

Equality and Rights Alliance Conference

“A FAIRER IRELAND – EQUALITY & RIGHTS AT THE HEART OF RECOVERY”

“Strengthening the Independence of Specialist Equality and Human Rights Bodies”

(The writer is a member of the Irish Human Rights Commission but this paper is written in my personal capacity. The views expressed are my own and are not intended to represent those of the Commission.)

“In times of economic difficulty you may begin to plant the seeds of social tension in society, and human rights protection is the best defence against social polarisation”.

That was a comment made by Thomas Hammarberg, the Council of Europe’s Commissioner for Human Rights in September last year, shortly before the swingeing budget cuts imposed on the Irish Human Rights Commission and the Equality Authority in the special budget in October 2008. Commissioner Hammarberg was being interviewed at a conference of European National Human Rights Institutions in Dublin (*Irish Times, 9 September 2008*).

He knew what was going on here and he warned the Government against destroying the Irish Human Rights Commission. Referring to the Equality Authority as well, he suggested that human rights and equality bodies should be linked to national parliaments rather than governments in order to bolster their independence and to protect their funding from arbitrary interference from the government of the day.

Commissioner Hammarberg’s comment is a valuable reminder of the seriousness of the situation we are facing. There is a danger here that frightened and angry people threatened with losing their jobs and houses will look for scapegoats in visible and vulnerable minorities. And that unscrupulous employers will try to play off groups of workers against each other in order to drive down wages and conditions.

If we allow the Equality Authority and Human Rights Commission to be hollowed out and left not fit for purpose, it is not just that the protection of equality and human rights will stand still for a period. There is a real danger that some of the gains made over the last 10 years will be lost and that we will see the development of deep social divisions that will take a long time to heal. That lends an extra edge to this discussion.

We need the Human Rights Commission and the Equality Authority restored to at least their pre-budget cuts position as quickly as possible because I seriously doubt if the Equality Authority can survive in a meaningful way for much longer with almost half its budget taken away and decentralisation cutting it off from the people it is supposed to serve, while it is also losing experienced and talented staff.

And the Human Rights Commission, about which I have more direct knowledge, while struggling hard to keep going, probably could not continue if there was another significant cut in its budget.

Independence

But even if the cuts were to be more or less restored in the short term, both bodies need their independence and adequate funding to do their jobs to be guaranteed into the future. And the two issues, funding and independence, are inextricably linked.

The United Nations' "Paris Principles", which are used to determine whether National Human Rights Institutions should be recognised by the UN, put it neatly:

"The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding ... in order to be independent of the Government and not to be subject to financial control which might affect its independence".

The Council of Europe's Commission Against Racism and Intolerance (ECRI) sets out basic principles for 'specialised bodies' to combat racism. That would include the Equality Authority here. Principle 5 states that

"Specialised bodies should function without interference from the State and with all the guarantees necessary for their independence..."

And in a series of reports on Ireland over the last five years, the UN Committee on the Elimination of Racial Discrimination in 2005; ECRI in 2006; Council of Europe Commissioner Hammarberg, after a week-long visit to Ireland in 2007; and the UN Human Rights Committee in 2008, all called for increased funding for the Irish Human Rights Commission and the Equality Authority and for a strengthening of their independence.

The UN Human Rights Committee, less than three months before the budget cuts were announced in October 2008 – and after being addressed by the Secretary General of the

Department of Justice, Equality and Law Reform, who did not give any indication of what was to come – urged the Irish Government to

“... strengthen the independence and the capacity of the Irish Human Rights Commission to fulfil its mandate effectively ... by endowing it with adequate and sufficient resources and linking it to the Oireachtas”.

Attempted Pressure

These were not just idle calls. There had already been one not too subtle attempt to influence the Human Rights Commission. When the Commission had drafted a quite moderate report calling on the Government to take steps to ensure that the US authorities did not transport prisoners through Shannon airport for the purposes of “rendition”, an attempt was made to pressure the Commission not to publish it.

And, more recently, during discussions about the budget cutbacks, Commission members received the distinct impression that if the Commission had been less critical of some of the criminal justice measures introduced by the Department of Justice, the Department might have been more understanding when it came to preserving the Commission’s budget.

But, of course, the simplest way to silence critical public bodies is to starve them into submission or oblivion by cutting off or drastically reducing their funds. And even if the completely disproportionately budget cuts applied to the Human Rights Commission and the Equality Authority were not part of a deliberate strategy to silence the two bodies, the alternative explanation was almost as discomfoting.

Justice Minister Dermot Ahern at one stage indicated that the Department of Justice was basically re-allocating scarce funds away from the two bodies and to the more politically acceptable cause of fighting crime.

That indicated a view that bodies like the Human Rights Commission and the Equality Authority are simply branches or agencies of the Department of Justice with budgets that could be siphoned off for other departmental requirements when necessary. And that in turn implied a judgement that the work of the Commission and the Equality Authority was not as important or valid as fighting crime, or indeed as important as the work of other ‘branches’ of the Department which were not raided for the purposes of the ‘war on crime’.

Such an attitude suggests a fundamental lack of understanding or respect for the role and work of human rights and equality bodies in a modern democratic society and a view that they are

essentially luxuries that may be alright in times of plenty but that should be among the first to be discarded when times get rough.

There has also been a move under this Government to close down “quangos” (*quasi autonomous non-governmental organisations*) concerned with protecting rights and commenting on Government policies and absorb their functions into government departments. And it has even been argued that the government departments can and will safeguard the rights of individuals just as effectively as the ‘quangos’.

You would think that a Government that had argued strongly against majoritarian rule in Northern Ireland and had called for a series of independent ‘watchdog’ bodies to be set up to hold the administration there accountable – including the Northern Ireland Human Rights Commission and the Equality Commission of Northern Ireland – would have learned the lesson that majority rule by itself does not guarantee the type of inclusive, accountable and fair society that we aspire to.

It is not rocket science to know that where there may be a conflict between a policy that Government wants to carry out and the rights of individual citizens, it cannot be left to Government departments to protect those rights against the Government’s own policies. That is why independent watchdogs are needed.

In that connection, I have to say that I am unhappy with some of the wording in the Research Report presented to this conference. The report says that the independence of the Irish Human Rights Commission and the Equality Authority has been “compromised”. As a member of the Commission – though not speaking on its behalf – I think that is not correct and is not fair to my colleagues on the Commission. I mentioned earlier the pressure on the Commission not to publish the ‘Rendition’ report. The report was published without any changes.

I also mentioned the impression the Commission received that its critical comments on some criminal justice legislation had not helped its funding position. Following that, the Commission was one of the few bodies to criticise the Criminal Justice Bill which was rushed through the Oireachtas during the summer with its proposals to send ‘ordinary crime’ cases to the non-jury Special Criminal Court for trial and to allow the use of Garda opinion evidence in criminal cases. That criticism was not well received in Government circles

But however independent members of a watchdog body are, they cannot be effective if their funding is cut to a level that makes it well nigh impossible to do their job. And we may be approaching such a situation with the Irish Human Rights Commission.

The Equality Authority has to be even closer to that point with a 43% cut in its budget and a misconceived decentralisation policy that has been pushed through with total disregard for its effect on the service that the Authority can provide.

Answering to the Oireachtas

An urgent renewal of funding is necessary just to keep these bodies in existence. But even if that comes in time to keep them above water, how can we strengthen their independence for the future?

The Human Rights Commission has argued for several years now that it should be made answerable directly to the Oireachtas rather than any Government Department, and particularly not the Department of Justice, Equality and Law Reform which, in the nature of things, is the Department most likely to attract critical scrutiny by the Commission.

That is the position with the Ombudsman and the Garda Ombudsman Commission, both of which are accountable directly to the Oireachtas. The Ombudsman can only be removed from office by a vote in the Oireachtas and it would be much more difficult to raid the budget of either organisation for other purposes as it would have to be openly discussed and approved by the Dail and Seanad instead of being done by administrative decision. And this should apply equally to the Equality Authority as well as the Human Rights Commission.

Being answerable to the Oireachtas might not be a bed of roses for either organisation. You can imagine the contributions that would be made by certain Government backbenchers – and maybe some Opposition backbenchers as well - in the Dail and Seanad during debates on the annual reports of the Commission or the Equality Authority. But that would not necessarily be a bad thing. The Commission has been anxious for its work to be discussed in the Oireachtas and if those of us who work in this area want more discussion on human rights and equality issues, we must be prepared to take the brickbats as well as the bouquets.

And when we are raising challenging ideas – which is the job of bodies like the Commission and the Equality Authority – it would be better to have them discussed, teased out and even attacked in the national parliament than have them moulder on shelves, unread by our legislators, or anybody much else for that matter.

On finance, if there was a specific vote for the statutory human rights and equality bodies, it could be ring-fenced from raiding for other projects. It would of course be subject to the vagaries of some of the less human rights or equality friendly Oireachtas members. Some enthusiastic supporters of male-only golf might even propose a (further) reduction in the budget

of the Equality Authority, but at least this time it would have to be debated in the open for all to see.

And if the Commission and the Equality Authority were answerable to the Oireachtas, it might spur our legislators to establish an Oireachtas Committee on Human Rights and Equality, like the Joint Committee on Human Rights in the UK parliament, which has done a lot to hold the UK government to account on human rights issues.

Selection Procedures

Another area where the independence of both the Human Rights Commission and the Equality Authority could and should be strengthened is through the method of appointment of board members. At the moment there is no appointments procedure set out for the Human Rights Commission or the Equality Authority, other than a requirement for gender balance and places reserved for nominees of the trade unions and employers on the Equality Authority.

I can speak best about the Human Rights Commission because it is the body I know most about. While there was a public advertisement for applications for membership of the Commission in 2006 and there was some oversight at the initial stage by Judge Catherine McGuinness, there is no information about how the final selection was made by the Minister for Justice, Equality and Law Reform or what criteria were used. The process was singularly untransparent.

In practice the people appointed to the Human Rights Commission both in 2001 and 2006 have shown themselves to be quite independent minded and not easily pressurised by Government. However, if a Minister wanted to ensure that the Commission would toe the line on politically sensitive issues, then even if the department's power to control the budget was removed, s/he could simply "pack" the board when it came up for appointment again.

And even if the Human Rights Commission and the Equality Authority were made answerable to the Oireachtas rather than the Department of Justice, it would still probably be left to the Taoiseach or another Minister to nominate the members and bring the names to the Oireachtas for approval. The list would have to be voted on, but it would be difficult to unpick the selection at that stage. The best way to guard against packing the boards would be to have an open, transparent and consultative process where, at the least, a shortlist would be drawn up by a selection committee and published so that the public could see whether the final selection was skewed by political prejudice or cronyism.

There is another reason as well for having a consultative and transparent appointments process. To function effectively a human rights - or equality - body needs more than independence and an adequate budget - though that would be a very good start. It also needs the confidence, support

and “buy-in” of the public, and especially of those whom it is supposed to protect: minorities, marginalised groups and those whose rights are under threat.

In that connection it is regrettable especially at the current moment, that the current board of the Human Rights Commission does not include any member of an ethnic minority, whereas the previous Commission did include a member of the Traveller community.

A process of consultation with civil society and NGOs about how appointments should be made, a selection committee including civil society representatives and an eventual membership that included representatives of ethnic minorities and marginalised groups would help to build confidence in and a sense of ownership of human rights and equality bodies among those whom the bodies are intended to serve.

I have, as I said, focused upon the Human Rights Commission as the body I am most familiar with, but these arguments apply just as much to the Equality Authority, where, without any explanation, none of the outgoing board members were re-appointed in 2007, despite a highly successful term of office. Indeed, following all the controversy surrounding the Equality Authority, the slashing of its budget, the obstinate insistence on pressing ahead with decentralisation, and the resignation of its widely respected CEO and several board members, the renewal of the Authority’s board membership following an open, transparent and consultative appointments process would be a good start in rebuilding confidence in it.

The Next Steps

We must not forget that there were other human rights and equality bodies out there before the axe fell: the Combat Poverty Agency, the NCCRI and the National Action Plan Against Racism. The unceremonious dumping of these bodies without any consultation says a lot about this Government’s interest in combating poverty or racism and reinforces the argument for statutory guarantees of independence and for taking all such bodies out of the grip of Government Departments.

The work that these bodies did needs to be carried on in a new human rights and equality landscape. But what should that landscape look like?

It may be that there is scope for including the roles of the agencies that have been closed down in the mandates of a strengthened Human Rights Commission or Equality Authority but I think we should be cautious about calls for a new super or unified Equality and Human Rights body. The example of the UK’s new Equality and Human Rights Commission should give us pause. It has led to divisions and disappointment among the minorities and disadvantaged groups it was intended to serve and it has been wracked by resignations and recriminations.

One of the major flaws in the UK body appears to be that it has blunted the focus on certain areas of its mandate where there had previously been highly focused and effective bodies, notably in the area of disability discrimination.

This may not be inevitable in a unified organisation but it is notable that in Northern Ireland where there are separate Human Rights and Equality Commissions, just as here, they complement each other and no-one in the sector is calling for a merged body on the overall UK model. There is also, of course, a specific requirement in the Good Friday Agreement for the two Human Rights Commissions, North and South, to work together through a Joint Committee of the two institutions. The creation of a new ‘super’ body could complicate that situation.

We should not confine our ambitions when we weather this storm to simply re-constituting the Human Rights Commission and Equality Authority exactly as they were. We should take the opportunity to build better and stronger bodies for the future, but we do need to weather the current crisis and get the two bodies back in reasonable working order as soon as possible, albeit with greater independence and removed from the ambit of the Department of Justice or any other government department.

Then we can and should think more radically about what the future human rights and equality infrastructure should look like and particularly about how human rights and equality bodies can develop a closer and more interactive relationship with civil society in general and vulnerable and marginalised communities in particular.

The Wider Human Rights Landscape

We should also bear in mind that human rights and equality bodies operate in a broader legal environment that sets out the rights that they are there to protect. This state has fallen behind in its ratification of international human rights conventions and even in fulfilling its pledge in the Good Friday Agreement to provide an equivalent level of protection of human rights to that pertaining in Northern Ireland.

On the all-Ireland or all-island level, we have no equivalent of the duty on public bodies to promote equality of opportunity as required by Section 75 of the Northern Ireland Act, 1998, or of the rather weak Nolan Principles that seek to prevent cronyism and corruption in public appointments. We could do with strengthened versions of both of them.

We have not ratified Protocol 12 to the European Convention on Human Rights (ECHR) which outlaws discrimination in its own right and not just in the limited way contained in the main Convention. As a result we are now in the B division or second rank of states that have ratified

the ECHR while other states forge ahead, developing a stronger culture of equality and non-discrimination than prevails here. Of course the UK has not ratified Protocol 12 either but that just means that if we do ratify, it will be the UK that will have to catch up with this state for a change.

We have not ratified the UN Convention on the Rights of Persons with Disabilities despite having lobbied hard for it to be adopted by the UN – and the UK *has* just ratified it. We have not ratified the UN Migrant Workers Convention, though increased protection of migrant workers is very clearly needed, especially during the current recession. And we have not ratified the new Optional Protocol to the UN Convention on Economic, Social and Cultural Rights which would enable people to take individual complaints against the Government to a UN body and would help to make these rights more meaningful in people's lives.

And of course, we do not allow gays and lesbians to marry and we do not even plan to do so under the current Civil Partnership Bill.

As European Human Rights Commissioner Thomas Hammarberg said last year, times of economic crisis can create serious social tension and division but stronger human rights protections can help prevent deepening polarisation and social breakdown. If we can put the human rights and equality bodies back in running order, strengthened and with greater independence and security, and can place them in a legal environment that substantially enlarges the scope of the rights they are mandated to protect, we will have made a good beginning. There will be more to do but we will have done something to stop the steady dismantling of the progress made over the last ten years.

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