

Analysis of the draft legislation published with the *New Decade, New Approach* document

January 2020

This paper explores the content of each of the three draft bills published alongside the *New Decade, New Approach* document. Respectively, these bills set out provisions for a new Office of Identity and Cultural Expression; an Irish Language Commissioner; and a Commissioner on Ulster Scots / Ulster British language, arts and literature.

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1. Legislation and process

The three draft bills

- 1.1 Combined draft legislation consisting of three bills was published alongside the *New Decade, New Approach* (NDNA) document by the NI Secretary of State and the Tánaiste on the 9 January 2020.
- 1.2 The three bills were published as drafts subject to introduction, passage and approval in the Northern Ireland Assembly, where they can, in theory, be subject to amendment, if any parties decided to deviate from the deal. The bills are:
 - *Northern Ireland Act 1998 (Amendment No 1) Bill*: “To make provisions to establish the Office of Identity and Cultural Expression.”
 - *Northern Ireland Act 1998 (Amendment No 2) Bill*: “To make provisions for the Irish Language.”
 - *Northern Ireland Act 1998 (Amendment No 3) Bill*: “To make provisions to establish a Commissioner to enhance and develop the language, arts and literature associated with the Ulster Scots / Ulster British tradition in Northern Ireland.”
- 1.3 Part 2 of NDNA contains the ‘Northern Ireland Executive Formation Agreement’. This includes the section ‘Rights, language and identity’ (paras 25-29) that largely focuses on the three bills (except for paragraph 28 on the NI Bill of Rights.)
- 1.4 This is complemented by Annex E of NDNA Part 2, which provides 25 further paragraphs focusing on the three bills (plus other paragraphs on a new process in relation to the NI Bill of Rights and a commitment to sign language legislation). These sections of NDNA should therefore be considered important *interpretive provisions* in relation to the legislation.

Legislative process

- 1.5 The subject matter of the three bills, in particular the functions on language and culture, would normally fall within the competence of the Department for Communities (DfC) and hence be introduced by the Minister for Communities. However, the new Office of Identity and Cultural Expression and an overarching framework will be auspiced under the Executive Office (TEO). It appears to be the intention that the First and deputy First Ministers (FM/dFM) will introduce the legislation.
- 1.6 The bills were formally published on the day of the formation of an Executive (following a commitment found within NDNA Annex E, 5.32), which took place on 11 Jan 2019.
- 1.7 The bills are to be ‘presented’ to the Assembly within three months as part of an “integrated package of legislation” that will pass through the Assembly simultaneously. The (unstated) reasoning behind this will be to ensure one bill (e.g. the Irish language bill) is not blocked whilst the others proceed.
- 1.8 One measure designed to assist this integration is that the three bills are to share a ‘common framework’ based on the principles of the Office of Identity and

Cultural Expression, and hence be interdependent. (Exploration of whether there are sufficient procedural safeguards to ensure this are beyond the scope of this paper.)

- 1.9 The three-month timeframe also permits time for consultation and equality screening, under the terms of the TEO's Equality Scheme.
- 1.10 Once enacted, the three bills will form separate new parts of the Northern Ireland Act 1998 (the main Good Friday Agreement (GFA) implementation legislation). Therefore, the Assembly, not Westminster, passes the legislation, (although in future, as with all legislation, either government could make amendments subject to the usual conventions). The Assembly passing the legislation will be subject to consent from the Secretary of State for any provision that is not a devolved matter.
- 1.11 As to the question of whether this is standalone legislation for the Irish language, the Irish language bill is produced separately and once enacted will become an Act within an Act, separate to the other legislation. The reasoning for this is presentational and has limited practical impact. The important issue was always the content of the bill, which this paper will further dissect.
- 1.12 The format of separate tailored bills in relation to Irish and Ulster Scots assists in preventing the same provisions being applied to both on the basis of artificial parity; a practice previously attempted by DUP ministers, which was rebuked by Council of Europe experts as damaging to both the linguistic development of Irish and Ulster Scots. The current approach of separate bills is therefore helpful.

2. Bill 1: The Office of Identity and Cultural Expression (OICE)

Public sector duty and new guiding principles

- 2.1 The first substantive clause in the bill for the Office of Identity and Cultural Expression ('the Office') would place a statutory duty on public authorities in NI. The duty is a 'due regard' duty (similar to the 'Section 75' equality and the Rural Needs Act duties).¹ The duties are centred on 'guiding principles' around identity and cultural diversity that are to form a TEO framework for the Office, and two Commissioners.
- 2.2 Public Sector 'due regard' duties mean a public authority must pay proper consideration to the duties in question (in this case the 'guiding principals') when a policy or practice is being formulated or reviewed. Whilst the 'due regard' standard does not require a particular outcome or content, it does require the 'guiding principles' duty to be actively taken into account in policy formation. If a course of action is taken that frustrates the purpose of the guiding principles, the duty could have been breached. Noncompliance with a 'due regard' duty can be actionable through judicial review, and there is case law – in particular the *Brown Principles* – that sets out factors courts will take account of as to whether the 'due regard' duties have been complied with.²
- 2.3 The potential for judicial review will be the enforcement route for non-compliance with the 'guiding principles' duties.
- 2.4 There are other models, such as the one applied to the Section 75 Equality Duty. In this instance, public authorities are to adopt Equality Schemes setting out in detail how they will comply with the duties. The Equality Commission for NI (ECNI) and ultimately the Secretary of State holds enforcement powers.³ ECNI's complaints process is usually to be exhausted as a statutory remedy before there is potential for judicial review.
- 2.5 An alternative model to this is the one used for the Rural Needs Act duty, which is not schemes based, although the Department of Agriculture, Environment and Rural Affairs (DAERA) has issued guidance on how to comply with the duty, which recommends that public authorities undertake a 'rural needs impact assessment'.⁴ Non-compliance with the Rural Needs Act duty is only actionable

¹ In Section 75 of the Northern Ireland Act 1998 and the Rural Needs (NI) Act 2016 respectively.

² R (Brown) -v- Secretary of State for Work & Pensions & others [2008] EWHC 3158 (Admin) - a decision-maker must be aware that he/she is obliged to comply with the public sector duties; the duties must be fulfilled before and at the time that a particular decision is being considered, and not afterwards; the duties must be exercised in substance, with rigour and an open mind, and not as a "tick box" exercise; the duties are non-delegable, meaning that it is the actual decision-maker who must comply with the duties, and not some other person; the duties are continuing ones, it is good practice to keep adequate records that will show that the statutory goals have been conscientiously considered and to promote transparency and discipline in the decision making process.

³ Schedule 9 Northern Ireland Act 1998. See also guidance and procedures from the Equality Commission <https://www.equalityni.org/Investigations>

⁴ <https://www.daera-ni.gov.uk/publications/guide-rural-needs-act-northern-ireland-2016-public-authorities-revised>

through judicial review. The new guiding principles on identity and cultural diversity take a similar approach.

- 2.6 Specifically, the duty is for public authorities to pay due regard to two guiding principles:
- (a) the need to respect the freedom of all persons in Northern Ireland to choose, affirm, maintain and develop their national and cultural identity and to celebrate and express that identity in a manner which takes into account the sensitivities of those with different national or cultural identities and respects the rule of law;
 - (b) the need to encourage and promote reconciliation, tolerance and meaningful dialogue between those of different national and cultural identities in Northern Ireland with a view to promoting parity of esteem, mutual respect and understanding and cooperation.
- 2.7 In general, with one caveat, the two principles are both compatible with and can advance positive human rights obligations.
- 2.8 The concepts in principle (b) – ‘reconciliation’, ‘tolerance’, ‘meaningful dialogue’, and the promotion of ‘mutual respect’, and ‘understanding’ are all terms that are found in and can be hence interpreted in line with international standards. This helpfully facilitates harnessing the body of good practice and experience that has been developed internationally. Parity of esteem, from the GFA, has been interpreted by the NI Human Rights Commission (NIHRC) as equality of treatment (in essence non-dominance) of the identity and ethos of the the two ‘main communities’ in NI. This is to be interpreted consistently with the rights and freedoms of others.⁵
- 2.9 The concept in principle (a) – around respect of freedom of cultural expression, self-determination and of choice – is also in line with human rights standards. There is one caveat to this, however, related to the interpretation of the qualification clause inserted into this principal i.e. the reference to taking into account the “**sensitivities** of those with different national or cultural identities and respects the rule of law”. Restrictions on freedom of expression must be compatible with European Convention of Human Rights (ECHR) Article 10, and a simpler limitation provision would have been to state “in a manner compatible with the rights of others”.
- 2.10 The qualification that identity-related expression must be compatible with the ‘rule of law’ should not be problematic if its focus is, for example, on precluding hate expression, and, in particular, incitement to hatred on protected grounds.
- 2.11 The qualification on ‘sensitivities’ of others is more subjective and merits further clarity. The term ‘sensitivities’ is used in the GFA (in relation to languages) but would not be compatible with human rights standards if it restricted free expression purely on the basis of the prejudice and intolerance of others to such

⁵ NIHRC *A Bill of Rights for Northern Ireland*, 10 December 2008. Page 41 sets out a ‘Parity of Esteem’ provision for the Bill of Rights: “Public authorities must fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland. No one relying on this provision may do so in a manner inconsistent with the rights and freedoms of others.”

expression. This would risk institutionalising prejudice, including sectarianism, in the decision-making framework.

- 2.12 NIHRC in this context has drawn attention to there being ‘no right to be offended’ and in the context of the Irish language provision has highlighted how restricting the Irish language provision to accommodate the ‘sensitivities’ of others would be incompatible with free expression. The NIHRC demonstrates a manner in which this term can be interpreted compatibly with human rights standards, by ensuring the rights of others are respected.⁶
- 2.13 Notably if ‘sensitivities’ was interpreted in a regressive and restrictive manner, it would conflict with other elements of the principles and therefore this would not appear to be a reasonable interpretation of the provision. It is foreseeable however that the meaning of this term will be contested, and its subjectivity could be harnessed to sabotage the intended purpose of the duties, much in the same manner as the good relations duty has been misused to obstruct equality and right based provisions.⁷

Framework on culture, identity, diversity and difference⁸

- 2.14 The guiding principles around identity and cultural diversity are set out in NDNA as part of a new framework “recognising and celebrating Northern Ireland’s diversity of identities and culture and accommodating cultural difference”. This framework is to be overseen by FM/dFM, the Junior Ministers and TEO.
- 2.15 The framework is to be ‘underpinned’ by: “an affirmation of the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, while acknowledging and accommodating those within our community who define themselves as ‘other’ and those who form our ethnic and newcomer communities.”
- 2.16 This underpinning principle of the framework is not on the face of the legislation but is an important interpretive provision for the above guiding principles.

⁶ NIHRC *Minority Language Rights: The Irish language and Ulster Scots, Briefing paper on the implications of the European Charter for Regional or Minority Languages, European Convention on Human Rights and other instruments* 2010 See 4.2 Freedom of expression and ‘sensitivities’, which states: “On broader issues, the Commission has drawn attention to the fact that there is no “right not to be offended” by another party exercising a right. This is a general principle of freedom of expression (ECHR Article 10, which must be read in conjunction with ECHR Article 14 on non-discrimination on grounds that include language). The Commission is aware of arguments that there are ‘sensitivities’ regarding the Irish language. Indeed the UK government within the Belfast (Good Friday) Agreement encourages the Assembly to sustain commitments to the Irish language in a manner that ‘takes account of the desires and sensitivities of the community’ (albeit it is not clear if this refers to the Irish-speaking or English-speaking community.) In general restricting use or promotion of Irish to accommodate the ‘sensitivities’ of others would be incompatible with freedom of expression. However, both ECtHR jurisprudence and the Charter provide a clear indication of how the sensitivities of non-speakers can be accommodated, namely through the prevention of monolingualism in the minority language. The promotion of linguistic pluralism implicit in ECtHR jurisprudence is reflected in and explicitly codified into the Charter. For example, the UK’s commitment to allow Irish to be used in debates in the Assembly and council chambers stands alongside an explicit provision that this has to be done without excluding the use of English. The same principle indicates that the sensitivities of non- Irish speakers could be met by ensuring that English is not excluded from appearing alongside Irish in corporate identities.”

⁷ See CAJ ‘Unequal Relations? Policy, the Section 75 duties and Equality Commission advice: has ‘good relations’ been allowed to undermine equality?’ 2013.

⁸ No title is given to the framework, this title is summarised by the author for ease of reference.

- 2.17 The principle draws directly on the language of GFA citizenship provisions by affirming the birthright of those born in NI to “identify” and “be accepted” as “British or Irish or both” as a matter of choice.
- 2.18 This provision in the TEO framework avoids the (non-devolved) question of rights relating to British or Irish (or both) citizenship(s). NIHRC’s official advice on the Bill of Rights had recommended it incorporate “the right of the people of Northern Ireland to hold British or Irish citizenship or both ... with no detriment or differential treatment of any kind.”⁹
- 2.19 The statutory equality duty referenced in the GFA was also to have two limbs. The first, the statutory equality duty legislated for under Section 75(1) (NI Act 1998). The second, a ‘parity of esteem’ duty that disappeared from the implementation legislation and was instead replaced in Section 75(2) by a ‘good relations’ duty, with this latter concept being undefined, subjective and ultimately problematic. NIHRC had also recommended the Bill of Rights include the aforementioned provision obliging public authorities to “fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland”. This was a formulation in legislation for ‘parity of esteem.’ A qualifier added that, “No one relying on this provision may do so in a manner inconsistent with the rights and freedoms of others.”
- 2.20 The formulation in NDNA augments the duty on the UK and Irish states to accept NI born persons as British, Irish or both with the provision of acknowledging and accommodating firstly those ‘within our community’ who define as ‘other’ (mirroring the third category of Assembly and fair employment designation) and secondly our “ethnic [sic] and newcomer communities.”
- 2.21 The use of ‘ethnic’ community is clumsy (as it was in the GFA) as all persons have an ethnicity – including British and Irish citizens. ‘Newcomer communities’ (a term used in education) refers to new migrant communities, who also have an ethnicity. The intention appears to be to acknowledge both minority ethnic communities with a long term multi-generational presence in the north of Ireland, as well as new migrant communities.
- 2.22 It is not clear if persons who do not wish to primarily express their identity around Britishness or Irishness (but who will be a citizen of one or both states) will self-identify as ‘other’ *per se*, or rather will have a multiplicity of diverse manners of self-identifying (as will many who also identify as British or Irish). However, this is a clearly aimed attempt to broaden the formulation of identity in the GFA, which was limited to ‘British/Irish’ in the context of being tied to citizenship.

The composition of the framework

- 2.23 The framework itself is set out as consisting of (in summary):
- The Office of Identity and Cultural Expression itself and its functions;
 - The provisions of the Irish language bill;
 - The provisions for the Ulster Scots/Ulster British Commissioner;

⁹ NIHRC, *A Bill of Rights for Northern Ireland*, 10 December 2008.

- A Central Translation Hub for the public sector, based in the Department of Finance (DoF) and established within three months;
 - A simultaneous translation system for the NI Assembly for Irish and Ulster Scots, with amendment of the Assembly’s Standing Orders to permit any person to conduct business in the Assembly (including Committees) in Irish or Ulster Scots.
- 2.24 One of the provisions listed in the framework for the Irish language is the repeal of the Administration of Justice (Language) Act (Ireland) 1737, which had the purpose and effect of preventing the use of Irish in any court documents. The draft legislation for the Office of Identity and Cultural Expression (rather than the Irish language bill) contains the repeal.¹⁰ The provision would place a duty on a court “to the extent necessary in the interests of justice” to facilitate the use by a person of a language other than English. This would cover the duty explicit in the right for a fair trial (ECHR Article 6) to provide interpretation for non-English speakers. It can also be read as allowing a person to use Irish before the court, but with the above qualification that essentially places the decision in the hands of the court.
- 2.25 The draft bill does not amend the Assembly’s Standing Orders to provide for the use of Irish and Ulster Scots before the Assembly. This must be done elsewhere (perhaps alongside other amendments to Standing Orders committed to in NDNA, such as on the Petition of Concern).
- 2.26 The Central Translation Hub and interpreting system for the Assembly are not on the face of the draft bill (nor would they technically require legislative change). Council of Europe treaty-bodies had found the UK in breach of its obligations under the European Charter for Regional or Minority languages for not providing simultaneous interpreting in the Assembly for the Irish language. This commitment would remedy that breach.

Which public authorities would the new duty and principles on identity and cultural diversity apply to?

- 2.27 The legislation would automatically apply the ‘guiding principles’ duty to most public authorities in NI. This includes all Stormont departments; local councils; health bodies; the Northern Ireland Housing Executive and housing associations; PSNI and justice bodies; and education bodies, including the two NI universities, and schools.¹¹
- 2.28 Other public bodies that are not automatically included can be added (or designated bodies removed) by regulations tabled by the FM/dFM.
- 2.29 Unless there is some limitation on non-devolved matters it would appear that UK-wide bodies with functions in NI could be included (as is the case regrading

¹⁰ Repeal of Administration of Justice (Language) Act 1737 78E. —(1) The Administration of Justice (Language) Act (Ireland) 1737 is repealed. (2) A court must, to the extent necessary in the interests of justice, ensure that appropriate arrangements are made to facilitate the use by a person in proceedings before the court of a language other than English.”. ¹¹ The bill uses the list of public bodies that are accountable to the NI Public Services Ombudsman as its mechanism for automatic inclusion, the full list is here: <http://www.legislation.gov.uk/nia/2016/4/schedule/3>

¹¹ The bill uses the list of public bodies that are accountable to the NI Public Services Ombudsman as its mechanism for automatic inclusion. The full list is here: <http://www.legislation.gov.uk/nia/2016/4/schedule/3>

designations for fair employment legislation). Theoretically, this could include the Home Office (who have had difficulty abiding by the GFA provisions to accept persons as 'British or Irish or both') or even the BBC (with the implication that the Nolan show would have to pay due regard to the need to promote reconciliation, etc).

Office of Identity and Cultural Expression: Aims and functions

2.30 The draft legislation would set four statutory aims for the Office namely:

- (a) to promote cultural pluralism in Northern Ireland;
- (b) to promote social cohesion and reconciliation between those of different national and cultural identities;
- (c) to increase the capacity and resilience of people in Northern Ireland to address issues related to differences of national and cultural identity;
- (d) to support, and promote the celebration of, the cultural and linguistic heritage of all people living in Northern Ireland.

2.31 The aims are broadly in line with human rights standards and goals. The aims do not rely on the now tainted concept of 'good relations'.

2.32 The NDNA document echoes these aims but has a slightly different formulation in some areas which may just be reflective of wording suitable for legislation. For example, in the document the aim of cultural pluralism is specified as including "ethnic, national, linguistic and faith communities."¹²

Functions of the Office in relation to the guiding principles

2.33 The bill sets out the functions of the Office. Four of these relate to the guiding principles themselves. In summary they are to:

- provide guidance to public authorities on the guiding principles
- monitor public authority compliance with the guiding principles;
- report to the Assembly on compliance with the guiding principles; and
- promote best practice in relation to compliance with the guiding principles.

2.34 It would therefore be open to the Office to develop an 'impact assessment' type model as part of guidance as part of its role.

Other Functions of the Office under the Bill

2.35 In addition to the guiding principles duty, the bill grants the Office other functions namely (in summary):

- Commission and publish research on cultural identities/traditions;

¹² The full list is: 5.3.1. to promote cultural pluralism and respect for diversity, including Northern Ireland's ethnic, national, linguistic and faith communities; 5.3.2. build social cohesion and reconciliation so that everyone has a sense of belonging; 5.3.3. build capacity and resilience on how we address our unresolved cultural identity issues; and 5.3.4. celebrate and support all aspects of Northern Ireland's rich cultural and linguistic heritage, recognising the equal validity and importance of all identities and traditions.

- Undertake research and make recommendations on ‘matters of particular concern’ requested by the Irish language Commissioner or Ulster Scots/Ulster British Commissioner;
 - Promote public awareness / educational programmes in subject area;
 - Make grants to bodies which promote cultural pluralism and respect for diversity;
 - Cooperate with other bodies with functions on cultural pluralism/ diversity;
 - Provide support (e.g. corporate, IT) services to the Irish and Ulster Scots/Ulster British Commissioners;
- 2.36 NDNA describes all the functions of the Office as giving effect to the guiding principles. It also elaborates further on some of the provisions. For example, the duty on public awareness and educational programmes includes “guidance on how the rights of a child to learn about their identity and heritage, as well as those of other traditions, will be incorporated into the education sector”.
- 2.37 A function not listed in the bill, but found elsewhere within NDNA, is for the Office to “periodically audit public authorities on how they have respected and accommodated the cultural expression of minorities within their area of responsibility”.
- 2.38 NDNA provides more detail on the grant making function of the Office as encompassing capital and revenue “funding streams and schemes including publishing and broadcasting, small grants, events and tourism, exhibition and museum curation, built heritage, cultural education and tourism projects”.

Format of the Office

- 2.39 The bill provides that the Office be headed by a Director, within whom all decision making power is vested (corporation sole). This individual is to be appointed by the FM/dFM for a five-year term.
- 2.40 Subject to TEO and DoF approval, the Director will appoint staff members (and may second in civil servants). The anticipated size of the Office is not specified.

3. Bill 2: The Irish language bill

The Irish Language Commissioner and standards

- 3.1 The second bill is the Irish language bill, including the establishment of the Irish Language Commissioner, who is to be appointed by FM/dFM for a five year term (with a potential second term). The powers of the office are vested solely in the Commissioner (corporation sole).
- 3.2 Subject to TEO and DoF approval the Commissioner will appoint staff members (and may second in civil servants). The anticipated size of the Commissioner's office is not specified in NDNA.
- 3.3 The Bill takes a 'standards-based' approach, whereby the Commissioner issues Irish language standards to which public authorities are to have 'due regard'.¹³ The public authorities that this automatically applies to are the same as for the Office of Identity and Cultural Expression (most NI public authorities).
- 3.4 The 2006 St Andrews Agreement had committed the British government to an Irish Language Act "reflecting on the experience of Wales and Ireland." The current proposed bill is more limited than the legislation in Wales or that which is in place in Ireland through the Irish constitution and legislation. However, it does establish an institutional framework that can function effectively to promote and safeguard the Irish language if it is not frustrated.

Official status for Irish?

- 3.5 The Irish constitution and Welsh legislation provide official status for Irish and Welsh respectively. Official status can be viewed conceptually as having two strands. The first is declaratory (i.e. a statement in the legal framework of official status), while the second relates to how 'official status' is given *legal effect* in practice.
- 3.6 Under the Welsh language measures from 2011, official status is granted in declaratory fashion by Section 1(1) stating: "The Welsh language has official status in Wales". Section 1(2) then sets out how this is given legal effect:
 - (2) Without prejudice to the general principle of subsection (1), the official status of the Welsh language is given legal effect by the enactments about—
 - (a) duties on bodies to use the Welsh language, and the rights which arise from the enforceability of those duties, which enable Welsh speakers to use the language in dealings with those bodies (such as the provision of services by those bodies);
 - (b) the treatment of the Welsh language no less favourably than the English language;
 - (c) the validity of the use of the Welsh language;
 - (d) the promotion and facilitation of the use of the Welsh language;
 - (e) the freedom of persons wishing to use the Welsh language to do so with one another;

¹³ For the interpretation of due regard, see paragraph 2.2 above.

- (f) the creation of the Welsh Language Commissioner; and
- (g) other matters relating to the Welsh language.

- 3.7 Bunreacht na hÉireann (the Irish Constitution) at Article 8(1) states: “The Irish language as the national language is the first official language...”. The Official Languages Act 2003 gives further legal effect to this. Part 2 of the act makes provision for the use of Irish in the House of the Oireachtas. In Part 3, provision is made to allow ministers to issue regulations for public authorities in relation to the use of the Irish language (for example, to make Irish and English official languages on stationary). Part 4 sets out the establishment of a language commissioner (An Coimisinéir Teanga) and provisions for place names.
- 3.8 Consultation proposals for an Irish Language Act for NI were published by the now defunct Department of Culture, Arts and Leisure (DCAL) in 2015. These proposals did not include draft legislation, but suggested a declaratory provision that would ensure “Irish ... be defined as an Official Language in the north in such a way as to guarantee services through Irish on a par with those available through English”. Further effect was then given to this by the proposals for the legislation (which was based on language schemes, rather than standards based).¹⁴
- 3.9 The current bill is more limited. In a declaratory sense there is no reference to official status per se but rather the first clause (78F) refers to “official recognition of the status of the Irish language” over and above the existing statutory provisions for Irish.¹⁵
- 3.10 The same clause in the bill then gives legal effect to this declaratory provision in two areas, provided for in the rest of the bill, namely (in summary):
- the appointment and functions of the Irish Language Commissioner, and
 - the provisions for Irish language best practice standards.
- 3.11 Reference is also made in this clause to the provisions not affecting the status of English. Such a statement is consistent with international standards.

Functions of the Irish Language Commissioner

- 3.12 The bill (clause 78H) then sets out the functions of the Irish Language Commissioner. The main function is to “protect and enhance the development of the use of the Irish language by public authorities in connection with the provision by those authorities of services to the public in Northern Ireland.”
- 3.13 The language used (protect and enhance the development of Irish) reflects that already present in the existing duty for the NI Executive to adopt an Irish language strategy.¹⁶
- 3.13 The bill then sets out further functions that the Commissioner must ‘in particular’ undertake. These all relate to the Irish language standards. In summary, the Commissioner must:
- Draft the Irish language standards for public authorities;

¹⁴ DCAL, *Tograí faoi choinne Bille Gaeilge / Proposals for an Irish Language Bill*, February 2015.

¹⁵ Namely, the duty to adopt an Irish language strategy; the duty on the Department of Education to promote Irish medium education; and the existence of the North-South language body.

¹⁶ <http://www.legislation.gov.uk/ukpga/1998/47/section/28D>

- Provide support to public authorities on the standards (including advice and guidance; training and awareness programmes);
- Monitor compliance with the standards by public authorities;
- Investigate complaints for non-compliance with the standards.

3.14 Two further provisions are added in relation to the Commissioner's functions. The first is a duty on the Commissioner to comply with any directions given by FM/dFM in the exercise of functions. The power of ministerial direction is usually a power to overrule and compel the Commissioner to take particular action, albeit it would require consensus from both FM and dFM to do so.

3.15 The second qualifier on functions is that the bill states that the equality, good relations and non-discrimination duties in Sections 75 and 76 of the Northern Ireland Act apply to the Commissioner. This is an unusual formulation.¹⁷

Irish language best practice standards

3.16 Clause 78I sets out a 'due regard'¹⁸ statutory duty on public authorities to comply with the 'best practice standards' on the Irish language:

Duty of public authority to have due regard to best practice standards

78I.—(1) A public authority must, in connection with the provision by it of services to the public in Northern Ireland, have due regard to the best practice standards which apply to the authority.

(2) A public authority must prepare and publish a plan setting out the steps it proposes to take to comply with subsection (1).

(3) A public authority may at any time, and must if the best practice standards which apply to the authority are amended or replaced under section 78K, prepare and publish a revised plan.

(4) Before preparing a plan or revised plan under this section a public authority must consult the Commissioner.

3.17 The approach is therefore for public authorities to publish a Plan setting out how they will comply with the best practice standards, and also to pay 'due regard' to the standards. A due regard duty is weaker than a duty to 'act compatibly' with the standards, but can be effective if its purpose is not actively frustrated. By contrast to this, the Welsh language legislation is formulated around duties to comply with the language standards and includes powers to issue compliance notices.¹⁹

3.18 This duty will apply automatically to most NI public authorities, using the same formulation as with the Office of Identity and Cultural Expression (see paragraph 2.27 above). FM/dFM can add other public authorities to the list in the same way

¹⁷ Section 76 prevents sectarian discrimination by public authorities that is not already unlawful under fair employment legislation. However, the draft bill at paragraph 15 of the schedule also adds the Commissioner to the list of bodies accountable to the Public Service Ombudsman, which means Section 76 would already apply to the Commissioner by virtue of s76(7)(c) of the NIA 1998. In relation to Section 75, the statutory equality and good relations duties, application is normally through a public authority being designated for the Section 75 duties, which this provision appears to also aim to do.

¹⁸ For the implications of a due regard duty, see paragraph 2.2.

¹⁹ Welsh Language (Wales) Measure 2011, see part 4, including Duty to Comply s25.

as for the Office (although the provision is separate and different additional designations could apply).

Setting of best practice standards

- 3.19 Clause 78J provides that the Irish Language Commissioner draft the best practice standards for the Irish language (c78J(1)).
- 3.20 In drafting the standards the Commissioner must:
- Pay ‘due regard’ to ministerial guidance issued on the standards by FM/dFM;
 - Consult with public authorities and other persons / bodies.
- 3.21 The duty to consult does not explicitly include provision specifically to consult and take into consideration the needs and wishes of Irish speakers, which is a duty under Article 7(4) of the European Charter for Regional and Minority Languages in relation to policy such as the best practice standards. It is clearly, however, open to the Commissioner to do this, in addition to being a duty under the Charter.
- 3.22 The best practice standards can make different provision for different public authorities or classes of public authorities (c78J(5)). This is an approach similar to that advocated by Conradh na Gaeilge and makes sense as clearly some public authorities will have a key role in language promotion and services and others will not. The NDNA documents set out further detail as to the ‘sliding scale’ approach that is anticipated on basis of need, interaction with public, size, etc.²⁰
- 3.23 The best practice standards once drafted by the Commissioner are subject to both approval and amendment by the FM/dFM (c78j(3)) This means both ministers must agree to approve the standards, and can also *amend* them prior to such approval.
- 3.24 The Commissioner is to review the standards at least once every five years with any revisions also following the above process (c78K).

Ministerial guidance

- 3.25 The draft bill does not provide a framework for the ministerial guidance on the standards, but further detail as to what is anticipated is set out in NDNA.
- 3.26 NDNA sets out that ministerial guidance should ‘emphasise the importance’ of the Commissioner producing best practice standards that:
- reflect the guiding principles of the framework as set out in legislation, and serve to promote mutual respect, good relations, understanding and reconciliation;
 - take account of consultation with public authorities; and

²⁰ NDNA Annex E: 5.9. The legislation will stipulate that the Commissioner will, prior to introduction, consult on the development of a number of categories and standards. Each public body will be assessed and placed in one of the categories on the basis of set criteria such as the level of interaction with the public, number of employees and established need. There will be a ‘sliding scale’ of standards within categories dependent on the criteria. The Commissioner will engage with each public body to agree how it can fulfil its requirement under the standards; and each public body will develop an implementation plan.

- place requirements on public authorities that are reasonable, proportionate and practical.²¹
- 3.27 The first of these three provisions relating to the guiding principles is somewhat repetitive. Three of the four concepts singled out (mutual respect, understanding, and reconciliation) are already part of the guiding principles. Nevertheless, they are concepts found in international standards limiting the risk of perverse interpretation. Their singling out for emphasis should not be problematic if interpreted properly. ‘Good relations’, the final concept to be singled out in this provision, is **not** also mentioned within the guiding principles. However, this concept was defined by a Council of Europe body in 2017, as including fostering mutual respect, understanding (which are already mentioned in their own right) as well as integration and tackling discrimination and intolerance.²² Provided good relations is interpreted compatibly with international standards, this should therefore not present an obstruction to best practice standards. The main potential problem reflecting back to the guiding principles, as already explained, would be if there is a regressive interpretation of the concept of ‘sensitivities’ (see para 2.11).
- 3.28 The second provision relating to the ministerial guidance (about taking into account consultation with other public authorities) should generally be unproblematic. Having said that, a minister or council responding that they wanted an ‘English-only’ policy on being consulted would frustrate the purpose of the language standards. However, whilst this view could be ‘taken into account’, there would not be an obligation for it to influence the outcome given other considerations. There is an omission insofar as the guidance is not explicitly mandated to take into account consultation with Irish speakers, a duty under the European Charter for Regional and Minority Languages (see 3.21 above).
- 3.29 The third provision (that requirements on public authorities be ‘reasonable, proportionate and practical’) is consistent with international standards. Clearly, under a minoritised language planning model what is reasonable, proportionate and practical will increase over time as capacity and demand develops.
- 3.30 There is a further provision in NDNA as regards the ministerial guidance; it stipulates that: “The guidance will ask the Commissioner, as a first priority, to focus on developing best practice standards that facilitate interaction between Irish language users and public bodies, including but not limited to making information or forms available in Irish where required, enabling widely used public websites to have an Irish Language translation available, and ensuring that public bodies reply in Irish where practical to correspondence in Irish.”²³
- 3.31 This provision appears to frame ministerial guidance as promoting focus on some of the minimal floor for existing obligations on public authorities under the European Charter for Regional and Minority Languages. This includes being able

²¹ NDNA Annex E, 5.10.

²² ECRI General Policy Recommendation No. 2: Equality bodies to combat racism and intolerance at national level, 2017, explanatory memorandum paragraph 21: “Promoting good relations between different groups in society entails fostering mutual respect, understanding and integration while continuing to combat discrimination and intolerance.”

²³ NDNA, Annex E, paragraph 5.11.

to correspond in Irish, making Irish language forms available, etc (although facilitating interaction with Irish speakers is referenced and can go beyond this). If this was *all* the standards were supposed to do, this would fall below existing obligations under the charter, which include duties to take ‘resolute action’ to promote Irish, for which increasing visibility, bilingual signage, etc, is a key recommended action. As such, if the above were *all* the standards were to do, they could be criticised as maintaining an ‘unseen and unheard’ approach, where public authorities’ focus is on private communication with Irish speakers with no broader promotion and enhancement of the language. However, this is not the case as the above provision asks the Commissioner *as a first priority* to focus on such matters, and does not preclude other areas. Furthermore, the standards are ‘best practice’ standards, meaning the standards should reflect international best practice, which is far from limited to such matters. The ministerial guidance will also not be the only consideration for the Commissioner.

- 3.32 There is a risk that there will be an attempt to issue regressive guidance to constrain the Commissioner. As both FM and dFM have to sign off this guidance, this would likely not be approved. The bill would not appear to constrain the Commissioner in developing standards in such a circumstance. The Commissioner must take into account ministerial guidance, if it exists, but does not appear constrained if it does not. However, the risk is any lack of approved ministerial guidance may be cited subsequently as a rationale for a minister to then decline to approve standards.

Complaints on non-compliance with the language standards

- 3.33 Clause 78L introduces a statutory remedy complaints procedure where affected persons can complain that a public authority has failed to comply with the best practice standards for the Irish language.
- 3.34 The Irish Language Commissioner is the complaints body and the complaints procedure is similar to the enforcement process for the Section 75 equality duty.
- 3.35 In summary, a person (presumably individual or legal person) who claims to be directly affected by non-compliance with language standards, has three months to complain to the Commissioner (and must have raised the issue with the public authority first). The Commissioner then can launch an investigation (or give reasons for not doing so). It is for the Commissioner to determine the procedure of the investigation, which can be done confidentially. As with the Equality Duty there are no disclosure powers per se, rather the public authority is expected to cooperate with the Commissioner. The Commissioner is then to issue an investigation report, which if non-compliance is identified, can make remedial recommendations to the public authority. If the public authority does not comply with recommendations, unlike the equality duty, there is no direct hard law power for directions to compel compliance.²⁴
- 3.36 The success of such a statutory remedy will depend on the effectiveness of the Commissioner in operating the complaints and investigation powers. There have been concerns that the Equality Commission for NI has been weak in its

²⁴ In relation to the Section 75 duties, such a power is vested in the Secretary of State (Northern Ireland Act 1998, schedule 9, paragraph 11(3)(b)).

operation of powers.²⁵ ECNI has, however, recently revised its investigation procedures and it is hoped this will lead to more effective application of the powers. The existence of a statutory remedy does not prevent attempts to challenge non-compliance through judicial review, although the statutory remedy of complaint to the Commissioner will normally have to have been exhausted first.²⁶

Other provisions

3.37 The repeal of the 1737 Act in relation to Irish in the courts is dealt with in an earlier section (see paragraph 2.24 above.). NDNA in its provision on the 1737 Act also commits to making the any necessary provision for:

- births, marriages and deaths to be registrable through Irish, and
- for wills to be validly made in Irish, as an option and matter for individual choice.²⁷

3.38 This commitment is presumably facilitated by the repeal of the 1737 Act, which banned certain certificates and other court documents in languages other than English. The above commitments fall to the Department of Finance. Clearly it would be helpful if these commitments, whether through legislation or otherwise were enshrined in a manner that cannot be reversed unilaterally by a future minister.

Overall assessment

3.39 It is clear that the Irish language bill is more limited than the commitment in the St Andrews Agreement to bring forward an Irish Language Act shaped by the legal framework in Wales and the Irish state. The bill also falls short of the Council of Europe Committee of Ministers' preferred option for a comprehensive Irish language policy for NI – namely, one taken forward through legislation that provides statutory rights for Irish speakers.²⁸

3.40 However, the legislation provides a strong and robust institutional model in making provision for a Commissioner and best practice language standards. The bill therefore provides an appropriate structure that could be effective if not actively frustrated. There is, however, a long track record of political obstruction of Irish language measures (by the DUP in particular) and the outworkings of all of this will test whether there truly is a 'new approach' in this new decade.

3.41 The weakness in the legislation relates to the potential for political interference to frustrate the intended aim and operation these new measures, especially because of the manner in which ministerial powers have been shaped. Any such practices will inevitably lead to calls, including from international treaty compliance bodies, for the strengthening of the independence and powers of the Commissioner and duties around the standards.

²⁵ See Equality Coalition, *Equal to the Task*, 2018.

²⁶ For a summary of case law as regards to the Section 75 duty, see Equality Coalition, *Equal to the Task*, 2018.

²⁷ NDNA Annex E paragraph 5.13.

²⁸ Recommendation CM/RecChL(2014)3 of the Committee of Ministers on the application of the European Charter for Regional or Minority Languages by the United Kingdom (adopted by the Committee of Ministers on 15 January 2014), Recommendation 2.

Bill 3: The Ulster Scots / Ulster British Commissioner

The Commissioner and educational duty

- 4.1 The third bill makes provision for an Ulster Scots / Ulster British Commissioner. It should be noted that the Commissioner at present does not have a name or title, but is referred to in the bill as ‘The Commissioner’ or elsewhere in NDNA as the “further Commissioner”. For ease of reference, the term ‘Ulster Scots / Ulster British Commissioner’ will be used in this paper, reflecting the Commissioner’s mandate as set out in the bill.
- 4.2 The institutional form of the Commissioner’s office will be similar to that of the Irish Language Commissioner. FM/dFM will appoint the Commissioner for a once renewable five year term. The powers of the office will be vested in the persona of the Commissioner (Corporation Sole). The size of the office is yet to be determined, but can include seconded civil servants.²⁹
- 4.3 There is a provision in NDNA that precludes “any quotas in employment for speakers of any particular language” from the functions of the Ulster Scots/Ulster British Commissioner (and Irish language Commissioner).³⁰ This provision can be read as preventing quotas in the public sector for Irish speakers in general.
- 4.4 Neither bill addresses the question of whether the Ulster Scots / Ulster British commissioner would need to be a speaker of the Scots language, as would be expected for such a role. Clearly, competence in Scots would also likely be an occupational requirement for staff in the Commissioner’s office. It would be improbable that the Irish Language Commissioner would not be an Irish speaker or that the Commissioner’s staff would not have competence in the Irish language. The bill and NDNA are, however, silent on this subject.
- 4.5 The second provision of the third bill (c78R) is to place a statutory duty on the Department of Education (DENI) to “to encourage and facilitate the use and understanding of Ulster Scots in the education system”. This is different to the existing duty on the department to encourage and facilitate Irish-*medium* education. It is a general duty across the education system. This is consistent with duties under the Article 7(1)(f-g) of the European Charter for Regional or Minority languages.

Functions of the Ulster Scots/Ulster British Commissioner

- 4.6 The main function of the Commissioner are set out in clause 78Q(1) as:
- ...to enhance and develop the language, arts and literature associated with the Ulster Scots and Ulster British tradition in Northern Ireland.
- 4.7 The Commissioner may in particular produce and distribute publicity material (c78Q(2)). NDNA also states that the creation of the Commissioner is to provide “official recognition of the status of the Ulster Scots language in Northern Ireland.”³¹

²⁹ Bill no 3, schedule 9c.

³⁰ NDNA, Annex E 5.21.4.

³¹ NDNA, 27(c).

- 4.8 Three further functions are set out that the Commissioner ‘must’ undertake. The first one is (c78Q(3)):
- (a) increase awareness and visibility of Ulster Scots services which are provided by public authorities to the public in Northern Ireland;
 - (b) provide advice and guidance to public authorities on enhancing and developing the relevant language, arts and literature;
- 4.9 The provision of Ulster Scots in services (a) is further defined in the bill as “services which are provided in Ulster Scots or are otherwise likely to be of particular interest to those who have an interest in the relevant language, arts and literature”. (c78Q(4))
- 4.10 The NDNA implies an intention that the advice and guidance duty (b) refers to both the Ulster Scots and Ulster British remit of the Commissioner’s mandate (insofar as the third function below is only to apply to Ulster Scots, and the first is explicitly framed around Ulster Scots).³² In this case function (b) (advice and guidance to public authorities on ‘language, arts and literature’) would be the only function relating to an ‘Ulster British’ tradition.
- 4.11 Given the dominant position of the English language, it would appear unlikely the Commissioner’s Ulster British remit will promote the use of the English language *per se* but will rather focus on arts and literature.
- 4.12 The dual mandate of the Commissioner appears to conflate Ulster British tradition with Ulster Scots. Like Irish, Ulster Scots is part of a shared heritage, in that it is spoken by Catholics as well as Protestants in its geographical areas. Indeed, some figures, though not others, suggest it is spoken in equal numbers by both Protestants and Catholics.³³
- 4.13 It is possible the ‘Ulster British’ remit of the Commissioner has been added at a late stage to seek to accommodate dissenting perspectives, such as that of the Orange Order, which has been critical of an Ulster Scots focus, arguing that the identity of “British Citizens in the UK is in many areas wider than simply Ulster-Scots”. To this end however the Orange Order has nevertheless been critical of the current proposed Commissioner role despite the expanded remit.³⁴

³² NDNA Annex E paragraph 5.16.2.

³³ See for example draft EQIA in draft Strategy for Ulster Scots language, culture and heritage, (DCAL, July 2012) and data from the 2011 Census. Figures are complex. The 2007 *Omnibus Survey* found ‘no difference’ between Catholic and Protestant respondents in their knowledge of Ulster Scots. The 1999 *Life and Times Survey* also found similar proportions of unionists and nationalists spoke Ulster Scots (both cited in DCAL 2012). Other figures, including those cited from the 2011 Census, showed that a higher a level of Protestants (21%) than Catholics (8%) ‘had knowledge’ of Ulster Scots. This differential however may be reflected in the compositions of persons in the areas where Scots is traditionally spoken. Overall NI figures are different relative to what level of competency is looked at e.g. understanding spoken Ulster Scots (14%) as compared to speaking (4%), reading (3%), and writing (1%) Ulster Scots. This is reflective of Scots largely as a spoken language that is mostly mutually comprehensible with English. (Figures cited in <http://scotshaunbuik.co.uk/wp/?p=383>)

³⁴ <https://mobile.twitter.com/OrangeOrder/status/1215628463438225414>

- 4.14 The third function of the Commissioner is tied *in the NDNA* to the Ulster Scots remit of the Commissioner only.³⁵ This distinction is *not* however explicitly in the bill. It mandates the Commissioner to provide advice and guidance to public authorities on the effect and implementation of three human rights treaties:
- (3) The Commissioner must— ...
 - (c) provide advice and guidance to public authorities on the effect and implementation so far as affecting the relevant language, arts and literature of—
 - (i) the Council of Europe’s Charter for Regional and Minority Languages dated 5th November 1992,
 - (ii) the Council of Europe’s Framework Convention for the Protection of National Minorities dated 1st February 1995; and
 - (iii) the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November
- 4.15 This function considerably overlaps with and - should the guidance digress - could come into conflict with the role of NIHRC under its mandate under domestic legislation and the UN Paris Principles for National Human Rights Institutions.³⁶
- 4.16 Whilst there is reference in NCND to the Ulster Scots/Ulster British Commissioner ensuring complementarity and cooperation with the Boord o Ulstèr-Scotch in fulfilling its role (which also applies to the Irish Language Commissioner and Foras na Gaeilge)³⁷, there is no reference to the crossover of the mandate with the NIHRC.
- 4.17 There is a further problematic qualification in relation to the Commissioners functions in relation to Ulster Scots, in that the Commissioners main function in the bill is restricted to the “language, arts and literature” associated with Ulster Scots “*in Northern Ireland*”.
- 4.18 Ulster Scots linguistically is a variant of the Scots language, spoken in parts of Scotland. Ulster Scots has been traditionally spoken in areas of the north of Ireland that long pre-date the existence and boundaries of Northern Ireland. This includes a large area with the Causeway and Antrim coasts (Co Antrim and Derry/Londonderry) and north east County Down, but also east Donegal. Even if the remit is read as encompassing pre-1921 literature, arts and linguistic heritage, the geographical qualifier risks placing outside the remit, not only heritage from Donegal, but also from Scotland where the largest literary and other resources are likely to be available.

³⁵ NDNA Annex E paragraph 5.16.2: “provide advice and guidance to public authorities, including where relevant on the effect and implementation, so far as affecting Ulster Scots, of commitments under the European Charter for Regional and Minority Languages, the European Framework Convention for the Protection of National Minorities, and the United Nations Convention on the Rights of the Child;”.

³⁶ *UN Principles relating to the Status of National Human Rights Institutions* (The Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993. The functions of the NIHRC in domestic law are set out under the Northern Ireland Act 1998.

³⁷ NDNA, Annex E paragraph 5.20.

- 4.19 This approach conflicts with that provided for by human rights standards such as the European Charter for Regional or Minority languages. Under Article 7(1)(e) of the charter legislation, policies and practices for Ulster Scots are to be based on “the maintenance and development of links” between speakers of Ulster Scots and other groups in the UK speaking a language “in an identical or similar form” –in this instance Scots in Scotland, which is also registered under the charter. Under Article 7(1)(i) legislation for Ulster Scots is to promote transnational exchanges between users of Ulster Scots in any other State, which is directly relevant to speakers in Donegal.
- 4.20 It cannot be determined from the bill if the approach to distinguish promotion of the Ulster variant of Scots from Scots *per se* is intentional or not, yet there have been attempts to artificially separate Scots from Ulster Scots since the GFA, which have been detrimental to the enhancement and development of Ulster Scots.
- 4.21 In addition, it should be stressed that Ulster Scots is a largely spoken tradition, on a linguistic continuum with English, with which it is largely mutually comprehensible in all but the most differentiated vocabulary. This is a strength that opens up significant promotional opportunities. However, the specified focus, in part, on written literature, could also limit impact on the enhancement and development of Ulster Scots if it leads to the neglect of other forms of expression.
- 4.22 A further issue is that in issuing guidance to public authorities there is no duty to take into consideration the needs and wishes of speakers of Ulster Scots, as is required under Article 7(4) of the European Charter for Regional and Minority Languages.
- 4.23 There is a further provision in NDNA that the “Commissioner’s remit will include the areas of education, research, media, cultural activities and facilities and tourism initiatives”.³⁸
- 4.24 The exercise of functions of the Ulster Scots/Ulster British Commissioner is qualified by two provisions in relation to ministerial direction and Sections 75 and 76 of the Northern Ireland Act, in the same way as the Irish Language Commissioner (see paragraphs 3.15 above).

UK recognition of Ulster Scots as a national minority

- 4.25 There is also a relevant commitment in NCND that engages the Ulster Scots / Ulster British Commissioner mandate. This may not have been readily noticed as it is not in or referred to in the section on the Commissioner (or draft bill), but rather is in a different section on commitments by the UK government. This states that the UK will “Recognise Ulster Scots as a national minority under the Framework Convention for the Protection of National Minorities”.³⁹
- 4.26 This may have significant implications on the remit of the Commissioner. Ulster Scots speakers have already been recognised under the framework

³⁸ NDNA, Annex E paragraph 5.15,

³⁹ NDNA, page 49, paragraph 24.

convention as a *linguistic* minority,⁴⁰ including by the UK,⁴¹ which has also recognised Ulster Scots as a language under the European Charter for Regional and Minority Languages (along with Scots per se in Scotland).

- 4.27 It appears, therefore, that this provision may seek to recognise Ulster Scots as an ethnic group in Northern Ireland as this is how, beyond linguistic minorities, the UK has generally interpreted its approach to the framework convention.⁴² The recognition of Ulster Scots in this way would be dependent on persons self-defining their ethnicity (or possibly national identity) in this way, as self-identification is a criterion under the framework convention.⁴³ The definition of minority in international standards generally requires a numerical minority, in a non-dominant position, with different ethnic, religious or linguistic characteristics to the rest of the population.⁴⁴
- 4.28 In terms of self-identification, the 2010 Omnibus Survey did contain data that 18% of respondents stated they did perceive themselves as Ulster Scots, with higher numbers of Protestants than Catholics responding affirmatively.⁴⁵ It is not clear if the intention is therefore to empower the Commissioner to advise public authorities on the application of the framework convention rights in relation to Ulster Scots specifically as an ethnic/ national group. This issue may be clarified by a UK statement, similar to that released when recognising Cornish as a national minority for the framework convention.⁴⁶ Whether Ulster Scots is defined as a national minority on the basis of linguistic (as is now), ethnic or religious grounds will clearly have a significant impact on the community it is to encompass and the remit of the Commissioner.

Ulster Scots / Ulster British Commissioner complaints function

- 4.29 Clause 78Q(5) provides that the Commissioner may investigate complaints from a member of the public that a public authority has failed to have due regard any advice provided by the Commissioner as part of the above functions (i.e. including on human rights instruments). The Commissioner can investigate and lay a report before the Assembly.
- 4.30 This is a curious formulation as there is no duty for a public authority to have due regard to the advice issued by the Commissioner.

⁴⁰ See for example ACFC/OP/IV(2016)005 *Fourth Opinion on the United Kingdom* (adopted on 25 May 2016) paragraph 103.

⁴¹ See for example, ACFC/SR/IV(2015)004 rev (4th Report by UK) Framework Convention, 2015, Page 40.

⁴² As well as recognising linguistic minorities, the UK has tied its understanding of the framework convention to 'racial group'. Cornish was recognised in 2014 as a national minority under the framework convention. The decision was taken on grounds of "the unique position of the Cornish as a Celtic people within England", although the UK did this without prejudice to whether Cornish constituted a racial group, leaving determination to the courts. See: <https://www.gov.uk/government/news/cornish-granted-minority-status-within-the-uk>

⁴³ Framework Convention for the Protection of National Minorities, Article 3(1): "Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such..."

⁴⁴ See UNSR Francesco Caporti, 19771/ E/CN.4/Sub.2/384/Rev.1, para. 568. Also see: *Minority Rights: International Standards and Guidance for Implementation*, OHCHR, 2010.

⁴⁵ Cited in a draft DCAL strategy for Ulster Scots language, culture and heritage, July 2012.

⁴⁶ <https://www.gov.uk/government/news/cornish-granted-minority-status-within-the-uk>

- 4.31 The complaints function is restricted to ‘language’ only so will relate to any advice given on Ulster Scots (or in theory also the English language). In relation to advice on interpreting human rights instruments this compounds the problem of duplication and conflict with the NIHRC mandate.

Overall Assessment

- 4.32 Overall, at one level it does not appear that the functions of the Commissioner have been particularly well thought through. The remit of the Commissioner in advising on certain human rights standards also overlaps and could come into conflict with that of NIHRC. It is also not clear if the Commissioner and staff will be required occupationally to have a command of the Scots language. There is also questions around the apparent tying of Ulster Scots to Ulster Britishness, and possible UK recognition of Ulster Scots as a national minority under the framework convention (in addition to than the current recognition of Ulster Scots speakers as a linguistic minority). The Commissioner has a power to investigate complaints that public authorities have not given due weight to the Commissioners advice, in a context where the public authorities are under no duty to do so.
- 4.33 In relation to Ulster Scots, there are a number of provisions relating to the Commissioner that have the potential to be counterproductive in enhancing and developing Ulster Scots linguistically. This includes a geographical qualifier on the functions of the Commissioner in relation to language, arts and literature in Northern Ireland. This may limit the scope for the language promotion if it is not possible to draw on the broader resources from Scots in Scotland, and engage with speakers in Donegal.
- 4.34 On a more positive note, the duty to promote Ulster Scots linguistically within the education system takes forward an important Council of Europe recommendation for compliance with the European Charter for Regional or Minority Languages.⁴⁷

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⁴⁷ Recommendation CM/RecChL(2014)3 of the Committee of Ministers on the application of the European Charter for Regional or Minority Languages by the United Kingdom (adopted by the Committee of Ministers on 15 January 2014), recommendation 4.