1. The intervention landscape here has evolved significantly from where it was when I came to the Bar almost 14 years ago, both from the perspective of the courts and proposed interveners. In the time that has passed since 1997 there has been a growth in the numbers, confidence and stature of NGOs here, the establishment of statutory bodies like the Human Rights Commission and NICCY and a change in the attitude of the judiciary to such groups and to applications for leave to intervene.

2. What the changes have meant is that the courts are familiar with applications for leave to intervene and they are more receptive to interventions from interest groups, previously regarded as “strangers” to litigation. But it also means that they are more stringent about the conditions under which leave to intervene is granted.

3. I think it is important to say that the value of a good intervention in a case cannot be underestimated. It can give a different perspective to the issue being decided, it can provide additional information on the outworkings of a law on the ground and the implications a decision might have, it can add credibility to a point being made by one of the parties. This is the clear value that an NGO or statutory commission can add to
proceedings by way of intervention. However, a misjudged intervention can also have implications: for a group’s credibility before the courts and for the courts’ attitude to interventions generally.

4. Those gloomy words beg the question - when is an intervention appropriate? I will try to consider that question with the use of a few cases I have been involved in and my reflections on them. I will also ask some more questions that arise about interventions. I will then make some suggestions about factors to be considered when deciding whether to intervene and how an application for leave to intervene should be approached.

Re Peter Neill¹

5. This was a challenge to the introduction of the ASBO legislation here. One of the grounds of challenge was based on the statutory equality duty in section 75 of the Northern Ireland Act 1998. Given that this was the first case in which that duty would be considered by the courts here the Committee on the Administration of Justice took a keen interest in it. CAJ had been closely involved in lobbying and briefing around the human rights and equality aspects of the Good Friday Agreement and thereafter the enactment of section 75. They had also continued to monitor the operation of section 75 and had a dedicated equality officer whose role was concerned with doing that. As a result they were in a unique position because of their knowledge of the background to section 75 and the purpose for which it was enacted. They also had a clear interest in both ensuring its effective implementation and protecting the remedial provisions in the 1998 Act.

6. One of the main issues arising was whether, given the inclusion of Schedule 9 in the 1998 Act and the explicit role set out for the Equality Commission there, judicial review could be used to remedy a breach of section 75.

7. CAJ were granted leave to intervene. The application for judicial review was unsuccessful both in the High Court and in the Court of Appeal. However CAJ’s submissions on the correct approach to section 75 were specifically relied upon and adopted in large part by the Court of Appeal. The possibility of using judicial review in section 75 cases was preserved although Schedule 9 was identified as the primary remedy.

8. I considered this to be a successful intervention and a good example of what an intervention could be used for. The intervention focused on knowledge that CAJ had, from their long years of working on equality and specifically the enactment of section 75. It also used examples of cases concerned with similar equality duties in England and Wales to show that judicial review provided a remedy in certain circumstances there.

9. There were some problems though. The CAJ’s interests in intervening did not align directly with those of the applicant for judicial review. CAJ were prepared to acknowledge the role of Schedule 9 as the intended remedy for the majority of breaches of equality schemes. The applicant, understandably, wanted to concentrate on the availability of judicial review as a remedy. In this case the applicant’s legal
representatives objected, unsuccessfully, to CAJ’s application for leave to intervene before the Court of Appeal.

10. This may sometimes happen. Of course, there is no obligation on an intervener to support or fully support any particular party in the case. However proposed interveners will want to think very carefully about their intervention and how it may impact on the case being advanced by the parties. Of course in many cases that is precisely the point of the intervention – to challenge a public authority’s stance on the law or policy. However in the types of cases we are discussing there could also be an impact on the case being made by an applicant for judicial review. Proposed interveners will need to consider this carefully and try to identify where their case may impact on e.g. an applicant’s case. If potential damage is identified the intervener may need to balance that very carefully against the possible benefits that the intervention could bring. That is perhaps a particular consideration in a small jurisdiction like this.

**Re E (a child)**

11. The second case I want to speak about has, for the wrong reasons, become one of the seminal decisions on interventions in recent years. The NIHRC were granted permission to intervene before the House of Lords in a case relating to the protest at the Holy Cross school. The challenge was to the policing of the protest and, essentially, whether the Human Rights Act required that more robust police action should have been taken against the protesters. At all stages this was a very controversial and difficult case. The Commission had not intervened in the lower

---

2 [2008] 3 WLR 1208
courts and spent a lot of time considering whether to intervene before the House of Lords, in what form and the content of the proposed intervention.

12. An application was made and permission was granted for written and oral submissions. The Commission did intervene and was represented before the House of Lords. The case ran without any adverse comment on the oral intervention made by the Commission. It was only when the decision was handed down and the speeches were published that the storm broke. The presiding Law Lord, Lord Hoffmann didn’t deliver a speech on the substantive issue in the case but in one of the three short paragraphs in his speech was critical of the Commission’s oral intervention. His comments are now immortalised in the relevant practice direction for the Supreme Court.

13. What are the lessons to learn from this case? On one level it could be tempting to say that this is a good example of the principle that it is sometimes better not to intervene at all or to restrict an intervention to written submissions only. However, this was a very important case and one in which the Commission had taken a stand at various stages, including during the protest itself. It also raised an important issue about the test to be applied by courts in assessing whether there had been a breach of a Convention right – the Commission argued and the House of Lords accepted that the wrong test had been applied by the Court of Appeal here.

14. The reason that I question whether the obvious lesson from the E case is the correct one is because I am not sure that it is quite so clear cut as that. I wonder if the intervention in the E case may have fallen foul of one of the intangibles of
interventions: the notion of support or adding credibility to a case. It has arisen in a couple of cases I have been involved in, generally controversial cases where an appellant is facing more than one public authority as respondents. Such cases can be difficult to argue, perhaps because a court is hostile to the case and the arguments being made or perhaps because there are difficult and novel issues of law involved. It has generally involved an issue the intervener has a particular interest in and has worked on closely. The intervener may wish to stand beside the appellant to support him or her in such circumstances. This notion of support or adding credibility is not generally recognised by the courts in case law on interventions and is hard to measure but it can be an important strategic factor for an intervener.

15. The *Re E* case is also, however, a salutary lesson on how the court will always have the last word on an intervention. In addition, it is a reminder that the intervener has no independent role in the proceedings – it cannot decide to appeal and cannot even be involved in an appeal without making a fresh application to intervene before the Court of Appeal or higher court.

16. Clearly the outcome of the intervention in *Re E* was extremely disappointing for all involved and understandably made the Commission wary of intervening again after that. However they did so, and successfully, in a recent Supreme Court case.
Re McCaughey & Quinn\textsuperscript{3}

17. *Re McCaughey & Quinn* was an appeal relating to the application of the Human Rights Act 1998. Specifically, the issue for consideration was whether for deaths which occurred before the coming into force of the Human Rights Act in October 2000 an inquest held after that date must comply with Article 2 ECHR. It revisited, in part, the controversial House of Lords decision in *Re McKerr*. The Human Rights Commission had intervened in writing in *McKerr*, it had also intervened in the *Amin* case which preceded it and in a number of significant applications to the ECtHR on this issue. It had prioritised Article 2 ECHR and the issue of “the past” in its work for a number of years.

18. The appellant in the case faced opposition from the Coroner involved, the Chief Constable and the NI Attorney General who applied to intervene against the appeal. The Commission was very interested in intervening, in part to lend support and credibility to the appellant’s case, but was understandably wary of doing so after its experience in *Re E*.

19. In a clever move the Commission therefore sought allies. This resulted in a joint intervention from the NIHRC and the Equality and Human Rights Commission in England and Wales. The Commissions requested permission to intervene on a number of precise issues. They indicated that they sought permission for written and oral submissions and that they wouldn’t repeat any of the submissions made by the appellant. In the event permission was granted, written and oral submissions were made and the appeal was successful.

\textsuperscript{3} [2011] UKSC 20
20. One of the lessons from that intervention was that there can be safety in numbers. In addition the Commissions made clear efforts to keep both the written and oral submissions concise and directed towards elaborating points that were not fully explored by the appellant. The submissions were also used to attempt to ensure that the court did not go further in its decision than was required to decide the case and therefore that certain important issues could be reserved for consideration in a future case if they arise.

21. So, the key question is clearly whether to intervene. Where a case will involve consideration of an issue that a group has an interest in it is tempting to want to jump in immediately. However there is much more to it than that. I would suggest that the following issues must be considered:

a) What do you hope to achieve by the intervention? Is that outcome achievable by way of intervention? Will the intervention make a difference?

b) Is an intervention the only and best way of achieving that outcome? Could an affidavit, provision of information to the parties or even publicity achieve the same goal?

c) Is it a case that is likely to go further? Might an intervention be best left until the case reaches a higher court?

d) What damage could be done by intervening? Overuse or misuse of the intervention facility could lead to dilution of the effect of interventions generally and, more particularly, from individual groups.
e) Could an intervention damage the case being made by one of the parties? If so, is that an acceptable and/or justifiable use of the intervention facility in the particular case?

f) What are the costs of making the intervention?

22. That list is by no means exhaustive. There may be many other issues related to the internal processes and procedures of the proposed intervener that have to be considered. Of course, sometimes the best strategic decision will be not to intervene.

23. Once the decision to intervene is taken the question of how to intervene arises. An intervener can consider intervening by way of written submissions only. This means is often used although I have to say that my own view is that a written intervention on its own will be of limited impact. However, there is clearly a question of cost and a danger that when the time for oral intervention comes there may be little left to say that has not already been digested by the parties and addressed in their own oral interventions.

**Applying for leave to intervene**

a) Liaise with the parties involved or one of them to get a sense of the case and, if possible, the grounding documents so that you are aware of the issues being raised;

b) Be clear about what the purpose of the intervention is;

c) Be clear about the issues which will be the subject of submissions;

d) Write to the court office outlining the following:
• Who the proposed intervener is, a little about its work and background (this is to establish credibility and expertise in the relevant area);

• Indicate what leave is sought for i.e. leave to intervene in the proceedings to assist the court in considering the issues before it;

• Indicate the proposed means of intervention i.e. by lodging an affidavit; in writing only; in writing and orally; in writing initially leaving open the option of an oral intervention if required;

• Indicate, briefly but precisely, what issue(s) the intervention will cover;

• Indicate what the intervention will add that isn’t already being covered in the proceedings.

**How to make an application for leave to intervene more attractive to the court**

a) By having the consent of the parties. Depending on the time involved their consent, in writing, should be sought. If consent is forthcoming that could be included with the letter seeking permission to intervene;

b) By indicating that the intervention will not add significantly to the time required to hear the case. By way of example, if an oral intervention would mean a case running into a second day that could be significant;

c) By indicating that the intervention will not disturb the hearing date set for the case;

d) By indicating that the intervention will not add to the cost of the case;

e) By indicating that the intervener will bear its own costs in the case;

f) By indicating that the need for an intervention will be kept under review. In this regard it is often advisable to flag up the possibility of an oral intervention
at the outset but indicate that the final decision will only be taken when the parties’ skeleton arguments have been seen. This may require a modest adjustment to the usual timetables for lodgement of skeleton arguments to allow sight of the parties skeleton arguments before an intervention is lodged;

g) If an application is made to intervene by way of oral submissions, by including an indication of the maximum time required (keep it as short as possible) or a willingness to abide by a court imposed time limit;

h) If there is more than one proposed intervener a joint intervention should be considered.