCY has engaged with the UN on issues of violence against children¹⁷ and the UNCRC in relation to the 'voice of the

¹⁴ Paris Principle A.1. See also para 12 of UNCRC General Comment.

¹⁵ Dickson, §5.

¹⁶ Indeed, the NIHRC compared its powers with those required by the Paris Principles in 2001 and the Government has now accepted that there should be an increase in its powers in consequence.

¹⁷ Submission to the United Nations Secretary General's Study on Violence against Children by the Northern Ireland Commissioner for Children and Young People. (NICCY) March, 2005.



child¹⁸. It also interacts with the Council of Europe through its participation in ENOC.

NICCY has participated in the development of the British and Irish Network of Children's Commissioners (BINOCC).¹⁹ It may be that BINOCC, with suitable respect for the national autonomy of the Republic of Ireland, could form the basis for a national Children's Rights Network which would act authoritatively on a national level, the essential benefit of an NHRI. There is great benefit in having four Commissioners close to the issues in each of the four territories of the UK but it may be that a collective voice on issues of national significance, such as Anti-Social Behaviour Orders (ASBOs), would carry greater weight on the national political stage. The Network might also allow some coordination of priorities, as would be inherent in the activities of an NHRI, to either focus upon some issues or avoid duplication but it is appreciated that this is easier said than done. A high degree of coordination of autonomous Commissioners is not realistic but they might be able to ask one of their group to take the lead on a specific topic (e.g. the position of young Travellers).

There is a network of human rights and equality bodies in the UK and Republic of Ireland. This network will alter its formation over the next few years with the establishment of the Commission on Equality and Human Rights (CEHR) in 2007 and the eventual absorption of the CRE into the CEHR in 2009. One possible avenue towards a genuine network or coalition of HRIs in the UK would be for the 4 Commissioners to join this network and employ it as a vehicle for authoritative statements on a limited number of human rights issues where consensus can be reached. This initiative would also cement the status of the Children's Commissioners as HRICs.

The second advantage of an NHRI is its representative function on the European and international stage. A network of UK HRICs (there may be jurisdictional and constitutional issues around the formal inclusion of the Irish Commissioner in such an arrangement) would carry great weight before the UNCRC, particularly within ENOC and on some issues within the EU and before the Council of Europe, eg children's rights issues before the European Committee on Social Rights. So also a network of human rights, equality and HRICs could carry great weight. Dickson identifies Sweden as a possible model to follow: the International Coordinating Committee of NHRIs permits different Swedish organisations to represent the country at NHRI meetings

¹⁸ Submission to the Committee on the Rights of the Child's Day of General Discussion on "The Child's Right to be Heard" by the Northern Ireland Commissioner for Children and Young People (Sept 2006).

¹⁹ NICCY Briefing to the Joint Committee on Human Rights (June 2006), §12.



provided the Swedish bodies have agreed between themselves which particular organisation should attend which meeting.²⁰

It is recommended that the four HRICs and the wider network of equality and human rights agencies in the UK (without prejudice to the important role of Irish bodies) should consider how some of the advantages of an NHRI could be replicated through closer coordination among themselves in terms of both national, European and international influence.

3.2 Breadth of mandate

3.2.1 Mandate over non-public authorities

Paris Principle A.2 provides that a NHRI “should be given as broad a mandate as possible”. The main issue concerning the breadth of NICCY’s mandate, as opposed to the breadth of its powers, relates to the organisations with respect to which the Commissioner has a remit to utilise his or her powers. Dickson discusses the extent to which non-State bodies are covered by the NICCY Order.²¹ It is the case that NICCY, under Article 7(1) of the Order, has a wide-ranging power:-

“The Commissioner shall promote—

- (a) an understanding of the rights of children and young persons;*
- (b) an awareness of the importance of those rights and a respect among children and young persons for the rights of others; and*
- (c) an awareness of matters relating to the best interests of children and young persons.”*

So also, under Article 7(2), the Commissioner has a general power to,
“keep under review the adequacy and effectiveness of law and practice relating to the rights and welfare of children and young persons.”

It should also be noted that the Commissioner has a general power to investigate under Article 8(3), which provides:-

“The Commissioner may, for the purposes of any of his functions, conduct such investigations as he considers necessary or expedient.”

However, in practice, these powers are restricted to ‘relevant authorities’ except in relation to the Commissioner’s functions under Article 7(1) and (2). For example, Article 7(3) provides:-

“The Commissioner shall keep under review the adequacy and effectiveness of services provided for children and young persons by relevant authorities.”

²⁰ As Dickson indicates, at §9, in relation to the Swedish experience, “The International Co-ordinating Committee of NHRIs allows Sweden to be represented at international gatherings of NHRIs by whichever ombudsman is designated for that meeting by the collection of ombudsmen as the most appropriate national representative.”

²¹ Dickson, §§18-21.



NICCY's more detailed powers²² are therefore directed at the activities of 'relevant authorities' as defined in Article 4(1).²³ It is not clear on what basis the Commissioner could undertake what Dickson describes as 'level 1 investigations'²⁴ under section 8(3) into the activities of bodies other than 'relevant authorities' by virtue of duties under Article 7(1), although there may be some scope for a general investigation into such activities by "*keep[ing] under review the adequacy and effectiveness of law and practice relating to the rights and welfare of children and young persons*" under Article 7(2)(emphasis added).

It is increasingly recognised that human rights involve the activities of non-State parties. Paragraph 9 of the UNCRC General Comment states,

"These powers should include the promotion and protection of the rights of all children under the jurisdiction of the State party in relation not only to the State but to all relevant public and private entities."

As Dickson states, ENOC provides that a HRIC should have

*"powers to have regard to the situation of children in the family, in schools and in all other institutions; powers to consider the promotion and protection of children's rights in relation not only to government but also to private bodies; [and] the right to have access to children in all forms of alternative care and all institutions which include children".*²⁵

It should be noted that 'relevant authorities' under Schedule 1 does include a range of 'independent bodies', to which public functions are 'contracted-out':-

"2. An independent provider, that is to say a person (whether an individual or a body)—

- (a) providing services of any kind under arrangements with a health and social services body or a general health services provider; and*
- (b) not being a health and social services body or a general health services provider.*

3. Any person carrying on any of the following within the meaning of the Children (Northern Ireland) Order 1995 (NI 2)—

- (a) a children's home or voluntary home;*

²² With the exception of legal assistance and intervention powers under Articles 14 and 15, NICCY Order.

²³ *"In this Order "relevant authority " means—*

(a) any body (other than the Office of the Commissioner) listed in Schedule 2 to the Commissioner for Complaints (Northern Ireland) Order 1996 (NI 7) (bodies subject to investigation);

(b) any department or other authority listed in Schedule 2 to the Ombudsman (Northern Ireland) Order 1996 (NI 8) (departments and other authorities subject to investigation); and

(c) any body or person listed in Schedule 1."

²⁴ Dickson, §49.

²⁵ Dickson, §20.



(b) a residential care home, nursing home or private hospital in which children are accommodated.

4. A person providing day care to which Article 118(1)(b) of the Children (Northern Ireland) Order 1995 (NI 2) applies."

So also a wide range of educational establishments are covered by Schedule 1, including the Board of Governors of a grant-aided school, within the meaning of the Education and Libraries (NI) Order 1986²⁶ and the managers of an independent school, within the meaning of the 1986 Order.²⁷ However, these definitions of 'relevant authorities' are subject to a significant limitation in Article 26, NICCY Order, which restricts the Commissioner's remit to the performance of public functions.²⁸

It is clear that a range of organisations, eg faith-based organisations, organisations in the community and voluntary sector and commercial organisations, can have a significant effect on the rights and interests of children and young people but will not be 'relevant authorities' under the Order.²⁹ It may be that, depending upon the structures under which such organisations operate, NICCY may be able to use its powers under Article 9 to review the inspection arrangements of relevant authorities which have a remit over some private organisations. So also there may be uncertainty over the extent to which some organisations may be 'relevant authorities' in relation to some of their activities. For example, an independent school may be a 'relevant authority' for the purposes of its educational activities but not the organisation of boarding arrangements or extra-curricular activities. So also, with the introduction of the Employment Equality (Age) Regulations 2006 on 1 October 2006, issues will arise outside the scope of 'relevant authorities' in relation to the employment and training of young people,³⁰ an issue in relation to which a Memorandum of Understanding would be necessary with the Equality Commission. It is suggested that the Commissioner should not be restricted in his investigation of abuses of the rights and interests of children and young people, so long as the privacy of family and domestic arrangements are not intruded upon.

²⁶ Schedule 1, para 5.

²⁷ Schedule 1, para 6.

²⁸ For example, Article 26(3), NICCY Order, provides:- *"In relation to any other relevant authority, the relevant authority provisions of this Order apply only in relation to matters arising in connection with the exercise by the authority of its public functions."*

²⁹ Reference has been made to bodies such as private nurseries, private care homes and dancing schools.

³⁰ Article 32(1) provides:- *"States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development."*



There is therefore a wide ambit of activities of a range of organisations which are in the 'public sphere', as opposed to the 'purely private sphere', but outside the scope of 'relevant authorities'. Increasingly, the focus of human rights law and policy has shifted from the perpetrator, as the source of the alleged abuse, to the victim as the recipient of the alleged abuse and this shift is particularly appropriate in relation to the rights and interests of children and young people. Other specialised human institutions such as the equality agencies and the NIHRC are not subject to a strict public/private sector demarcation line. In comparison, the 'Ombud model' is largely focused on the activities of public bodies. It is an unnecessary fetter on the breadth of the Commissioner's mandate, as a HRIC, to be unable to exercise the full range of his powers in relation to the activities of organisations in the broad public, as opposed to the purely domestic, sphere.

It is recommended that the mandate of NICCY should be extended to include private authorities, including a wide range of faith-based, community and voluntary and commercial organisations, subject (arguably) to the limitation that NICCY should not have the power to promote and protect children's rights within families or against parents.

3.2.2 Mandate over public authorities

Although also considered under 'reserved powers limitations' in section 4.4.2.2, it is relevant here that NI-specific public authorities which deal with some 'reserved matters'³¹ are within the remit of the Commissioner under Schedule 1 Part II, subject to certain significant restrictions in relation to formal investigations under Article 9 (general review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities) but UK-wide authorities, performing functions within Northern Ireland, for example, the Home Office, the Ministry of Defence and the Treasury, may be not within the Commissioner's remit at all.³² These authorities are concerned with 'excepted matters'³³ which include matters such as "the armed forces of the Crown",³⁴ "Nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents"³⁵, "taxes or duties under any law applying to the United Kingdom as a whole",³⁶ National Insurance matters,³⁷ and "special powers and other

³¹ 'Reserved matters' are defined in Schedule 3 of the Northern Ireland Act 1998.

³² It may be possible for the Commissioner to conduct an investigation which might include activities governed by 'excepted matters' under Article 8(3), in conjunction with Articles 7(1) and (2) but it is unclear whether the legislature intended 'excepted matters' to be within the Commissioner's remit.

³³ 'Excepted matters' are defined in Schedule 2 of the Northern Ireland Act 1998.

³⁴ Para 4 of Schedule 2.

³⁵ Para 8 of Schedule 2.

³⁶ Para 9(a) of Schedule 2.



provisions for dealing with terrorism or subversion”³⁸ However, many of these matters are specifically covered by the Convention on the Rights of the Child. For example, Article 22.1 provides:-

“States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.”

The English Commissioner³⁹ has certain powers of investigation over ‘excepted matters’⁴⁰ under section 7 of the Children’s Act 2004 (functions of Commissioner in Northern Ireland).⁴¹ Under section 7(1) of the 2004 Act,
*“The Children’s Commissioner has the function of promoting awareness of the views and interests of children in Northern Ireland in relation to excepted matters.”*⁴²

Section 7(2) of the Act provides that the provisions of section 2, concerning the Commissioner’s general functions, are applicable to his functions under section 7 but section 2(7) specifically states,

“(7) The Children’s Commissioner is not under this section to conduct an investigation of the case of an individual child.”

This significant restriction is only partly remedied by section 7(4), which provides:-

“Where the Children’s Commissioner considers that the case of an individual child in Northern Ireland raises issues of public policy which are of relevance to other children in relation to an excepted matter, he

³⁷ Para 10 of Schedule 2.

³⁸ Para 17 of Schedule 2.

³⁹ The NI, Scottish and Welsh Commissioners have set out a most helpful comparative survey of the powers of all four Commissioners, *Memorandum from the Commissioner for Children for Wales, the Commissioner for Children and Young People for Scotland and the Commissioner for Children and Young People for Northern Ireland to the House of Commons Education and Skills Committee* (January 2005). It is not the purpose of this Report to repeat that comparison, or to apply a ‘HRIC analysis’ to their powers, although some reference will be made to relevant provisions governing the other Commissioners.

⁴⁰ The English Commissioner does not have any powers in relation to ‘reserved matters’, considered in section 4.4.2.2 below.

⁴¹ The English Commissioner also has powers in relation to ‘reserved matters’ in Scotland (section 6) and has powers in Wales except in relation to matters within the Welsh Commissioner’s remit (section 5).

⁴² Section 7(3) of the Act provides that *“In discharging his function under subsection (1) above the Children’s Commissioner must take account of the views of, and any work undertaken by, the Commissioner for Children and Young People for Northern Ireland.”*



may hold an inquiry into that case for the purpose of investigating and making recommendations about those issues."

Section 7(5) provides that the Commissioner's powers of 'inquiry' are governed by section 3 of the Act, which includes a requirement that he must consult the Secretary on State, under section 3(3) of the Act, before conducting any such inquiry.⁴³ The Commissioner may conduct a slightly more individualistic inquiry under section 4 of the Act, in the "*case of an individual child in England [which] raises issues of relevance to other children*" but only at the direction of the Secretary of State.⁴⁴

It should be noted that Section 7(3) of the Act provides that
"In discharging his function under subsection (1) above the Children's Commissioner must take account of the views of, and any work undertaken by, the Commissioner for Children and Young People for Northern Ireland."

However, it would appear to be appropriate that any inquiry conducted in Northern Ireland should be 'in conjunction with' the NI Commissioner so that the latter can at least have some semblance of a comprehensive remit over the rights and interests of all children and young people in Northern Ireland.

There is parliamentary disquiet on two levels with these arrangements, first, at the circumscribed powers available to the English Commissioner and his apparent lack of independence from Government.⁴⁵ What is not immediately apparent from a reading of the Children's Act 2004 is that there is no reference to the 'rights' of children. Indeed an attempt in the House of Lords to include children's rights in the Bill was overturned in the Commons,⁴⁶ although the Commissioner "must have regard to the United Nations Convention on the Rights of the Child."⁴⁷ What emerges is a paradox in relation to the distinction between an 'Ombud' and a HRIC. The English Commissioner has a 'strategic' role in relation 'general matters of public policy' but no role in relation to the rights of children. In effect, he has a limited,

⁴³ The powers of inquiry are provided in section 3(8) which provides, "Subsections (2) and (3) of section 250 of the Local Government Act 1972 (c. 70) apply for the purposes of an inquiry held under this section with the substitution for references to the person appointed to hold the inquiry of references to the Children's Commissioner."

⁴⁴ Section 4(1).

⁴⁵ MPs 'unsatisfied' with independence of new children's commissioner', The Guardian Wednesday June 9, 2004

(<http://politics.guardian.co.uk/homeaffairs/story/0,11026,1234982,00.html>).

⁴⁶ 'Hodge 'broke promise' on children's commissioner', comment by the Children's Rights Alliance, reported on 10 Nov 2004

(<http://www.epolitix.com/EN/News/200411/bd81bd79-b679-48b5-8504-f30b45738e93.htm>).

⁴⁷ Section 2(11).



'strategic' role as an Ombud but his role is significantly further removed from that of a HRIC than the role of the NI Commissioner.

Secondly, there is disquiet that 'regional' HRICs do not have remit over non-devolved matters. This was forcefully expressed by the Welsh Affairs Committee during the course of 2004. In January 2004 the Welsh Affairs Committee published its *Report on the Empowerment of Children and Young People in Wales*,⁴⁸ in which it recommended that the remit of the Welsh Commissioner be extended to non-devolved matters. This recommendation was rejected by Government. What is striking is the language of the Committee, at the time of the passing through Parliament of the Children's Bill 2003, in its Fifth Report of that session, published in June 2004, *The Powers of the Children's Commissioner for Wales*.⁴⁹

It is worth quoting at some length from the Summary of the Report⁵⁰:-

"We conclude that the proposals as set out in the Bill will have an undesirable impact that could fundamentally undermine the work of the Children's Commissioner for Wales in his support for children and young people in Wales.

The Government has argued that it does not wish to use the Children Bill as a vehicle for extending the devolution settlement in Wales. We conclude that this argument is misguided and puts into question the Minister's commitment to placing the needs of children over that of spurious bureaucratic expediency.

We recommend strongly that the Government amend the Children Bill to confer on the Children's Commissioner for Wales powers that cover all aspects of a child's life in Wales."

The context of this report is that of a regional HRIC which ought to have 'as broad a mandate as possible' and a strategic approach to the protection of the rights and interests of children and young people in Northern Ireland. First, the scope for 'excepted matters' under the Northern Ireland Act is considerably narrower than 'reserved matters' under the Scotland Act 1998⁵¹ and the scope for 'devolved matters' under the Wales Act is narrower still. Indeed, the scope for 'reserved matters' in Northern Ireland is also narrower and yet the NI Commissioner does have remit over these matters, except for limitations of his powers of formal investigation in some circumstances.

⁴⁸ First Report from the Welsh Affairs Committee, The Empowerment of Children and Young People in Wales, HC 70 of Session 2003–04.

⁴⁹ HC 538.

⁵⁰ At p 3.

⁵¹ Schedule 5.



Secondly, the extension of the Commissioner's remit over 'excepted matters' by way of devolved legislation would raise issues of the competence of the NI Assembly.⁵² Section 8 of the Northern Ireland Act 1998 provides,

"The consent of the Secretary of State shall be required in relation to a Bill which contains-

(a) a provision which deals with an excepted matter and is ancillary to other provisions (whether in the Bill or previously enacted) dealing with reserved or transferred matters; or

(b) a provision which deals with a reserved matter."

It is understood that the Secretary of State gave his consent to those aspects of the NICCY Bill which deal with 'reserved matters'.⁵³ It is strongly arguable that an extension of the Commissioner's powers to include 'excepted matters' would be "ancillary" to the other provisions in the NICCY Order.

Clearly, there is room for close cooperation between the four Commissioners within the UK. Nonetheless, it is not satisfactory that an English Commissioner, with constrained 'Ombud' powers of investigation, should be given responsibility for the activities of UK-wide public authorities in relation to the performance of their functions in Northern Ireland. First, the NI Commissioner cannot take a strategic view of the rights and interests of all the children and young people if there are significant gaps in his remit. Secondly, by creating a 'jigsaw' of powers across various Commissioners, the legislature is perpetuating a 'perpetrator-based' view of the human rights of children and young people rather than a 'victim-based' perspective. Thirdly, there are already two HRIs in Northern Ireland, namely the NIHRC and the ECNI, which are not constrained by distinctions between 'transferred', 'reserved' and 'excepted' matters. Albeit creatures of Westminster legislation, the NIHRC and the ECNI are also creatures of the equality and human rights agendas of the Belfast Agreement. It is therefore incongruous that the Children's Commissioner enjoys a 'second-class' status as a regional HRIC within the jurisdiction of Northern Ireland.

Alternatives should be considered to remedy this situation. First, the United Kingdom could have a UK level Children's Commissioner with powers at least equivalent to those of the best equipped of the four regional Commissioners (which may be those of the NI Commissioner for many purposes) and also powers compliant with the Paris Principles, as interpreted by ENOC and the

⁵² The proposals of the Welsh Affairs Committee, referred to at fn 49, referred to the provisions of a Westminster Bill.

⁵³ McCrudden, p 20.



UNCRC.⁵⁴ Indeed, the UNCRC, in its Concluding Observations on the United Kingdom's State Report of 2002⁵⁵ states,⁵⁶

"The process of devolution of powers to the respective administrations makes more compelling the need for effective coordination of the implementation of the Convention throughout the State party between the various levels of government in Northern Ireland, Scotland, England and Wales, as well as between governments and local authorities."

Secondly, and preferably, for the purposes of this report, the NI Commissioner must have a full range of Paris Principles compliant powers to protect the rights and interests of all the children and young people in Northern Ireland, irrespective of the nature of the public authority whose functions are at issue.⁵⁷

It is recommended that the mandate of NICCY should be extended to include all public authorities, including UK-wide public authorities.

In the alternative, consideration should be given to a review of the remit of the four Children's Commissioners in the United Kingdom to ensure that there is an infrastructure of HRICs within the UK which enjoys powers which are compliant with the Paris Principles, as interpreted by ENOC and the UNCRC. Whatever infrastructure is put in place, the NI Commissioner should act in conjunction with a UK or English Commissioner in matters pertaining to the rights and interests of children and young people in Northern Ireland.

4. Breadth of powers

4.1 Introduction

A major focus of this review is the possible limitations on the use of the Commissioner's powers which prevent NICCY enjoying the full range of powers required by the Paris Principles and also by the UNCRC General Comment No. 2. Dickson gives extensive consideration to compliance with

⁵⁴ It would be possible to envisage a distinction between UK wide policies and practices, in relation to 'excepted matters' which would be within the remit of a UK wide structure of HRICs and NI specific policies and practices which would be within the remit of the NI Commissioner.

⁵⁵ CRC/C/15/Add.188

([http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.188.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.188.En?OpenDocument)).

⁵⁶ At §12.

⁵⁷ For example a UK wide public authority, "in carrying out its functions relating to Northern Ireland" is subject to the statutory duties under sections 75(1) and (2) of the 1998 so long as they are 'designated', under section section 75(3)(d) of the Act and hence subject to the investigative powers of the ECNI under paragraphs 10 and 11 of Schedule 9 to the Act.



Paris Principles C.1⁵⁸ and C.2⁵⁹. It should also be noted that the General Comment, under the heading 'Providing remedies for breaches of children's rights', provides⁶⁰:-

"NHRIs must have the power to consider individual complaints and petitions and carry out investigations, including those submitted on behalf of or directly by children. In order to be able to effectively carry out such investigations, they must have the powers to compel and question witnesses, access relevant documentary evidence and access places of detention. They also have a duty to seek to ensure that children have effective remedies - independent advice, advocacy and complaints procedures - for any breaches of their rights."

In section 4.2, the Commissioner's powers to investigate and consider complaints are set out in some detail, followed by a commentary of the use of those powers and an analysis of some restrictions on the use of his powers.

4.2 The structure of the Commissioner's powers to investigate and consider complaints

Although NICCY has a duty under Article 7(2) to

"keep under review the adequacy and effectiveness of law and practice relating to the rights and welfare of children and young persons",

the Office has a more specific duty under Article 7(3) to

"keep under review the adequacy and effectiveness of services provided for children and young persons by relevant authorities",

referred to in the Office as 'service reviews'.

Under Article 8, NICCY has general powers including, under Article 8(3), a power

*"for the purposes of any of his functions, to conduct such investigations as he considers necessary or expedient".*⁶¹

Under Article 8(4),

*"If the Commissioner so determines, Schedule 3 shall apply in relation to an investigation conducted by the Commissioner for the purposes of his functions under Article 7(2) or (3)."*⁶²

Schedule 3, which is also applicable to some reviews under Article 9(7) (see below), sets out a relatively formal investigatory process, including terms of reference, the possibility of a hearing and a right to make oral or other

⁵⁸ "Within the framework of its operation, the national institution shall freely consider any questions falling within its competence, whether they are submitted by the government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner."

⁵⁹ "Within the framework of its operation, the national institution shall hear any person and obtain any information and any documents necessary for assessing situations falling within its competence."

⁶⁰ Para 13.

⁶¹ Described by Dickson, at §49, as 'level 1 investigations'.

⁶² Described by Dickson, at §50, as 'level 2 investigations'.



submissions by an authority or person who might be adversely affected by a report or recommendation, subject to cross-examination. Paragraph 2(6) provides,

“(6) The Commissioner may for the purposes of an investigation obtain information from such persons and in such manner, and make such enquiries, as he thinks fit.”

However, there is no power of discovery, summoning of witnesses or entry on to property as is found in Articles 16-23 (proceedings in formal investigations), where the Commissioner enjoys the powers of a High Court judge. Under Schedule 3, the Commissioner can issue a report or make recommendations and ultimately can publish a finding of inadequacy on the part of the authority or person in carrying out the recommendations. It should be noted that the formal investigation powers set out in Articles 16-23 are not available for investigations launched under Article 8 (general powers of the Commissioner).

The scheme of the NICCY Order provides for more specific powers of investigation in Articles 9 (general review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities), Article 10 (review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities in individual cases)⁶³ and Article 12 (investigation of complaints against relevant authorities). There is, in addition, a power, under Article 11 to assist with complaints to relevant authorities.

However, these powers are circumscribed in significant ways. For example, Article 9(4) provides,

“The Commissioner shall not review the operation of the inspection arrangements made by a relevant authority unless he is satisfied that no other body or person has power under any statutory provision to review those arrangements.”

This provision will be described in this report (discussed further below at 4.4.1) as a ‘broad residuary clause’ in that, in this case in relation to inspection arrangements, the Commissioner has power to investigate only where no other body or power has such power. Similarly, Article 10(3) provides,

“The Commissioner shall not review the operation of the inspection arrangements made by a relevant authority unless he is satisfied that no other body or person has power under any statutory provision to review those arrangements.”

A narrower ‘residuary clause’ is contained in Article 11. Article 11 (3) provides,

⁶³ Article 9 sets out in more detail advocacy, complaint, inspection and whistle-blowing arrangements.



"The Commissioner shall not provide any assistance to a child or young person under paragraph (1) [assistance in making a complaint] unless it appears to the Commissioner that there is no other person or body likely to provide such assistance." (emphasis added)

Article 11(4) provides,

*"The Commissioner shall not take any action on behalf of a child or young person under paragraph (2) [acting on behalf of a child or young person in making a complaint] unless it appears to the Commissioner that there is no other person or body likely to take such action."*⁶⁴

This formulation is repeated, in relation to assistance in relation to legal proceedings (Art 15) which provides,

"(3) The Commissioner shall not grant an application for assistance under paragraph (2) unless it appears to him that there is no other person or body likely to provide such assistance."

Article 12(2)(b) provides that the Commissioner has power to investigate a complaint if

"the complaint does not fall within an existing statutory complaints system".

Likewise, Article 13(1) provides,

*"(1) The Commissioner shall not conduct an investigation in respect of any action in respect of which the complainant has or had—
(a) a right of appeal, complaint, reference or review to or before a tribunal constituted under any statutory provision or otherwise; or
(b) a remedy by way of proceedings in any court,
unless the Commissioner is satisfied that, in the particular circumstances, it is not reasonable to expect the complainant to resort to or have resorted to the right or remedy."*

Finally, the formal investigation powers of the Commissioner, in Articles 16-23 of the Order,⁶⁵ apply to investigations under Articles 9, 10 and 12(1). The powers of the Commissioner in these circumstances are virtually identical to those in Schedule 3 except for the extensive powers in Article 20 (evidence in formal investigations), whereby the Commissioner has the powers of a High Court judge, Article 21 (powers of entry and inspection for purposes of formal investigation) and Article 22 (obstruction and contempt in relation to formal investigation). However, a significant restriction on the formal investigation powers is contained in Article 16(1)(a) which provides that the Commissioner *"may determine to conduct an investigation ... for the purposes of his functions under Article 9 in relation to a relevant authority other than one listed in Part II of Schedule 1."*

⁶⁴ Article 15(3) (legal assistance) states:- "(3) The Commissioner shall not grant an application for assistance under paragraph (2) unless it appears to him that there is no other person or body likely to provide such assistance."

⁶⁵ Described by Dickson, at §51, as 'level 3 investigations'.



This latter range of authorities is concerned with some 'reserved matters', as set out in Schedule 3 of the Northern Ireland Act 1998. These include, for example, in paragraph 9(c) of the Schedule,

"the prevention and detection of crime and powers of arrest and detention in connection with crime or criminal proceedings"

in paragraph 9(e),

"the treatment of offenders (including children and young persons, and mental health patients, involved in crime); ... Sub-paragraph (e) includes, in particular, prisons and other institutions for the treatment or detention of persons mentioned in that sub-paragraph."

and in paragraph 10,

"the maintenance of public order".

It is worth setting out Part II of Schedule 1, namely:-

"Justice and policing

11. The Northern Ireland Court Service.

12. The Northern Ireland Policing Board and the Chief Constable of the Police Service of Northern Ireland.

13. The Juvenile Justice Board and any other body or person with whom the Secretary of State has made arrangements for the provision of juvenile justice centres or attendance centres under the Criminal Justice (Children) (Northern Ireland) Order 1998 (NI 9).

14. The Probation Board for Northern Ireland.

15. The Chief Inspector of Criminal Justice in Northern Ireland.

16. The Northern Ireland Legal Services Commission.

17. The Northern Ireland Law Commission.

Others

18. The Police Ombudsman for Northern Ireland.

19. The Parliamentary Commissioner for Administration.

20. The Information Commissioner

21. The Qualifications and Curriculum Authority.

22. The Northern Ireland Office."

It is important to appreciate that this exclusion of some 'reserved matters' from the scope of the Commissioner's formal investigation powers applies only to investigations conducted under Article 9 (general review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities) investigations which take the form of general reviews and that Article 9(7) provides that Schedule 3 can apply. The exclusion does not apply to reviews in individual cases under Article 10 (review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities in individual cases) or to investigations of complaints against relevant authorities under Article 12 (investigation of complaints against relevant authorities). It is also important to appreciate, as discussed above, that some authorities which are UK-based are not 'relevant authorities' at all, for example, the Home Office, the Ministry of Defence and the Treasury.



Having set out the structure of these powers, their use and their perceived deficiencies will now be discussed.

4.3 Use of Commissioner's powers

It is clear that NICCY has not sought to rely explicitly on this wide range of, sometimes circumscribed, formal powers in its first involvement in acting on behalf of children and young people. A substantial range of issues has been resolved or influenced by NICCY without recourse to formal powers. It is also the case that much of NICCY's work has been casework under Article 11. In 2004-05, NICCY assisted with 342 complaints. The total number of complaints received by NICCY in June 2006 stood at 627.⁶⁶ This has been a highly successful aspect of the Commissioner's work. The JCHR Briefing sets out the largest categories of complaints received in the following priority areas⁶⁷:-

• safeguarding children	210
• special educational needs	199
• children and young people with disabilities	58
• enquiry/info request	51
• bullying	26
• road safety and school transport	21

The 'authorities type' were categorised as follows⁶⁸:-

• Health Boards/Trusts	167
• Education Authority	147
• Schools	51
• Government Departments	25
• Police	10
• Housing	11
• Councils	8

The Briefing also indicates that the objective was met in 86.6% of cases and partially met in 10% of cases. Of the remaining 3.2% of cases, 2.2% of all cases (about 13) involved a lack of cooperation.

Although Article 16 and legal action were threatened on a number of occasions in order to facilitate casework, formal investigations were not initiated in any of these cases, in response to voluntary agreements to cooperate with the Office.

There has been a range of 'service reviews' under Article 7(3),⁶⁹ namely:-

⁶⁶ NICCY's Briefing to the Joint Committee on Human Rights (JCHR) June 2006, §8.1,.

⁶⁷ Table 2.

⁶⁸ Table 3.



- Vetting, the recommendations from which were accepted by Government and for which follow-up was due to occur in June 2006;
- Speech and Language Therapy, in relation to which there have been two reviews in March 2005 and March 2006, all the recommendations from which have been accepted and a task force established;
- Child protection jointly with the Social Services Inspectorate, the recommendations from which have been forwarded to Trusts;
- Child centred care, the review of which was launched in June 2006;⁷⁰
- Aspergers, which is ongoing.⁷¹

It is understood that, while Schedule 3 has not been invoked in relation to these service reviews, terms of reference have been published. The Commissioner has been able to exercise his powers under Article 7(3), in conjunction with Articles 8(3) and (4), without any invocation of the powers of formal investigation under Article 16.

These service reviews have provided the basis for strategic analysis of the service provision in question. For example, the review of Speech and Language Therapy (SLT) Provision reached conclusions on:-

- the continued existence of a postcode lottery
- the significant number (>5000 children and young people) who require SLT services
- the inadequate provision of resources specifically targeted at SLT services for children and young people
- the disparity between the increased volume of complaints to NICCY and the decreased number of formal complaints recorded by the Trusts
- the overall lack of action at a strategic or policy level in response to NICCY's and others' concerns.⁷²

It is clear that service review under Article 7(3) has been a major vehicle for the achievement of the Commissioner's objectives.

This use of service reviews under Article 7(3) has matured into the Commissioner's first use of his powers under Article 9 to undertake a general 'Review of Advocacy Arrangements for Children and Young People with

⁶⁹ Both service reviews and research projects are subject to the scrutiny of an Independent Scrutiny Committee.

⁷⁰ NICCY (2006) A Northern Ireland Based Review of Children and Young People's Participation in the Care Planning Process Belfast: NICCY.

⁷¹ NICCY has also commissioned a range of research reports, the most significant of which was a comprehensive review of children's rights in NI conducted by a QUB research team, Kilkelly, U., Kilpatrick, R., Lundy, L., Moore, L., Scraton, P., Davey, C., Dwyer, C. and McAlister, S. (2004) *Children's Rights in Northern Ireland* Belfast: NICCY.

⁷² NICCY Briefing paper to JCHR, June 2006, p 6-7.



Mental Health Needs who are in the Care of Relevant Authorities.⁷³ A second Article 9 review of advocacy arrangements for disabled children and young people with complex needs is also being prepared. Reviews in individual cases under Article 10 have not yet been undertaken. It is understood that further reviews under both Articles are contemplated in the near future, in particular a general review of complaints procedures in the juvenile justice system, jointly with the Inspector for Criminal Justice.⁷⁴ We are aware of a range of investigations within the scope of Article 12, although the Article may not have been formally invoked. For example, in Case No. 84, which grew out of Article 11 assistance, the Commissioner considered an Article 12 investigation but decided against one in view of the fact that an investigation was being conducted by the Hospital Trust. In light of the Trust's unwillingness to release the subsequent report to the Commissioner, he threatened an Article 16 formal investigation. After taking advice, the Hospital Trust released the required report.

An investigation under Article 8(3) and (4) was conducted in Case No. 363 and paragraph 2(2) of Schedule 3 was invoked. The Commissioner decided not to invoke Articles 12 and 16 as the H&SST was cooperating with the Office. At a later stage, a PSNI officer queried the Commissioner's power to require information from the Service. In response to further explanation, the PSNI released the relevant files. Controversy arose with another H&SST in a case where Article 7(3) was invoked and oral indications were made of possible use of Article 16. It would have been necessary to launch an investigation under Article 12, which appears to have been appropriate on the facts, in order to in turn invoke Article 16.

The Commissioner has also made highly strategic use of his powers under Article 14 of the Order to "bring, intervene in or assist in legal proceedings".⁷⁵ In *In the Matter of the Application for Judicial Review of the Northern Ireland Commissioner for Children and Young People*,⁷⁶ the Commissioner challenged ministerial decisions made during the legislative progress of Anti-Social Behaviour Orders in Northern Ireland. A number of challenges were made, including issues surrounding an alleged 'breach' of section 75 of the Northern Ireland Act 1978, in relation to the statutory equality duty on public authorities to show due regard to the need to promote equality of opportunity across a range of grounds including age. For the purposes of this report, two

⁷³ The Review is being conducted on behalf of NICCY by the School of Nursing, University of Ulster.

⁷⁴ This general review under Article 9 has emerged from the findings of an application for judicial review, *In the matter of an Application for Judicial Review by TP a Minor by his Father and Next Friend*, judgment of Weatherup J., 29 September 2007 [2005] NIQB 64.

⁷⁵ It is understood that the Commissioner has yet to use his powers to assist in relation to legal proceedings under Article 15 of the Order.

⁷⁶ [2004] NIQB 40, judgment of Girvan J, 23 June 2004.



points were of note. First, the judgment does not even mention that the Commissioner was acting under his power to bring legal proceedings under Article 14, which was not contested.

Unlike other powers which have been scrutinised in this report, there are few constraints upon the Commissioner's freedom of action in terms of bringing, intervening in or acting as *amicus curiae* in legal proceedings. Article 14(3) of the Order provides,

"The Commissioner shall not bring or apply to intervene in proceedings unless he is satisfied that—

(a) the case raises a question of principle; or

(b) there are other special circumstances which make it appropriate for the Commissioner to do so."

This formulation is even less onerous than the minimal conditions set out in Article 15 on the power to assist in relation to legal proceedings. Here a third 'threshold' condition is imposed in Article 15(2)(b), namely,

"it would be unreasonable to expect the child or young person to deal with the case without assistance because of its complexity, or because of his position in relation to another person involved, or for some other reason;"

This formulation is typical of those available to the ECNI and the NIHR. For example, section 75(1) of the Sex Discrimination (NI) Order 1976 provides,

"Where, in relation to proceedings or prospective proceedings either under this Order or in respect of an equality clause, an individual who is an actual or prospective complainant or claimant applies to the Commission for assistance under this Article, the Commission shall consider the application and may grant it if it thinks fit to do so on the ground that—

(a) the case raises a question of principle, or

(b) it is unreasonable, having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved or any other matter, to expect the applicant to deal with the case unaided,

or by reason of any other special consideration."

It is significant that even these minimum 'threshold' criteria for legal assistance have been jettisoned in the legal assistance provisions in section 28 of the Equality Act 2006. Here the CEHR is simply given the following power,

"(1) The Commission may assist an individual who is or may become party to legal proceedings if-

(a) the proceedings relate or may relate (wholly or partly) to a provision of the equality enactments, and

(b) the individual alleges that he has been the victim of behaviour contrary to a provision of the equality enactments."



Like NICCY, the CEHR has a wide power to initiate or intervene in judicial review proceedings, in accordance with section 30 of the Act,

“(1) The Commission shall have capacity to institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function.”

This may be compared with the position of the NIHRC (and by implication the ECNI) in which cases this power to intervene in proceedings, according to the House of Lords in *Re Northern Ireland Human Rights Commission*,⁷⁷ is implied.

A second point to note about NICCY’s Application is that the Commissioner sought to rely on the right to be heard in Article 12 of the Convention on the Rights of the Child, which provides,

“1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

Girvan J doubted whether a ‘right to be consulted’ was an aspect of the ‘right to be heard’ in Article 12 but, in any event, concluded that “the Convention is not part of domestic law”. It is well-established that British courts are reluctant to acknowledge the significance of international law obligations. Hence, it is necessary for the Human Rights Act 1998 to ‘transpose’ the European Convention of Human Rights into UK law. Hence, under section 6(1) of the Act a ‘direct action’ can be taken against public authorities for contraventions of Convention rights. So also, the Act sets out a presumption of purposive interpretation in section 3(1) which provides,

“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

It cannot be expected that the Convention of the Rights of the Child will be transposed into UK or NI law. However the Commissioner must take the Convention into account in performance of his functions, in accordance with Article 6 which provides,

“(3) In determining whether and, if so, how to exercise his functions under this Order, the Commissioner shall have regard to—

⁷⁷ [2002] NI 236.



- (a) the importance of the role of parents in the upbringing and development of their children; and*
- (b) any relevant provisions of the United Nations Convention on the Rights of the Child."*

It is incongruous that the Commissioner must take the Convention into account but the courts and tribunals can totally refuse to do so. It would be valuable to give the Convention some status in NI law so that its significance can be taken into account. A precedent is available in the equality statutes, for example the status of codes of practice under the Sex Discrimination (NI) Order 1976. Article 56A(9) provides,

"(9) A failure on the part of any person to observe any provision of a code of practice shall not of itself render him liable to any proceedings, but in any proceedings under this Order or the Equal Pay Act before an industrial tribunal—

(a) any code of practice issued under this Article shall be admissible in evidence; and

(b) any provision of the code which appears to the tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

It would be possible to use this precedent to give the Convention some standing in the interpretation of UK legislation.

It is suggested that the NICCY Order should include a provision whereby courts and tribunals should be required to take the Convention on the Rights of the Child into account in determining any issue concerning the rights and interests of children and young people.

The Commissioner became involved in a second application for judicial review against the NIO in relation to ASBOs.⁷⁸ On this occasion, a 28 years old, who was one of the first recipients of an ASBO in NI, sought to challenge the validity of the ASBO legislation on the basis that the ECNI had recently issued a report concluding that the NIO had failed to comply with its equality scheme. The applicant was arguing that a failure to comply with an equality scheme amounted to a breach of section 75 itself, thereby rendering the legislation *ultra vires*. Here is not the place to consider this litigation in detail. Suffice it to say that the Commissioner had a more peripheral role as an intervenor in the first instance litigation and deciding not to intervene in the appellate proceedings. The conclusion of this litigation, both at first instance and in the Court of Appeal, was that Schedule 9 of the Act, which sets out a range of functions for the ECNI to perform, including investigations into complaints of failures to comply with equality schemes, was largely a self-sufficient form of enforcement of section 75. Hence to the extent that the

⁷⁸ *In the Matter of the Application of Peter Neill* [2005] NIQB 66, judgment of 7 October 2005 (Girvan J) and [2006] NICA 6, judgment of 8 March 2006 (CA).



Commissioner was seeking a ruling on the legality of a public authority's failure to comply with an equality scheme, as a breach of statutory duty under section 75, this intervention was not successful.

There is widespread appreciation of NICCY's work amongst stakeholders, particularly in relation to casework and also collaborative work with other agencies and NGOs. But there is a feeling that NICCY lacks a certain transparency over what happens to complaints once NICCY takes them on. Although NICCY's first Annual Report covering 2003-4⁷⁹ sets out some statistics on complaints etc, the Commissioner's Office was only coming into being during that year. At the moment, NICCY's Annual Report for 2004-05 is at a late stage of preparation. NICCY already has an extensive Corporate Plan,⁸⁰ which applies from 2005-08, supported by annual Business Plans, the first for 2005-06.⁸¹ There was extensive consultation⁸² and a wide research programme leading to the development to the Corporate Plan, in particular the research project mentioned above into 'Children's Rights in Northern Ireland'. Indeed, the JCHR Briefing Paper also provides detailed information on NICCY's activities.

Another concern is that NICCY has not made full use of its powers. The distinction has already been made between an 'Ombud' who investigates individual complaints, such as on the basis of the Local Ombudsman model in Northern Ireland and a Commissioner (ie HRIC) who applies a more strategic, rights based, approach towards its powers. In one sense, the Commissioner has attributes of the former, for example, the 'closed list' approach towards 'relevant authorities' in draws upon the list of public authorities governed by the Commissioner for Complaints (Northern Ireland) Order 1996 and the Ombudsman (Northern Ireland) Order 1996.⁸³ So also the Commissioner's powers under Article 12 (investigation of complaints against relevant authorities) are consistent with an 'Ombud' role. However, a wider survey of the Commissioner's powers reveals both an enhanced 'Ombud' role, particularly in relation to his Article 11 power to assist with complaints to relevant authorities but also an entrenched 'strategic role' as a HRIC. This is apparent from the general and strategic nature of the Commissioner's powers of service review under Article 7(3), the general and strategic nature of his powers to conduct general reviews under Article 9 and the particular but still strategic power to conduct review into individual cases under Article 10. So also the Commissioner's power to initiate and intervene in cases under Article 14 and the power to give legal assistance under Article 15 are both

⁷⁹ http://www.niccy.org/uploaded_docs/AnnualReport.pdf.

⁸⁰ http://www.niccy.org/uploaded_docs/CorporatePlan05-08.pdf.

⁸¹ http://www.niccy.org/uploaded_docs/Business%20Plan%202005-06%20-FINAL.pdf.

⁸² See details of the SHOUT consultation (2004-05) on NICCY's corporate priorities on its website at http://www.niccy.org/uploaded_docs/Shout%20Consultation.pdf.

⁸³ Respectively Articles 4(1)(a) and (b), NICCY Order.



inconsistent with a pure 'Ombud' model and are fully consistent with a strategic HRIC model. In this regard, it is indisputable that the legislature intended the Commissioner to be an amalgam of an Ombud and a HRIC with a strong and preponderant emphasis on the latter.

It should be said, in response to this concern over a focus on the individual rather than the strategic, that in wider campaigns, research programmes and service reviews, NICCY appears to have acted in a highly strategic fashion. It should be emphasised that the values of NICCY presuppose the avoidance of the precipitous use of formal powers. These values include to "be flexible and innovative, always trying to find quick and appropriate solutions" and to "work with others in a collaborative and cooperative manner but, where this proves ineffective, to be prepared to use the full range of our powers to bring about change."⁸⁴ It is also significant that Article 24(2) of the NICCY Order requires a review of the "working of the Order" as soon as practicable after the third anniversary of the making of the Order, namely 27 February 2003 but the first Commissioner was only appointed in October 2003 and the Senior Management Team was only in place by March 2004. Given that this Report forms part of this, somewhat early, review of the working of the Order, it is fair to say that the Commissioner is entitled to take stock at this early stage of his Office of which powers has been utilised until now and which might be utilised over the next three year review period.

As intimated earlier, NICCY is entitled to be more interested in outcomes than methods. It has formally used its powers frequently and successfully under Article 7(3) and under Article 11, has commenced to use its powers under Article 9 and has threatened to use its more intrusive powers under Article 12 and Article 16 on a number of occasions, bringing about collaboration and cooperation with relevant authorities in accordance with NICCY's values. It would be gratuitous to construct a situation in which powers could be used merely for the purpose of testing them.

Given the relatively informal approach of the Commissioner's Office towards the use of its formal powers, and given the need to deal with the flow of particular complaints which are made to any HRI or equality agency, NICCY has begun to make formal use of its powers under Article 9, although reviews in individual cases under Article 10, investigation of complaints directly under Article 12, or the launching a formal investigation under Article 16 have yet to be undertaken. This is not to deny that the threat of the use of formal powers has brought about collaborative outcomes on a range of occasions.

⁸⁴ NICCY Corporate Plan 2005-08, p 5
(http://www.niccy.org/uploaded_docs/CorporatePlan05-08.pdf).



4.4 Deficiencies in NICCY's powers

It is already apparent in light of Dickson's analysis of the Paris Principles and ENOC guidelines, and from consideration of the UNCRC's General Comment, that there are deficiencies in NICCY's powers. The three most significant are the prevalence of 'residuary clauses' throughout the Commissioner's powers, the limitation of formal investigation powers to specific functions under Articles 9, 10 and 12, the exclusion of a range of authorities, set out in Part II of Schedule 1, from formal investigation powers, albeit only in relation to Article 9 investigations and the related matter of the exclusion of some UK-wide authorities from the scope of 'relevant authorities', already discussed in section 3.2.2 above, but subject to the investigative powers of the English Commissioner under section 7 of the Children's Act 2004.

4.4.1 'Residuary clauses'

Essentially, the fundamental objection to 'residuary clauses' is that the Commissioner, as a HRIC, does not have the full scope of powers to allow him or her to act in a strategic fashion. Effectively, NICCY's powers 'flow around' existing powers in agencies which do not have the Commissioner's perceptive and strategic vision on the rights and interests of children and young people.⁸⁵ Hence the Commissioner has a patchwork of powers of Byzantine complexity. If the Commissioner was 'merely' an Ombud settling individual complaints, rather than a HRIC, this residuary approach would 'fill in the gaps' in existing investigatory procedures.

The rationale for a residuary approach is provided by the Swedish Government in relation to the powers of the Swedish Ombud for Children. It stated,

"There were strong reasons of principle for segregating the respective assignments of the Ombudsman, other national authorities and voluntary organisations. Sweden already had authorities whose task was to intervene for the protection and support of individual children and youngsters. Besides, the way in which these authorities discharge their duties comes under the scrutiny of a pre-existing Ombudsman, the Parliamentary Ombudsman. The Swedish Parliament found it neither appropriate nor practical for similar duties to be vested in the Children's Ombudsman, because then there would be too great a risk of collisions and duplication.

Another important viewpoint concerned (getting) the best out of the Children's

Ombudsman's limited resources. Powers of intervention in particular cases could result in the secretariat being swamped with cases which were

⁸⁵ Dickson sets out a range of these investigation powers at §46. The CLC submission to the Committee for the Centre (August 2002), at p 3, states, "Effectively in respect of a number of his/her functions the OCCYP is a "fall back" position with the Commissioner being required to second guess other institutions". So also CLC states that children need a "one stop shop" for complaints.



*important but in which other authorities had already taken action and society had done what it could. Even in cases where individual children and youngsters had been badly treated by the authorities, supervisory bodies existed already. There were good reasons for supposing that the resources of the Children's Ombudsman are better occupied with trying to influence and modify the attitudes taken by authorities and other bodies to various questions by which children and young persons are affected."*⁸⁶

But it is clear that this residuary approach is fundamentally inconsistent with both the Paris Principles and the UNCRC's General Comment on HRICs. As Dickson states,

*"Given the range of limitations on the Commissioner's powers under these 'residual' provisions it is clear that the 2003 Order does not comply with Paris Principle C.1."*⁸⁷

In this context, it is worth noting the severity of various categories of residuary clauses but all of these formulations place a significant, if not fatal, impediment upon the Commissioner's strategic performance of HRIC functions.

There are three broad categories of residuary clauses. The most severe category is set out in Article 12(2)(b) which provides that the Commissioner has power to investigate a complaint if "the complaint does not fall within an existing statutory complaints system". This is a substantial residuary clause in that the entire scope of the investigatory power is excluded if an alternative investigatory procedure exists.

An intermediate category is exemplified by Article 9(4)⁸⁸ which provides,
"The Commissioner shall not review the operation of the inspection arrangements made by a relevant authority unless he is satisfied that no other body or person has power under any statutory provision to review those arrangements."

This is an intermediate residuary clause first because it only applies to one of the subject-matters of the review power, namely inspection arrangements of relevant authorities (as opposed to advocacy, complaint and whistle-blowing arrangements) and secondly because there is at least a minimal level of discretion on the part of the Commissioner. However this apparent discretion is largely illusory. Dickson sets out a range of inspection arrangements in relation to which the Commissioner could only be satisfied that such arrangements exist.⁸⁹ It is also important to appreciate that the residuary

⁸⁶ <http://www.ombudsnet.org/Ombudsmen/Sweden/sweden.htm>.

⁸⁷ Dickson, §47.

⁸⁸ Article 10(3) sets out an identical residuary clause in relation to reviews of inspection arrangements in individual cases.

⁸⁹ Dickson, §46.



clause does *not* apply to general reviews of advocacy, complaint and whistle-blowing arrangements, in the case of general reviews under Article 9, or reviews of such arrangements in individual cases under Article 10.

A third category represents a marginally more modest residuary clause, for example, Article 11 (3) which provides,

*“The Commissioner shall not provide any assistance to a child or young person under paragraph (1) [assistance in making a complaint] unless it appears to the Commissioner that there is no other person or body likely to provide such assistance.”*⁹⁰

This model of residuary clause is marginally more modest because, although it is a comprehensive exclusion of the use of the investigatory power, it requires a genuine judgment on the part of the Commissioner, on the basis of relatively subjective discretion, as to whether other agencies are likely to intervene. It certainly implies that a Memorandum of Understanding should exist with appropriate agencies but the residuary effect of such a clause is less draconian than the other two models.⁹¹

It is tempting to construct a less draconian residuary clause, based on the ‘more modest’ model, but this is not a satisfactory exercise. No doubt, some organisations might suffer from ‘investigation fatigue’ if a range of investigatory bodies descend upon it. However, this ‘residuary’ approach does not apply in relation to other HRIs or equality agencies. For example, in relation to the formal investigation powers of what is now the Equality Commission for Northern Ireland (ECNI), section 57(1) of the Sex Discrimination (NI) Order 1976 (SDO), as amended, provides:-

“Without prejudice to its general power to do anything requisite for the performance of its duties under Article 54(1), the Commission may if it thinks fit, and shall if required by the OFMDFM, conduct a formal investigation for any purpose connected with the carrying out of those duties.”

⁹⁰ The power to grant legal assistance is not a focus of this report. However, it should be noted that Article 15(3) also sets out a ‘more modest’ residuary clause in relation to availability of alternative sources of legal assistance.

⁹¹ For example, this is what the NIHRC has done vis-à-vis the Inspector of Criminal Justice and his power to inspect (e.g.) juvenile justice centres: a member of the NIHRC staff was made part of the Inspector’s team which inspected the Juvenile Justice Centre at Lisnevin. It is interesting to note in this regard that NICCY is establishing a joint review with the Inspector for Criminal Justice into *complaints* arrangements in the juvenile justice system under Article 9, NICCY Order, although NICCY is entitled to conduct such a review without such cooperation, but would not be able to invoke its formal investigation powers under Article 16 as bodies involved in juvenile justice are governed by Schedule 1 Part II, para 13..



So also the ECNI has virtually untrammelled powers of formal investigation (in terms of the *scope* of its statutory remit) in relation to its powers under the equivalent provisions of the Race Relations (NI) Order (1997) (RRO), the Fair Employment and Treatment (NI) Order 1998 and the Equality (Disability) (NI) Order 2000. As yet, there are no powers of investigation under the Employment Equality (Sexual Orientation) Regulations (NI) 2003⁹² and the Commission's powers of investigation under paragraphs 10 and 11 of Schedule 9 to the Northern Ireland Act are limited to questions of failure to comply with equality schemes. So also, as set out in section 4.4.2.3, the soon-to-be-established Commission for Equality and Human Rights in Great Britain has widespread powers of inquiry and investigation under the Equality Act 2006.

As a HRIC, the Commissioner is entitled to have untrammelled powers to protect the rights and interests of children and young people.⁹³ The UK cannot avoid the requirements of the Paris Principles and the UNCCRC General Comment by treating a 'devolved' HRIC as a 'second-class' HRIC in relation to pre-existing statutory investigatory and complaint arrangements or indeed by using its devolved status as an opportunity to avoid its international obligations. The Commissioner, as a guardian of the rights of children and young people in Northern Ireland, must be able to make strategic use of these investigatory powers in cooperation with, but not excluded by, pre-existing arrangements.

It is recommended that all residuary clauses be removed from the NICCY Order and that NICCY be encouraged to enter into Memoranda of Understanding with other agencies responsible for investigations and complaint arrangements to avoid duplication of such arrangements.

4.4.2 Formal investigation powers

4.4.2.1 Specific powers limitation

A first deficiency in the Commissioner's formal investigation powers is their limited applicability. The powers under Articles 9, 10 and 12 are significantly narrower than the general power of investigation under Article 8(3). Certainly Article 9 involves a strategic review but only on specific arrangements. Article 10 involves a quasi-strategic review of arrangements arising out of individual cases. Article 12 involves an individualistic investigation of a particular complaint. On the other hand, Article 8(3) investigations based on Article 7(2) and (3), which are intrinsically strategic, are not subject to Article 16 powers of formal investigation.

⁹² Or under the Employment Equality (Age) Regulations (NI) 2006.

⁹³ There is, for example, concern amongst stakeholders about the occasional nature of the inspection arrangements undertaken by some inspection authorities.



Although the powers of investigation under Schedule 3 initially mirror the powers under Article 16, the intrinsically strategic investigations under Article 7(2) and (3) are not subject to the coercive powers available under Articles 20-22. Once again, there is no precedent in the formal investigation powers of HRIs and equality agencies for this limitation of these powers.⁹⁴ These limitations are inconsistent with both the Paris Principles and the UNCRC's General Comment on investigatory powers, paragraph 13 of which states
"In order to be able to effectively carry out such investigations, they must have the powers to compel and question witnesses, access relevant documentary evidence and access places of detention."

It is therefore recommended that the Commissioner's powers of formal investigation should apply across the full range of the Commissioner's review and investigatory powers.

4.4.2.2 'Reserved powers' limitations

Much controversy surrounds the exclusion of Schedule 1 Part II authorities from the scope of at least some of the Commissioner's formal investigatory powers, as discussed in section 4.2. It is significant that this limitation applies only to general review powers under Article 9 and that Article 9(7) substitutes Schedule 3 processes for Article 16 powers. Nonetheless Article 10, albeit quasi-strategic, involves the situation of a particular child or young person, but *not* a particular complaint by a particular child or young person. The purpose of such an investigation appears to be an assessment of "the effect of that failure on any particular child or young person".⁹⁵ The individualistic nature of an Article 12 investigation requires a complaint concerning a child or young person.⁹⁶ Hence there is a funnelling of the Commissioner's formal investigations in these scenarios away from strategic investigations, in his capacity as a HRIC, and towards Ombud-focussed individualistic investigations. This is not to deny that Article 10 investigations can, and indeed should, be strategic in nature. Nonetheless, it is important that general reviews conducted under Article 9 are able to make use of the full range of investigative powers available under Articles 16 – 23. A specific reference to Northern Ireland is made by the UNCRC in its concluding observations on the UK's State Report 2002, namely to the "continued use of plastic baton rounds as a means of riot control in Northern Ireland"⁹⁷

⁹⁴ See section 4.4.2.3 below.

⁹⁵ However, it may be difficult for the relevant circumstances to be brought to the attention of the Commissioner. As one stakeholder pointed out, a self-harming young person at a juvenile detention centre may not even be aware of the Commissioner's existence.

⁹⁶ The issue has been raised as to whether such complaints could be anonymous, to protect the privacy of the complainant. So also, although a parent can raise a complaint on behalf of a child or young person, there is no equivalent power for an NGO to do likewise.

⁹⁷ See fn 2.



In relation to the 'reserved powers' limitation, McCrudden states, "I assume that the reason for this restriction was due to an argument that it would be inappropriate for public bodies operating in non-devolved areas to be subject to coercive powers operated by a Commissioner established by a devolved administration."⁹⁸ He suggests there should be a clear commitment by the Secretary of State that there will be no obstruction on his or her part to Commissioner investigations of Schedule 1 Part II authorities under what is now Article 9.⁹⁹ In any event, this is inadequate compliance with the Paris Principles and UNCRC General Comment No 2, particularly paragraph 13. For example, there has been controversy over access to juvenile detention centres, albeit in relation to a research programme.¹⁰⁰ Paragraph 13 explicitly refers to a power to "access places of detention". Indeed, issues of detention are explicitly referred to in the Convention on the Rights of the Child. Article 37 provides:-

"(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;"

It must be doubted whether criteria of legislative competence should be used in relation to a devolved HRIC to limit the existing powers of such a devolved HRIC with respect to the jurisdiction over which it has remit. There may well be situations in which the Commissioner may wish to invoke his strategic 'general review' powers under Article 9 against Schedule 1 part II authorities, an option still open to him, but may require him to invoke his formal investigations powers. In effect, he must gain the cooperation of Schedule 1 Part II bodies and may, for example, have to seek Government assistance. This may amount to an indirect Government influence on such investigations and relegates his role from that of a fully effective HRIC to one more in

⁹⁸ McCrudden, p 12.

⁹⁹ It is arguable that there should be a Memorandum of Understanding between NICCY and the NIO on Schedule 1 Part II investigations.

¹⁰⁰ It is also noteworthy that 10 complaints received since 2003 have concerned the Police Service. See list of authorities at fn 68.



keeping with an 'Ombud' model. It is inconsistent with his status as a regional HRIC that the Commissioner lacks these coercive powers against NI-based authorities which deal with 'reserved matters', given that they are otherwise within his remit.

It is also the case that the English Commissioner's power of inquiry under section 7 of the Children's Act 2004 only applies to 'excepted matters'. Hence there is no residual role for the English Commissioner in relation to Schedule 1 Part II bodies.

It is recommended that Schedule 1 Part II authorities should be subject to the same powers of formal investigation as apply to other relevant authorities.

4.4.2.3 Comparisons with investigative powers of other human rights institutions

Schedule 3, regulation 2(2) (in relation to investigations under Article 8(4)) and regulation 3(2) (in relation to investigations under Article 9(7)) require the production of terms of reference, notification of parties and opportunities to give oral or other evidence. Article 16 (on formal investigations) also sets out initially similar provisions on terms of reference and notification of parties. Indeed Article 16(8) provides that the Commissioner is not obliged to hold hearings unless, according to Article 16(9),

"it appears to the Commissioner that there may be grounds for making any report or recommendation that may adversely affect any relevant authority or other person".

Once an 'adverse impact' is identified, full hearings including cross-examination must be made available. This provision is mirrored in Article 58(3A) of the Sex Discrimination (NI) Order 1976, as amended, which provides:-

"Where the terms of reference of the investigation confine it to the activities of persons named in them and the Commission in the course of the investigation proposes to investigate any act made unlawful by this Order which they believe that a person so named may have done ..."

Article 20 (evidence in formal investigations) and Article 21 (powers of entry and inspection) are largely mirrored in Article 59 of the 1976 Order (power to obtain information), subject to two significant variations, in that the Commissioner has a power of entry to premises which the ECNI does not enjoy but failure to comply with ECNI notices lead to offences under the Order while failures under Article 20 or 21 of the NICCY Order leads to contempt of court proceedings before a High Court judge.

The most significant divergence between the ECNI's powers in formal investigations and that of NICCY is in relation to enforcement. The



Commissioner has a duty to report on a formal investigation under Article 18 and shall ultimately maintain a publicly available register of recommendations and resulting action (which may follow a notice under Article 19(3) of any failure to comply with recommendations) but cannot take the matter any further. In contrast, the ECNI may issue a non-discrimination notice under Article 67 of the 1976 Order and can ultimately enforce the notice against any judicially determined *repetition* of an unlawful act by seeking an injunction in the County Court under Article 71.

Hence, the ECNI and NICCY have similar powers of formal investigation, but the ECNI has a very wide scope within which to exercise its powers of formal investigation and enjoys significantly more powerful enforcement powers, including the power to issue a non-discrimination notice and seek an injunction against non-compliance with it, although there are limited circumstances in which it can seek the latter.

An interesting innovation in Article 7 of the Equality (Disability) (NI) Order 2000 (EDO) (agreements in lieu of enforcement action) which provides:-

“(1) If the Commission has reason to believe that a person has committed or is committing an unlawful act, it may (subject to Article 5(3)) enter into an agreement in writing under this Article with that person on the assumption that that belief is well founded (whether or not that person admits that he committed or is committing the act in question).

(2) An agreement under this Article is one by which—

(a) the Commission undertakes not to take any relevant enforcement action in relation to the unlawful act in question; and

(b) the person concerned undertakes—

(i) not to commit any further unlawful acts of the same kind (and, where appropriate, to cease committing the unlawful act in question); and

(ii) to take such action (which may include ceasing an activity or taking continuing action over any period) as may be specified in the agreement.”

It might be open to the Commissioner to desist from an Article 12 investigation in exchange for an undertaking not to continue with the behaviour which precipitated the complaint and to follow an action plan to rectify the situation. The Commissioner could then forego further investigation under Article 12(4), explaining to the complainant that an undertaking had been received and an action plan agreed. These undertakings and action plans could be appended to the reasons for not continuing the investigation.

What is significant about these enforcement powers is that the wider powers of the ECNI under the SDO (and equivalent provisions of the Race Relations (NI) Order 1997) and under the EDO is that they relate to ‘unlawful acts’ by



the relevant respondent. Of course, the Commissioner's investigations may overlap with issues of breaches of *rights* of children and young people in the broadest sense. There are however two significant limitations on his powers of investigation in 'breach of rights' cases. The more significant is set out in Article 13 (actions which may be investigated: restrictions and exclusions), in particular sub-section (1) which provides:-

The Commissioner shall not conduct an investigation in respect of any action in respect of which the complainant has or had—

(a) a right of appeal, complaint, reference or review to or before a tribunal constituted under any statutory provision or otherwise; or

(b) a remedy by way of proceedings in any court,

unless the Commissioner is satisfied that, in the particular circumstances, it is not reasonable to expect the complainant to resort to or have resorted to the right or remedy.

Clearly there is a degree of discretion in the concluding clause of this provision. But, for example, in relation to the proposed investigation into complaint arrangements in the juvenile justice system, the Commissioner is free to launch a general review investigation under Article 9 but could not utilise Article 12 as the particular circumstances had already been subject to judicial review. Indeed, given that an Article 10 investigation concerns "the case of a particular child or young person", it would appear that an Article 10 investigation might also be excluded even if significant issues concerning a complaint arrangement, or an advocacy arrangement, remained outstanding. By comparison, a particular tribunal or court decision could trigger a formal investigation by an equality agency. This may be described as an 'Ombud' style restriction upon the Commissioner's investigative powers, albeit primarily in relation to Article 10 and 12 investigations where the focus is a particular complaint or set of circumstances.

An interesting point of comparison concerns the powers of the NI Commissioner for Complaints who has a slightly less restricted opportunity to investigate complaints where legal proceedings are involved. Article 9 of the Commissioner for Complaints (NI) Order 1996 provides:-

“(3) Subject to paragraph (4) and to section 78 of the Northern Ireland Act 1998], the Commissioner shall not conduct an investigation under this Order in respect of—

(a) any action in respect of which the person aggrieved has or had a right of appeal, complaint, reference or review to or before a tribunal constituted under any statutory provision or otherwise;

(b) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in a court of law.

(4) The Commissioner may conduct an investigation—

(a) notwithstanding that the person aggrieved has or had such a right or remedy as is mentioned in paragraph (3) if the Commissioner is



*satisfied that in the particular circumstances it is not reasonable to expect him to resort to or have resorted to it; or
(b) notwithstanding that the person aggrieved had exercised such a right as is mentioned in paragraph (3)(a), if he complains that the injustice sustained by him remains unremedied thereby and the Commissioner is satisfied that there are reasonable grounds for that complaint."*

It is at least arguable that the Commissioner should enjoy the same residual power to investigate complaints under Articles 10 or 12 as is enjoyed by the Ombudsman in Article 9(4)(b) if there is a complaint *"that the injustice ... remains unremedied thereby and the Commissioner is satisfied that there are reasonable grounds for that complaint"*.

There is a second limitation on his power of investigation where questions of legality are at issue in *particular cases*. Article 17 (formal investigations: exclusions) of the Order provides:-

*"(1) The Commissioner shall not conduct a formal investigation for the purposes of his functions under Article 10 in relation to the operation of the advocacy, complaint, inspection or whistle-blowing arrangements of a relevant authority in the case of any child or young person if the Commissioner has under Article 14 or 15 brought or intervened in, or provided assistance in relation to, any proceedings -
(a) against the relevant authority which relate to the operation of the arrangements in question in the case of that child or young person; or
(b) in which the correctness in law of any action of the relevant authority in relation to the operation of any such arrangements in the case of that child or young person is called into question."*

Hence, it is only if the Commissioner has "brought or intervened in, or provided assistance in relation to, any proceedings" in relation to an Article 10-based investigation that a 'legality' based exclusion applies. A similar 'legality' exclusion is set out in Article 17(2) in relation to Article 12-based investigations.

This distinction between investigations into matters which may, and those which may not, involve unlawful acts is more starkly set out in the Equality Act 2006, in relation to the powers of the soon-to-be established Commission for Equality and Human Rights (CEHR). Under a set of powers headed by the heading, 'General powers', the CEHR may conduct 'inquiries' under section 16 of the Act. It is clear that an innovative distinction is being made between 'general inquiries' and 'specific investigations' into the determination of 'unlawful acts', whereby the CEHR must desist from reaching any adverse conclusions on issues of illegality during the course of an inquiry but may use any information gained in an inquiry to launch an investigation or during the course of an investigation. Section 16 of the Act therefore provides:-



*“(1) The Commission may conduct an inquiry into a matter relating to any of the Commission’s duties under sections 8, 9 and 10.
(2) If in the course of an inquiry the Commission begins to suspect that a person may have committed an unlawful act-
(a) in continuing the inquiry the Commission shall, so far as possible, avoid further consideration of whether or not the person has committed an unlawful act,
(b) the Commission may commence an investigation into that question under section 20,
(c) the Commission may use information or evidence acquired in the course of the inquiry for the purpose of the investigation, and
(d) the Commission shall so far as possible ensure (whether by aborting or suspending the inquiry or otherwise) that any aspects of the inquiry which concern the person investigated, or may require his involvement, are not pursued while the investigation is in progress.”*

By contrast, section 20 of the Act deals specifically with investigations into unlawful acts which can lead to an ‘unlawful act notice’. In relation to public sector duties in the fields of race, disability and gender, the CEHR may also issue ‘compliance orders’ under section 32 of the Act. Schedule 2 of the Act (inquiries, investigations and assessments) provides various specific powers with which are already familiar in other contexts, including powers of the High Court, in relation to inquiries, investigations and ‘assessments’ of public sector duties. By further contrast, under Schedule 9 to the Northern Ireland Act 1998, the ECNI may issue reports and recommendations, under paragraph 11(2) and (3) of Schedule 9, only on failures to comply with equality schemes approved by the ECNI in order, in turn, to comply with the statutory equality duty under section 75 of the 1998 Act. In this context, it is for the Secretary of State, under paragraph 11(3)(b) of the Schedule, to issue directions in relation to any designated public authority except UK Government departments, including the NIO itself.

It is also of note that the Commission shall, under paragraph 11(4) of the Schedule, notify the Assembly of any report under the Schedule and shall send a copy to the Assembly of any report referred to the Secretary of State for possible directions.

A number of conclusions can be drawn from this comparative review. First, there is a distinction within the ‘Ombudsman’ legislation between investigation of complaints into ‘maladministration’ and issues of ‘illegality’, even if the latter may be subject to investigation in some clearly defined scenarios but only to ‘remedy’ maladministration. This distinction is repeated in the NICCY Order, in an even more restrictive fashion than in the Commissioner for Complaints (NI) Order 1996. Secondly, there is a ‘conflict of interest’ distinction between cases in which the Commissioner has become involved in legal proceedings and cases in which he has not. As stated above, there is a



distinction between an Ombud, who investigates particular complaints and a Commissioner who has a strategic vision of the use of his powers to achieve his statutory objectives. These 'Ombud' restrictions over issues of legality are inconsistent with the strategic role of a HRIC and sit uneasily with the Commissioner's powers to undertake general reviews under Article 9 and indeed to initiate legal proceedings under Article 14 of the Order.

There is no justification for limiting the Commissioner's powers to issues which exclude questions of illegality, even if legal proceedings upon the issues in question have been initiated. Indeed, given the Commissioner's powers of legal assistance and initiation and intervention in legal proceedings, such a restriction would be illogical subject to an appropriate restriction on conflict of interest scenarios.

There is a distinction to be made between, on the one hand, a reporting power which focuses on recommendations to protect the rights and interests of children and young people, and which incidentally may address issues of illegality and, on the other, an adjudicatory power to make declarations of unlawful acts within the statutory remit of the relevant agency. Hence, although it is tempting to identify the absence of a power of non-discrimination notices on the part of NICCY enjoyed, for example, by the ECNI, the availability of such a sanction is dependant on the conferring on NICCY of such an adjudicatory role.

The second conclusion is that the Commissioner's powers should be directed towards the former reporting role at the expense of the latter adjudicatory power. It is perfectly proper that the Commissioner should have extensive powers of evidence gathering, as he enjoys at present, but it would fundamentally alter his functions to give him an adjudicatory role on unlawful breaches of the rights of children and young people, including enforcement powers such as non-discrimination notices.

Nonetheless, the innovative development in the ECNI's powers to enter into agreements in lieu of enforcement orders and the power to the CEHR to develop action plans in lieu of enforcement (see above) is noteworthy. **It may be useful to consider whether the option should be open to the Commissioner to enter into action plans with relevant authorities in lieu of making recommendations in a report or even in lieu of making a formal report.**

A further interesting possibility is the submission of the ECNI's reports on failures to comply with equality schemes to the Assembly. **As well as maintaining a public register of recommendations as set out in Article 19(5), it would be valuable if copies of the Commissioner's**



reports with recommendations should be submitted to the Assembly.

5. Autonomy and resources

Independence from Government is an essential component of the status of any NHRI, HRIC or equality agency. Dickson states:-

“National human rights institutions (NHRIs) should reflect the interests of the social forces of civilian society involved in the promotion and protection of human rights, but they should be officially independent from any other organisation or person and should be accountable in their own name for what they say or do.”¹⁰¹

The UNCRC’s General Comment makes two references to autonomy and resources. On resources, paragraph 11 states:-

“While the Committee acknowledges that this is a very sensitive issue and that State parties function with varying levels of economic resources, the Committee believes that it is the duty of States to make reasonable financial provision for the operation of national human rights institutions in light of article 4 of the Convention. The mandate and powers of national institutions may be meaningless, or the exercise of their powers limited, if the national institution does not have the means to operate effectively to discharge its powers.”

More pertinently, paragraph 25 (NHRIs and States parties) provides:-

*“The State ratifies the Convention on the Rights of the Child and takes on obligations to implement it fully. The role of NHRIs is to monitor independently the State’s compliance and progress towards implementation and to do all it can to ensure full respect for children’s rights. While this may require the institution to develop projects to enhance the promotion and protection of children’s rights, it should not lead to the Government delegating its monitoring obligations to the national institution. It is essential that institutions remain entirely free to set their own agenda and determine their own activities.”
(emphasis added)*

Although we recommend an extension of remit for NICCY into the community and voluntary and private spheres, its central role is in relation to agencies of the State. Hence the Commissioner must be able to perform his functions without interference by any Government Department.

The Commissioner’s office is established by Article 5 of the Order and his ‘principal aim’ is established in Article 6. His functions are set out in Articles 7-15. Schedule 2 provides more statutory underpinning of the Commissioner’s office, governing matters such as status (paragraph 1), general powers

¹⁰¹ Dickson, §6.



(paragraph 2) and tenure of office (paragraph 3). The rest of the Schedule is largely concerned with financial matters such as salary (paragraph 4), staff (paragraph 5), funding (paragraph 10), accounts (paragraph 11) and annual report (paragraph 12).

Unfortunately, both Schedule 2 of the NICCY Order, and the Management Statement and Financial Memorandum¹⁰², which governs NICCY's relationship with OFMDFM, significantly fail to meet the requirements of the Paris Principles and the UNCRC General Comment.

However, the first issue is potential control by OFMDFM of the performance of the Commissioner's functions. Although there is a need for financial accountability (and indeed wider public accountability), the immediate concern is the extent to which Government has influence or control over the Commissioner's policy making functions, ie the extent to which the Commissioner "remain[s] entirely free to set [his] own agenda and determine their own activities.". Financial control will also be examined and a parliamentary oversight model will be considered.

¹⁰² The Management Statement is dated June 2005 and is a public document. It is stated at paragraph 1.1.8 that "copies of this document [the Management Statement] shall also be made available to members of the public on the Commissioner's website."



5.1 Control of the Commissioner's policy making functions

First, Schedule 2, paragraph 3(2) allows for the removal of the Commissioner by the "First Minister and deputy First Minister acting jointly", under clearly delineated circumstances. In accordance with Article 5(2) of the Order, the Management Statement provides, in paragraph 3.4.1, that OFMDFM makes the Commissioner's appointment. It is typical that government Departments do make public appointments, a scenario which will come to an end when the Review of Public Administration is fully implemented. It may be a 'necessary evil' of the public appointment process that there is ministerial involvement in the appointment of a HRIC. As outlined further below, both the Scottish and Irish HRICs are appointed through parliamentary processes and there is no reason why the Commissioner should not be appointed by way of Assembly approval also. However, it is not compatible with the independence of the Commissioner that ministers should have the power to remove the Commissioner. It can be admitted that the circumstances in which the Commissioner can be removed are limited. Paragraph 3(5) of Schedule 2 provides:-

- (5) The First Minister and deputy First Minister acting jointly may remove a person from office as the Commissioner if satisfied that he has -*
- (a) been convicted of a criminal offence;*
 - (b) become bankrupt or made an arrangement or composition with his creditors;*
 - (c) without reasonable excuse, failed to discharge his functions for a continuous period of 3 months; or*
 - (d) become unfit or unable to exercise his functions.*

In other circumstances, for example, Chairmen and members of Tribunal NDPBs may only be removed following an investigation by a High Court judge. It is therefore difficult to reconcile the Commissioner's removal from office by ministerial decision with the degree of autonomy which he needs to enjoy. This is the case even in the cross-community nature of devolved administration under the Northern Ireland Act 1998, let alone under direct rule.

The Management Statement gets off to a difficult start. The "overall aim" is set out in paragraph 2.1 which states:-

*"The Order provides that the Ministers have approved the overall aim of the Commissioner in exercising his/her function as follows:-
'to safeguard and promote the rights and best interests of children and young people'."*

However, this is not what the Order says. Article 6(1) of the Order provides:-



"The principal aim of the Commissioner in exercising his functions under this Order is to safeguard and promote the rights and best interests of children and young persons."

It is the legislature, not Ministers, which has 'approved' the Commissioner's 'principal aim'. Hence, the impression is created that ministers determine the Commissioner's objectives rather than the Commissioner establishing his own agenda, on the instigation of the legislature.

The Management Statement and Financial Memorandum places significant constraints upon the freedom of action of the Commissioner which are not justifiable even under Schedule 2. For example, paragraph 2.2.1 of the Management Statement provides that "[t]he objectives, key targets and performance measures for the Commissioner will be set out in his/her Corporate and annual Business Plan which shall be agreed by OFMDFM and DFP and approved by the Ministers." There is no basis in Schedule 2 for this assertion. In any event, it is incompatible with the Paris Principles and UNCCRC General Comment No 2.

In paragraph 3.1.1, 1st indent, it is stated that, to be "accountable to the Assembly for the activities and performance of the Commissioner", OFMDFM responsibilities include "approving the Commissioner's strategic objectives and the policy and performance framework within which the Commissioner will operate". At paragraph 3.3.1, it is stated that the Children and Young People's Unit (CYPU) of the OFMDFM has responsibility "for overseeing the activities of the Commissioner". Ministers are to be advised, under paragraph 3.3.2, on "how well the Commissioner is achieving his/her strategic objectives and whether he/she is delivering value for money."

Although some of these provisions are couched in financial terms, to which attention will be turned below, it is also clear that this purported 'Management Statement' seeks to place significant executive constraints on the performance by the Commissioner of his functions. For example, paragraph 3.3.3, 2nd indent states,

"In support of the Departmental Accounting Officer, the sponsoring team [ie CYPU] shall ... address in a timely fashion any significant problems arising for the Commissioner, whether financial or otherwise, making interventions in the affairs of the Commissioner as OFMDFM judges to address such problems" (emphasis added).

This 'intervention' power is augmented by provisions of 'communications with the Commissioner in paragraph 3.3.3, 4th and 5th indents, which provide

"that the sponsoring team shall ... inform the Commissioner of relevant Government policy in a timely manner; if necessary, advise on the interpretation of that policy; and issue specific guidance to the Commissioner as necessary; and



bring concerns about the activities of the Commissioner to his/her attention; and require explanations and assurances that appropriate action has been taken."

The Management Statement proceeds to intensify the OFMDFM's control over the Commissioner and the performance of his functions. Paragraph 3.4.2 states,

"The Commissioner is responsible to the Ministers ... and in particular for ensuring that the Commissioner fulfils the aims and objectives agreed with OFMDFM and approved by Ministers."

The autonomous position of the Commissioner deteriorates further in paragraph 3.4.6 where it is stated,

"The Commissioner has corporate responsibility for ensuring that he/she fulfils the aim and objectives set by OFMDFM and approved by Ministers". In the first indent, it is stated that "the Commissioner shall establish his/her overall strategic direction within the policy and resources determined by OFMDFM." (emphasis added).

There is an attempt to ameliorate this extent of control over the Commissioner's activities in paragraph 3.10, 'Relationships', which states,

"Relationships between the Commissioner, Ministers and OFMDFM are governed by the 'arm's length' principle, wherein the primary role of Ministers is to set the Commissioner's legal and financial framework and the structure of his/her funding and management. Within the framework it is the role of the Commissioner to determine his/her policy and activities in keeping with his/her statutory responsibilities and the requirements of Assembly policy. OFMDFM has the right of access to carry out any examination of the internal financial control systems as may be required to enable its Accounting Officer to discharge his/her responsibilities in a proper manner."

Unfortunately, much which precedes this paragraph belies its intent. It might be argued that the preceding provisions are merely 'fall back' 'emergency' measures to deal with significant crises in the performance of the Commissioner's functions. However, this not to underestimate the extent of the potential involvement of OFMDFM in the performance of the Commissioner's functions through this Management Statement. It is also considered unlikely that a Board, or even a panel of a Commissioner and two Deputy Commissioners, could be subject to personal pressures, through the application of these intrusive measures, to which a single Commissioner might be subjected.¹⁰³

¹⁰³ It is also noted that paragraph 3.8 of the Statement provides that the Commissioner should perform the role as principal Officer for Ombudsman cases. A matter mentioned during discussions within NICCY was concern that at least one report of the Ombudsman verged upon intruding upon the autonomy of the Office in relation to a published report by the Commissioner and what it should contain.



Whether these powers are ever invoked, OFMDFM (and the Department of Finance and Personnel) retain significant control over the performance of the Commissioner's functions through their required approval, in paragraph 4.1.2 and paragraph 4.2.2 respectively, of NICCY's Corporate Plan and annual Business Plans. In particular, paragraph 4.1.5 provides,

"The main elements of the [corporate] plan – including key performance targets – shall be agreed between OFMDFM and the Commissioner in the light of OFMDFM's decisions on policy and resources taken in the context of the Government's wider policy and spending priorities and decisions."

Hence the Commissioner's entire plan of work for three years is subject to government approval and hence his freedom of action to determine his own priorities is susceptible to government control.

Of course, OFMDFM is itself a 'relevant authority' as are other Government Departments. It is difficult to imagine how the Commissioner could perform his functions in relation to any controversy concerning OFMDFM (or arguably other government Departments¹⁰⁴) when this key government Department has substantial control over the Commissioner's policy making and priorities. Even if many of the more intrusive powers are never invoked, the fact that they are set out in the Management Statement leaves the Commissioner open to informal pressures which might restrict his autonomy.

Certainly, there is proper concern at public accountability of Non-Departmental Public Bodies (NDPBs). This was recently exhibited in the 46th Report of the Public Accounts Committee 2005-06¹⁰⁵ concerning the oversight of the Department of Enterprise Trade and Industry of LEDU and, in particular, the establishment of the Emerging Business Trust and consequent financial conflicts of interest. This influential Committee commences the Summary of its Report by stating that "This is one of the worst cases of conflict of interest and impropriety that this Committee has seen." No doubt, there is deep sensitivity in the Northern Irish civil service over public accountability. The Committee, in paragraph 12 of its Conclusions and Recommendations states, "The Department [ie DETI] did not exercise an appropriate level of control over the NDPBs for which it was responsible and did not ensure effective oversight of third party organisations funded by its NDPBs."

¹⁰⁴ It can be noted that 25 complaints have been made concerning government Departments since 2003. See fn 68.

¹⁰⁵

<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpublic/918/91802.htm>.



However, a clear distinction must be made between a NDPB involved in high risk investments and share activities and a HRIC which must enjoy autonomy from Government and control over its own agenda.¹⁰⁶ There must also be a distinction between prudent overseeing of the Commissioner's use of resources and intrusions into the Commissioner's policy making functions and freedom to use his powers in what may be unpopular controversies, at least from a Government point of view. So also it is clear that the Commissioner should be prepared to work with Government without compromising his independence. He would also be expected to be fully aware of Government strategy, such as the 10-year Children's Strategy 2006-16, prepared by the CYPU in OFMDFM.¹⁰⁷

Although UK law is ambivalent towards the impact of international legal principles on the interpretation of municipal law, it is impossible to reconcile these intrusive controls on the part of OFMDFM over the performance of the Commissioner's functions with fundamental aspects of the Paris Principles and the UNCRC's General Comment. It is strongly arguable that the autonomy of the Commissioner is implied into the interpretation of his powers under the NICCY Order. Given the emphasis in Schedule 2 to the Order on financial control, it is also arguable that these purported policy-focused controls in the Management Statement, in any event, go beyond those provided for in Schedule 2, given the limited matters upon which the legislature has given OFMDFM control over the Commissioner's activities..

We also have evidence of practical involvement by OFMDFM in the performance of the Commissioner's functions. Obviously, in light of the purported controls set out in the Management Statement, OFMDFM has approved the Corporate Plan, Business Plans and Annual Reports. But it also approved terms of reference in early service reviews and has become involved in the performance of the Commissioner's functions as a form of 'court of appeal' following 'complaints' from individuals and political representatives. Some of these interventions might be understandable in the 'early days' of NICCY's existence, particularly given that OFMDFM had set NICCY up. It can also be said that understandings have arisen between NICCY and OFMDFM which have reduced Government involvement in NICCY's affairs as experience of the relationship has matured. So also a Government Department can be a source of support to the Commissioner, particularly in relation to matters where his powers are limited or where informal resolution avoids the use of formal powers. Nonetheless, such cooperation should not be seen as a form of 'dependence' upon the 'good offices' of the Department.

¹⁰⁶ See the observations of the JCHR on the distinction between NDPBs and 'constitutional watchdogs' set out at fn 111.

¹⁰⁷ <http://www.allchildrenni.gov.uk/ten-year-strategy.pdf>.



It is recommended that the appointment, re-appointment and removal of the Commissioner be removed from the remit of OFMDFM and be made the subject of an independent appointment and disciplinary process. It is also recommended that policy-focused aspects of the purported Management Statement should be removed as being incompatible with both the Paris Principles and the UNCRC General Comment No 2.

5.2 Financial Control

The issue of financial control has already been alluded to in section 5.1. It is clear that the expenditure of public funds must be monitored by government but not in such a way as to impinge on the Commissioner's autonomy. As Dickson states,

"Of course there needs to be full accountability for the use of public resources which are allocated to the NHRI, but this should not mean that the NHRI must do the bidding of those to whom it is accountable."

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Paragraph 10 of the UNCRC General Comment states,

"In order to ensure their independence and effective functioning, NHRIs must have adequate infrastructure, funding (including specifically for children's rights, within broad-based institutions), staff, premises, and freedom from forms of financial control that might affect their independence."

The Financial Memorandum between OFMDFM and NICCY which forms Part II of the Management Statement and Financial Memorandum sets out detailed provisions which go beyond provisions already outlined in the Management Statement. In particular, paragraph 12 of the Memorandum, headed 'Novel, contentious or repercussive proposals', sets out more significant controls over the Commissioner's freedom of action. It states,

"The Commissioner shall obtain the approval of OFMDFM and, where appropriate, DFP before:

- *incurring any expenditure for any purpose which is or might be considered novel or contentious, or which has or could have significant future cost implications, including staff benefits;*
- *making any significant change in the scale of operation or funding of any initiative or particular scheme previously approved by OFMDFM;*
- *making any change of policy or practice which has wider financial implications (e.g. because it might prove repercussive among other public sector bodies) or which might significantly affect the future level of resources required. (OFMDFM will advise on what constitutes "significant" in this context)."*

¹⁰⁸ Dickson, §11.



Here, and throughout the Financial Memorandum (and indeed the Management Statement), extensive financial control over the Commissioner's budget and his use of funds can be seen. Obviously, OFMDFM sets NICCY's overall budget. So also individual aspects of the Budget will be tied into the objectives of the Corporate Plan and Business Plans. In terms of staff costs, it appears that NICCY has to 'make a business case' for additional posts, their functions and grade at which they are to be filled. Hence, whether or not intrusive powers are invoked under the Management Statement, NICCY must seek approval for any developments in its policies and priorities which involve staff costs or indeed other expenditure.

Whether NICCY has "adequate infrastructure, funding (including specifically for children's rights, within broad-based institutions), staff, premises", as set out in paragraph 10 of the UNCRC General Comment is a largely a political judgment but it is difficult to argue that NICCY is under-resourced in the context of a jurisdiction the size of Northern Ireland. However, it is impossible to say that NICCY enjoys "freedom from forms of financial control that might affect [its] independence".

However NICCY already enjoys three levels of accountability without direct Government involvement in its financial affairs. First, the Commissioner has set up an Audit and Risk Committee made up of outside persons whose task is to scrutinise NICCY's financial affairs and the risk of incurring financial liabilities. Secondly NICCY has its own firm of internal auditors. Thirdly, it is answerable to the NI Audit Office.

It is difficult to make precise recommendations on matters as sensitive as financial control. Given that OFMDFM has to give approval for the detail of the Commissioner's financial expenditure, its intrusion into the Commissioner's autonomy is substantial. It ought to be sufficient that the Commissioner negotiated an annual budget over every three year period, sets down broad parameters within which he proposes to spend it (particularly in terms of staff resources) and informs OFMDFM of his Corporate Plan and Business Plans. However, greater control of the Commissioner's expenditure than that, however laudable in terms of public accountability, is inappropriate in relation to a human rights institution and particularly one whose functions are almost exclusively directed at public sector authorities.



5.3 Parliamentary oversight

Dickson emphasises a recommendation of the Joint Committee on Human Rights in relation to the then proposed Commission on Equality and Human Rights in Great Britain¹⁰⁹, namely,

*“A better solution, one strongly supported by the Parliamentary Joint Committee on Human Rights in one of its reports on the proposed Commission for Equality and Human Rights in Great Britain, would be to make the Commissioner for Children and Young People in Northern Ireland into a ‘parliamentary’ institution, with funding awarded to it out of the Consolidated Fund and not as part of a block grant to the Northern Ireland Office.”*¹¹⁰

The JCHR pinpoints the Parliamentary Commissioner for Administration (PCA), the National Audit Office (NAO) and the Electoral Commission as three bodies which are directly accountable to Parliament rather than have the status of NDPBs.¹¹¹ The JCHR makes five points in favour of parliamentary oversight of the CEHR.

*“First and most fundamental is the nature of the relationship between human rights and the State. ... Most NDPBs are dealing with non-state actors (ie principally the various regulators of things such as the water suppliers, the railway operators, the energy industry, the telecommunications industry or the broadcast media) or what might be termed common property (for example the national heritage in the form of museums and galleries, the built environment, the natural environment, etc.). ... We consider that the proposed commission has a character more like these constitutional watchdogs [ie the PCA, NAO and the Electoral Commission].”*¹¹²

*“Second, whatever the reality of the independence of well-respected bodies like the discrimination commissions, their accountability structure does not give the appearance of full independence, and may accordingly not be judged fully to comply with the Paris Principles.”*¹¹³

*“Third, the nature of the constitutional settlement could be argued to indicate that, on the matter of the protection of fundamental rights and freedoms, Parliament should be involved more fully than it is with a typical regulator or enforcement body.”*¹¹⁴

¹⁰⁹ 11th Report, Session 2003-04, at paras. 126-137 (www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/78/7807.htm#a23), further endorsed in the 16th Report, Session 2003-04, at para.50: www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/156/15607.htm#a20).

¹¹⁰ Dickson, §42.

¹¹¹ §§113-119 of the Report.

¹¹² §121.

¹¹³ §122.

¹¹⁴ §123.



*“Fourth, and pragmatically, the nature of the new commission will mean that it has responsibilities ranging across those of all Government departments. To avoid bias and turf wars, it is imperative to situate it outside the machinery of government.”*¹¹⁵

“Finally, as a new “independent national human rights institution”, the Commission for Equality and Human Rights would present an opportunity for the UK to demonstrate its commitment to the Paris Principles and the exhortations of the Council of Europe by designing a “best practice” model of independence.”¹¹⁶

These are compelling arguments in favour of the CEHR having the status of a ‘constitutional watchdog’ under parliamentary oversight, or perhaps a ‘Constitutional NDPB’, if NICCY is to remain a NDPB. In light of the JCHR’s emphasis on the Paris Principles, it should be noted that the CEHR has been established as a NDPB. Commissioners are appointed by the Secretary of State,¹¹⁷ Commissioners may be removed from office by the Secretary of State if, “in the opinion of the Secretary of State, [a Commissioner is] unable, unfit or unwilling to perform his functions”¹¹⁸ and there is only a modest ‘declaration of independence’ in the Act.¹¹⁹

Without dwelling on the comparative powers of other Commissioners, it is interesting that both the Scottish Commissioner and Irish Ombudsman are subject to parliamentary oversight and not that of a Government Department.¹²⁰ The Scottish Commissioner is “appointed by Her Majesty on the nomination of the Parliament” and the Irish Ombudsman is appointed in a similar fashion.¹²¹

Section 3 of the Scottish Act covers ‘removal’ and provides:-

¹¹⁵ §124.

¹¹⁶ §125.

¹¹⁷ Equality Act 2006, Schedule 1, para 1.

¹¹⁸ Schedule 1, para 3(5).

¹¹⁹ Para 42(3) of Schedule 1 provides, “The Secretary of State shall have regard to the desirability of ensuring that the Commission is under as few constraints as reasonably possible in determining- (a) its activities, (b) its timetables, and (c) its priorities.”

¹²⁰ Commissioner for Children and Young People (Scotland) Act 2003. See also section 4 of the Ombudsman for Children Act 2002 (IRL) which provides, “(2) The appointment of a person to be the Ombudsman for Children shall be made by the President upon resolution passed by Dáil Éireann and by Seanad Éireann recommending the appointment of the person.”

¹²¹ Section 2(1).



“(1) The Commissioner may be removed from office by Her Majesty if-
(a) the Commissioner so requests; or
(b) the Parliament has passed a resolution for removal on the
ground-
(i) that the Commissioner has breached the terms of appointment; or
(ii) that the Parliament has lost confidence in the Commissioner's
willingness, ability or suitability to carry out the functions of the office.
(2) A resolution for removal of the Commissioner, if passed on a
division, must be voted for by not less than two thirds of those voting.”
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In particular, paragraph 2 of Schedule 1 provides for the Commissioner's independence:-

“2 (1) The Commissioner is not, except as provided in the provisions
of this Act listed in sub-paragraph (2), subject to the direction or
control of-
(a) any member of the Parliament;
(b) any member of the Scottish Executive; or
*(c) the Parliamentary corporation.”*¹²³

It can be seen from the Ombudsman for Children Act 2002 that the Ombudsman is accountable to the Public Accounts Committee of Dáil Éireann for her financial accounts¹²⁴ but also “the systems, procedures and practices employed by the Ombudsman for Children for the purposes of evaluating the effectiveness of the operation of the office of the Ombudsman for Children”¹²⁵ and accountable to other parliamentary committees for her more general activities. Hence, it can be seen that, in both Scotland and the Republic of Ireland, a model of parliamentary oversight is in place, together with explicit statutory declarations of the independence of the HRIC. So also there are already precedents for parliamentary oversight of ‘constitutional watchdogs’ such as the PCA, the NAO¹²⁶ and the Electoral Commission.

While the Commissioner must be subject to public accountability in relation to finances and use of budget, the Commissioner's autonomy cannot be guaranteed if a government Department is his Sponsoring Department. In these circumstances, it would be

¹²² So also the Irish Ombudsman for Children can only be removed by the President “and then only upon resolution passed by Dáil Éireann and Seanad Éireann calling for his or her removal” (section 4(3)(b)).

¹²³ So also section 6(1) of the Ombudsman for Children Act 2002 provides, “The Ombudsman for Children shall be independent in the performance of his or her functions under this Act.”

¹²⁴ Section 18 of the 2002 Act.

¹²⁵ Section 18(1)(c).

¹²⁶ Indeed, the NAO is directly answerable to the Public Accounts Committee, whose deliberations might otherwise be used to justify greater Government involvement in the activities of NDGBs.



desirable if the Commissioner, as a 'constitutional watchdog', was made answerable to a Committee of the Assembly rather than a Government Department (or, during periods of direct rule, to a parliamentary committee at Westminster).¹²⁷

It is also noted that members of Tribunal NDPBs are subject to much greater protection in terms of suspension and removal. In order to resist pressures in relation to more general concerns at public accountability, it might be considered appropriate to create a category of NDPB, equivalent to Tribunal NDPB, such as a Constitutional NDPB. A useful precedent of autonomy from executive involvement concerns the Industrial Court for Northern Ireland, which is a Tribunal NDGB. Article 91(2) of the Industrial Relations (NI) Order 1992, concerning the relationship between the Department for Employment and Learning and the Industrial Court for Northern Ireland, a precedent which possibly dates back to the original establishment of an all-Ireland Industrial Court in 1919, states,

"The functions of the Court shall be performed on behalf of the Crown, but the Court shall not be subject to directions of any kind from any Minister of the Crown or Northern Ireland department as to the manner in which it is to exercise any of its functions."

Such Constitutional NDPBs should have declarations of independence as provided in paragraph 2 of Schedule 1 of the Commissioner for Children and Young People (Scotland) Act 2003. Hence, it would be plainer that intrusive aspects of the NICCY/OFMDFM Management Statement would be incompatible with the Order.

If NICCY is to remain a NDPB, a declaration of independence should be included in the NICCY Order. A new category of 'Constitutional' NDPB should be considered to encompass HRIs such as the Children's Commissioner, the NIHRC and the ECNI.

6 Participation

The resolution of the UNCRC on the establishment of NICCY includes the recommendation to "involve children and children's organisations effectively in their establishment and activities". This is an expression of the fundamental provisions of the Convention on the Rights of the Child, Article 12 which states,

"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the

¹²⁷ It is noted that the Westminster Public Accounts Committee performs the functions of the Assembly Public Accounts Committee when the Assembly is suspended. A similar arrangement might be made in relation to Assembly oversight of NICCY whereby, perhaps, the JCHR, could take on this role.



child, the views of the child being given due weight in accordance with the age and maturity of the child.”

On ‘pluralistic representation’, paragraph 12 of the General Comment provides,

“12. NHRI should ensure that their composition includes pluralistic representation of the various elements of civil society involved in the promotion and protection of human rights. They should seek to involve, among others, the following: human rights, anti-discrimination and children’s rights non-governmental organizations (NGOs), including child- and youth-led organizations; trade unions; social and professional organizations (of doctors, lawyers, journalists, scientists, etc.); universities and experts, including children’s rights experts. Government departments should be involved in an advisory capacity only. NHRI should have appropriate and transparent appointment procedures, including an open and competitive selection process.”

So also paragraph 15, under the heading ‘Accessibility and participation’, provides,

“15. NHRI should be geographically and physically accessible to all children. In the spirit of article 2 of the Convention, they should proactively reach out to all groups of children, in particular the most vulnerable and disadvantaged, such as (but not limited to) children in care or detention, children from minority and indigenous groups, children with disabilities, children living in poverty, refugee and migrant children, street children and children with special needs in areas such as culture, language, health and education. NHRI legislation should include the right of the institution to have access in conditions of privacy to children in all forms of alternative care and to all institutions that include children.”

6.1 Participation of children and young people

In the context of paragraph 15, it is clear that the Commissioner has put in place extensive measures to ensure the maximum involvement of children and young people in NICCY’s activities. Most prominent amongst these is the creation of the Youth Panel which comprises 42 members, incorporating 23 sub-committees. Youth panel members are also involved in steering groups concerning research and service reviews and in appointment processes.¹²⁸ There are also mechanisms in place to seek to ensure the representativeness of the Panel. As part of his Communications Strategy, he has also involved children and young people deeply in consultations on his Corporate Plan and a wide range of activities. He has also made himself and his Office fully accessible to children and young people and the quality of communication with children and young people, including NICCY’s web site and regular

¹²⁸ Briefing to the JCHR (June 2006), §10.1.



publications and bulletins¹²⁹, is very high. Over 4500 children and young people had training and/or awareness raising on their rights and the UNCRC.¹³⁰ The level of satisfaction on the part of members of the Youth Panel, and children and young people more generally, who have come into contact with NICCY is very high. Recently Participation Officers have been appointed to carry the Communications Strategy forward.

It is clear that the Commissioner has fully fulfilled all responsibilities upon him to ensure the full participation of children and young people in his activities.

6.2 Participation of representative groups

It was suggested earlier, under Section 2, 'Composition', that, in the absence of pluralistic representation, "it is advisable that the Commissioner should have strong networks supporting the Office and providing expertise to it". Dickson states,

*"This can be achieved through the establishment of bodies such as advisory councils, reference groups or taskforces."*¹³¹

Unusually, on this point, the Paris Principles are themselves more specific than the General Comment. Principle C.7 provides:-

"In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations 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 specialized areas."

NICCY has a considerable range of contacts across a wide range of groups representing children and young people. There has also been an extensive range of consultations with the community and voluntary sector and an effective communication strategy is in place. However, it has not set up a formal forum to allow NGOs to discuss NICCY's activities.

There are two schools of thought on the relationship between HRICs and NGOs. One is broadly that a specialised body sits uneasily between the State and the community and voluntary sector and therefore must have its own autonomous agenda. While maintaining open lines of communication with NGOs, the HRIC should not establish cumbersome mechanisms which may, in any event, exacerbate divisions within the community and voluntary sector. Such formal meetings involve extensive preparation on the part of the

¹²⁹ For example, a user-friendly Quarterly Bulletin.

¹³⁰ Communication and Participation Statistics 2005-06.

¹³¹ Dickson, §39.



specialised body and can actually deflect attention from the pursuit of its objectives.

In relation to NICCY, it is clear that the Youth Panel provides a direct line of communication to children and young people rather than relying on 'adult' organisations to represent the 'voice of the child'. Certain stakeholders prefer to be involved in a wide-ranging network of informal contacts 'as and when required' and NICCY is generally complimented for its responsiveness to inquiries and its collaboration with representative groups. The recent appointment of Participation Officers will also enhance communication with the NGO sector.

The other school of thought, particularly in an era of transparency, is that the NGO sector should have an opportunity for more formal involvement in NICCY's activities. There is some indication that some in the NGO community are not as clear about the progress of NICCY's activities as they would wish to be. An argument in favour of a more formal consultation structure is that, in the absence of pluralistic representation, a range of perspectives should be brought to bear on the Commissioner's priorities and their achievement in terms of practical outcomes. It is also arguable that, given the potential involvement of OFMDFM in NICCY's activities, a more formal mechanism is necessary to preserve the very distance which a specialised body must enjoy between both the State and the NGO sector.

It is therefore suggested that serious consideration should be given to the establishment of an NGO Forum, to meet occasionally, and in which the Commissioner can engage in a constructive exchange of views with the NGO sector.

7. Conclusion

Consideration of the Paris Principles has moved on since their inception in the early 1990s. In particular, both ENOC and the UNCRC have applied the Principles to the situation of a specialised agency to protect the rights of children, which may be described as a Human Rights Institution for Children (HRIC). It is now accepted that HRIs can be specialised and it is also accepted that a state party may have an infrastructure of regional agencies. It is therefore still fruitful to compare the powers of NICCY against these revised standards of the powers of a HRIC.

On this basis, it is concluded that, despite having a wide range of powers, the Commissioner is unnecessarily circumscribed by restrictions which are more appropriate for an Ombud model than a HRIC model. For example, there are at least three different models of residuary clauses in the NICCY Order. The Commissioner cannot act as a strategically minded HRIC while constrained by such clauses.



A fundamental issue is the bodies within the Commissioner's remit. There is a danger of taking a 'perpetrator' perspective, focusing on the nature of the perpetrator, rather than taking a 'victim' perspective, which is essential particularly in relation to vulnerable people such as children and young people. Hence, it is difficult to justify restrictions on the Commissioner's powers in relation to 'reserved matters' even though they are within the Commissioner's remit. As a devolved institution, issues arise around 'excepted matters' but, once again from a 'victim' perspective, the Commissioner should have remit over all the issues which affect the rights and interests of children and young people in Northern Ireland. It may be necessary to reconsider the infrastructure of HRICs in the UK but it is essential that the NI Commissioner either has remit for 'excepted matters' or works in close conjunction with a Paris Principles compliant English or UK Commissioner. So also, subject to certain limitations, private bodies should also be within the Commissioner's remit.

The most difficult issue is that of autonomy. Clearly the Commissioner cannot maintain his autonomy from government if it is subject to the potential involvement in the performance of his functions set out in the Management Statement. At least, a declaration of independence should be set out in the NICCY Order and the Management Statement renegotiated accordingly. However, the Scottish and Irish models rely on parliamentary oversight to maintain public accountability for the respective HRICs in those jurisdictions. The Joint Committee on Human Rights put forward powerful arguments in favour of the Commission for Equality and Human Rights being subject to parliamentary oversight. In these circumstances, it would be preferable if NICCY became subject to Assembly oversight.

There are great advantages in the Commissioner being a corporation sole but it may be appropriate to support the Commissioner with two Assistant Commissioners or an Advisory Council. The Commissioner's record in encouraging the participation of children and young people is admirable. It may be valuable to establish an NGO Forum to provide a more formal vehicle for dialogue between NICCY and the NGO sector.

Finally, this review occurs at an early stage in NICCY's development. Many of the powers available to the Commissioner have yet to be invoked, at least formally. No doubt, in the next three years, the full range of the Commissioner's powers may be exploited. Nonetheless, the present NICCY model is an amalgam of an Ombud model and a HRIC model. On occasions, elements of the Ombud model prevent the Commissioner enjoying the full scope of a HRIC model which would be compliant with the Paris Principles, as interpreted by ENOC and the UNCRC.

Barry Fitzpatrick
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